Talking Past Each Other: Divergent Approaches to the Community-of-Interest Standard in Wisconsin's State and Federal Courts

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Introduction

Almost fifty years ago, Governor Patrick Lucey of Wisconsin said:

> Just about every businessman on main street holds some kind of franchise. It may be a style of clothing . . . a line of hardware . . . fast food service . . . a brand of gasoline. In the past, many of those businessmen have been at the mercy of big corporations. And reports of improper pressure on small businessmen by those corporate giants have been frequent. The Wisconsin Fair Dealership Act, which I am signing into law today, is a move to protect our small businessmen from corporate intimidation.[1]

Further characterized by Governor Lucey as a "Magna Carta" for the rights of small businesses, the Wisconsin Fair Dealership Law (WFDL)[2] is a robust trade statute enacted to protect Wisconsin businesses from being "at the

1. Press Release, Office of Wis. Governor Patrick Lucey (Apr. 3, 1974).
2. Wis. Stat. § 135.01–.07.

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mercy of big corporations."[3] While this characterization is undoubtedly the perspective shared by parties protected by the law, others have criticized the statute as "vapid"[4] and "protectionist."[5] But love it or hate it, the WFDL has been an integral feature of Wisconsin law for the past half-century.

Unlike many franchise and dealership statutes, the WFDL is generally applicable and has applied to an eclectic mix of commercial relationships, including golf professionals hired by a municipality,[6] a custom log home distribution relationship,[7] alcoholic beverage wholesaling,[8] and seemingly everything in between.[9] Where WFDL protection attaches, a grantor is prohibited from terminating, cancelling, failing to renew, or substantially changing the nature of a "dealership" without "good cause," proper notice, and an opportunity to cure.[10] Whether a dealership exists turns primarily on whether a "community of interest" exists between the parties.[11]

It follows that the essence of WFDL protection lies in two oft-litigated issues: (1) when does a community of interest exist? And (2) when does good cause exist?[12] As the title suggests, this article focuses solely on dissecting the differing (and irreconcilable) approaches to answering the first question; the second question will be addressed by the authors in a forthcoming article set for publication in a later volume of the *Franchise Law Journal*.

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3. Press Release, *supra* note 1.

4. Kenosha Liquor Co. v. Heublein, Inc., 895 F.2d 418, 419 (7th Cir. 1990).

5. Moore v. Tandy Corp., 819 F.2d 820, 822 (7th Cir. 1987).

6. Benson v. City of Madison, 897 N.W.2d 16 (Wis. 2017).

7. Rustic Retreats Log Homes, Inc. v. Pioneer Log Homes of Brit. Columbia Inc., No. 19-CV-1614, 2020 WL 3415645 (E.D. Wis. June 22, 2020).

8. Order for Temporary Injunction, Gen. Bev. Sales Co.–Milwaukee v. W.J. Deutsch & Sons, Ltd., Case No. 2023CV764 (Waukesha Cnty. Cir. Ct. Sept. 25, 2023) (Doc. No. 140).

9. *See*, *e.g.*, Brava Salon Specialists, LLC v. Swedish Haircare, Inc., No. 22-cv-695-WMC, 2023 WL 1795512 (W.D. Wis. Feb. 7, 2023) (beauty product wholesaler); Wis. Lift Truck Corp. v. Mitsubishi Caterpillar Forklift Am., Inc., No. 20-CV-655, 2020 WL 2572806 (E.D. Wis. May 21, 2020) (forklift resellers); Kelley Supply, Inc. v. Chr. Hansen, Inc., 340 Wis. 2d 497 (Ct. App. 2012) (cheese coagulant dealer); Water Quality Store, LLC v. Dynasty Spas, Inc., 328 Wis. 2d 717 (Wis. Ct. App. 2010) (water spa reseller); Bush v. Nat'l Sch. Studios, Inc., 407 N.W.2d 883 (Wis. 1987) (school photographer). The statute specifically excludes from protection only motor vehicle dealerships protected by Wisconsin Statutes §§ 218.01-.0163, parties operating within Wisconsin's insurance industry, and door-to-door salespeople. Wis. Stat. § 135.07.

10. Wis. Stat. § 135.03–.04.

11. *See*, *e.g.*, Moe v. Benelli U.S.A. Corp., 306 Wis. 2d 812, 822 (Ct. App. 2007) (quoting Ziegler Co. v. Rexnord, Inc., 407 N.W.2d 873, 877 (Wis. 1987)) ("The third element of the dealership test, community of interest, is 'probably the element which most distinguishes dealerships from other forms of business arrangements.'").

12. The WFDL has been for the past fifty years, and continues to be, a constant source of litigation; there are over 500 judicial decisions touching on various aspects of the law. The issues posed by the law extend well beyond the franchise and dealership law and will continue to do so, and, to the authors' knowledge, the WFDL is the only dealership or franchise law in the state with its own treatise. *See* Brian Butler & Jeffrey A. Mandell, The Wisconsin Fair Dealership Law (5th ed. 2022). For a recent development, see Jeffrey A. Mandell & Isaac S. Brodkey, *Recent U.S. Supreme Court Decision Shows that the Dormant Commerce Clause Does Not Preclude WFDL Damages for Sales Beyond Wisconsin's Borders*, 2023 Wis. L. Rev. Forward 1 (Nov. 14, 2023), https://wlr.law.wisc.edu/recent-u-s-supreme-court-decision-shows-that-the-dormant-commerce-clause-does-not-preclude-wisconsin-fair-dealership-law-damages-for-sales-beyond-state-borders.

Since the law's enactment in 1974, courts have wrestled with answering the first question, culminating in two contrasting approaches. The first approach, followed by Wisconsin state courts, is a broad-ranging, fact-intensive inquiry that requires thorough analysis of every aspect of the parties' relationship to distinguish pedestrian vendor-vendee relationships from protected dealerships and ultimately determine whether the dealer would suffer a "significant economic impact" from the grantor's adverse action. The second approach, taken by Wisconsin federal courts, is far narrower.[13] Seemingly dismayed by the uncertainty inherent in the state courts' case-by-case application of the statute, the Seventh Circuit has extracted and refined the underlying principles of the Wisconsin case law to focus primarily on the percentage of revenue a dealer derives from the relationship and specialized investments made by the dealer that cannot be easily recouped upon termination. Under this approach, to invoke WFDL protection, the dealer must demonstrate that the grantor has it "over a barrel" such that it would suffer "severe economic consequences" from the grantor's adverse action.[14]

This article illustrates how the approach taken by federal courts diverges from the Wisconsin Supreme Court's binding guidance; it also assesses the consequences of this divergence. First, it provides a general overview of the WFDL, its history, and how it functions. Next, the article chronicles the development of the state and federal courts' differing approaches to the community-of-interest inquiry. Then, it analyzes how the Seventh Circuit doctrine is inconsistent with Wisconsin law, posing practical challenges for parties operating within the state and creating a unique dilemma for district courts obligated both to apply Wisconsin substantive law to a WFDL dispute and to follow binding Seventh Circuit precedent.

I. Background on the Wisconsin Fair Dealership Law

The Wisconsin Fair Dealership Law was enacted during the tumultuous and worsening economic climate of the 1970s. As franchising[15] became a more

13. *See infra* Part II.B.

14. *See infra* Part II.C.

15. "What is a franchise?" is somewhat of a loaded question. *See, e.g.*, David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 Okla. City U. L. Rev. 37, 55–56 (1999) ("Because of the variety of contexts in which the term 'franchise' has been used, there still is no complete agreement about its meaning."). *But see* Robert W. Emerson, Business Law 349 (Barron's eds., 6th ed. 2015) (identifying three forms of franchising: (1) business format systems, (2) distributorships, and (3) manufacturing arrangements). People most commonly associate the word with Golden Arches and thirty-minute pizza delivery. Indeed, many of the franchisees advocating for greater regulation operated within the fast-food industry. *See* William L. Killion, *The History of Franchising*, *in* Franchising: Cases, Materials, and Problems 11–19 (Meiklejohn ed., 2013). That said, from the authors' perspective, a franchise is best understood as a contractual arrangement between two legally separate companies in which one entity, the franchisee, is granted the right to sell and/or distribute the goods and services and/or authorized to use trade symbols of another entity, the franchisor. *Cf.* Roger D. Blair & Francine Lafontaine, The Economics of Franchising 3–4 (2011). For more on the history of franchising and current regulatory framework, see Robert W. Emerson, *Franchise Terminations: "Good Cause" Decoded*, 51

common and popular means of distributing goods and services in that era, would-be franchisees began to advocate for greater regulation and protection at the state and federal level.[16] From 1965 to 1967, multiple bills were introduced in Congress to protect franchisees from unlawful termination, but none was enacted.[17] While initially unsuccessful, these efforts continued into the 1970s.[18] During that decade, businesses and trade associations pushed their state and federal governments to enact laws providing greater protection for their industries.[19]

Wisconsin was at the forefront of these efforts and, in 1971, the Wisconsin Legislature enacted the Wisconsin Franchise Investment Law (WFIL).[20] The next year, Wisconsin trade associations began lobbying for the adoption of WFDL.[21] Unlike other proposed statutes and the WFIL, from the beginning the WFDL was intended to extend far beyond the standard business-format franchise and apply to a wide range of firms reliant on their relationship with their business partners.[22] These efforts initially failed to

Wake Forest L. Rev. 103, 104 (2016) (noting that modern franchising can be traced back to the mid-1800s and gained popularity in the 1950s); David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 Iowa L. Rev. 333, 346–50 (1995).

16. Gurnick & Vieux, *supra* note 15, at 55–56.

17. *Id.*

18. William L. Killion, *The History of Franchising*, *in* Franchising: Cases, Materials, and Problems 19–24 (Meiklejohn ed., 2013).

19. These efforts were largely successful, and every state has *some* form of franchise or dealership protection. *See*, *e.g.*, Boyd Allan Byers, *Making A Case for Federal Regulation of Franchise Terminations—A Return-of-Equity Approach*, 19 J. Corp. L. 607, 624–27 (1994); Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 Vand. L. Rev. 1503, 1512 n.29 (1990).

20. Wis. Stat. § 553.01–.78. The WFIL is more limited than the WFDL, and its primary function is to require franchisors to register their business with the state and provide prospective franchisees with a comprehensive disclosure document. *See id.* Wisconsin was also prominent in efforts to institute federal regulation. In 1971, University of Wisconsin Professors Urban B. Ozanne and Shelby D. Hunt presented their report, *The Economic Effects of Franchising*, to Congress, finding that franchising was a "positive" economic development and recommending, *inter alia*, (1) the enactment of federal full disclosure legislation; (2) a "cooling-off" period allowing a franchisee a brief window to rescind a contract; and (3) protection from arbitrary termination, allowing only for termination if the franchisee is "in substantial violation of the franchise agreement." Urban B. Ozanne & Shelby D. Hunt, The Economic Effects of Franchising 34–38 (1971). In late 1978, the Federal Trade Commission issued its Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, requiring that franchisors provide franchisees certain information regarding the franchise opportunity prior to investment. *See* 16 C.F.R. § 436.1.

21. Interview with William Nelson, former partner, Stafford Rosenbaum LLP (Oct. 28, 2022) (on file with authors). Former Stafford Rosenbaum LLP attorneys Nelson and Brian Butler, who at one time practiced at the same firm as the authors, were integral in drafting the WFDL and based the statute on the New Jersey Franchise Practices Act and Puerto Rico's Dealers' Contracts Act. Although not a state, Puerto Rico's dealership act, known as Law 75, was the first comprehensive dealership statute enacted in United States. *See* Definiciones, 10 L.P.R.A. § 278 *et seq*. Law 75 was heavily lobbied for by the Puerto Rico Chamber of Commerce in light of terminations of Puerto Rican dealers of multi-national manufacturers. Richard M. Krumbein, *Protectionism in Puerto Rico: The Impact of the Dealers' Contracts Law on Multinational Companies Planning Operations in Puerto Rico*, 25 Case W. Res. J. Int'l L. 79, 84–85 (1993); *see also* Manuel A. Pietrantoni & Ricardo F. Casellas, *Puerto Rico's Dealer and Franchise Statute Adapts to the Latest Developments in Law, Commerce, and Technology*, 30 Franchise L.J. 10 (2010).

22. Interview with William Nelson, former partner, Stafford Rosenbaum LLP (October 28, 2022) (on file with authors).

gain the traction necessary to enact a comprehensive dealership law in Wisconsin until the OPEC Oil Embargo following the Yom Kippur War.[23] In response to the oil shortage, petroleum suppliers began to overhaul their distribution networks and thereby force "a great many" gas stations out of business by way of direct termination or limiting the station's supply.[24] This result was untenable for the Wisconsin Legislature, and Governor Lucey reintroduced the Wisconsin Fair Dealership Law in 1973.[25]

By an overwhelming majority, in April 1974, the Wisconsin Legislature enacted the WFDL, and in 1977, the Wisconsin Legislature amended the statute to include the following policy declarations:

> 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; to protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships; to provide dealers with rights and remedies in addition to those existing by contract or common law; and to govern all dealerships, including any renewals or amendments, to the full extent consistent with the constitutions of this state and the United States.[26]

At the time of its enactment, Governor Lucey heralded the WFDL as the small business Magna Carta, ensuring that Wisconsin companies, regardless of industry, would have protections against misuse by their corporate partners.[27]

Far from dense, the law itself consists of merely eleven short sections, but is nevertheless teeming with nuance. A protected relationship, *i.e.*, a "dealership," exists where there is (1) a contract or agreement; (2) which grants one party the right to sell or distribute goods or use trade symbols; and (3) a "community of interest" exists in the business of offering, selling, or distributing goods or services.[28] For the most part, the first two elements

23. *Id.* For a first-hand retelling of the WFDL's enactment, see Robert B. Corris, *Opec, Gas Lines, and the Wisconsin Fair Dealership Law the Story of the 1974 Retail Gas Dealers' March on the State Capitol Is a True Legend of the Birth of the Wisconsin Fair Dealership Law*, Wis. Law., Apr. 1999, at 25; *see also* Butler & Mandell, *supra* note 12, § 1.3.

24. Butler & Mandell, *supra* note 12, § 1.3.

25. *Id.*; Interview with William Nelson, *supra* note 21.

26. *See* Wis. Stat. § 135.025(2)(a)–(d).

27. Press Release, *supra* note 1.

28. Wis. Stat. § 135.02(3); Cent. Corp. v. Research Prods. Corp., 681 N.W.2d 178 (Wis. 2004). Unlike many state statutes, the WFDL does not require a dealer prove that it paid a "franchise fee." *See* Sandra Gibbs, *Hidden Franchise Fees: Seeking a Rational Paradigm*, 39 Franchise L.J. 493 (2020) (examining what is and is not a franchise fee under existing statutory, regulatory, and case law); Bruce Napell, *States' Definitions of Franchise Relationship Not Uniform*, 26 Franchise L.J. 3 (2006) (analyzing distinctions between community of interest inquires and franchise fees); Thomas J. Colin, *State Franchise Laws and the Small Business Franchise Act of 1999: Barriers to Efficient Distribution*, 55 Bus. Law. 1699, 1711–16 (2000) (discussing indirect and direct franchise fees). Initial drafts of the WFDL required purported dealers to demonstrate the existence of a franchise fee to seek protection, but such a requirement was struck and replaced with the current definition of a "dealership." Kevin Scott Dittmar, *Foerster, Inc. v. Atlas Metal Parts—the Wisconsin Supreme Court Takes a Narrow View of the Dealer's Financial Interest Protected by the Wisconsin Fair Dealership Law*, 1985 Wis. L. Rev. 155, 171 n.88–89 (1985). Additionally, unlike other states, there is no requirement that the dealer operates pursuant to a marketing plan or

are relatively straightforward,[29] while the community-of-interest element is considerably more ambiguous. The statute defines a "community of interest" as "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."[30] That definition offers little guidance for anyone—businessperson, investor, or court—seeking to discern whether the statute and its considerable protections apply to a given business relationship.[31]

Where all three elements are established, the WFDL prohibits a grantor from terminating, failing to renew, cancelling, or substantially changing the competitive circumstances of a dealership without "good cause,"[32] proper notice, and an opportunity to cure.[33] Failure to comply with these statutory requirements renders the grantor subject to liability.[34] Recognizing the stakes for a dealer, the statute affords dealers significant remedies to redress the harm that result from grantors' unlawful conduct.[35] To that end, a dealer may pursue damages, injunctive relief, or both.[36] A dealer may also seek the repurchase of its inventory at market rate and, if successful in proving a

system prescribed by the grantor. *Id. See generally* Michael D. Braunstein & Megan B. Center, *A Crash Course on Interpretation of the "Marketing Plan or System" Element of State Franchise Statutes*, 42 Franchise L.J. 173 (2022). Absent these requirements, a greater number of Wisconsin businesses can be protected than businesses seeking refuge under statutes that require a prescribed marketing plan or system as a condition to protection.

29. Butler & Mandell, *supra* note 12, §§ 4.14–4.32.

30. Wis. Stat. § 135.02(3).

31. Butler & Mandell, *supra* note 12, §§ 4.2–4.10. What constitutes a community of interest, under the WFDL and other statutes, has been a topic of much scholarship. *See e.g.*, Megan B. Center, *Accidental Franchises: It Takes A Community (of Interest)*, 39 Franchise L.J. 545 (2020); Paul R. Fransway, *Traversing the Minefield: Recent Developments Relating to Accidental Franchises*, 37 Franchise L.J. 217 (2017); Joseph J. Fittante, Jr., *"Community of Interest": Clarity or Confusion?*, 22 Franchise L.J. 160 (2003); James R. Sims, III & Mary Beth Trice, *The Inadvertent Franchise and How to Safeguard Against It*, 18 Franchise L.J. 54 (1998); Kim A. Lambert & Charles G. Miller, *The Definition of a Franchise: A Survey of Existing State Legislative and Judicial Guidance*, 9 Franchise L.J. 3 (1989).

32. As with the community of interest, what constitutes "good cause" to take an action adverse to a dealer or franchisee has been the subject of considerable scholarship. *See, e.g.*, Tracey A. Nicastro, *How the Cookie Crumbles: The Good Cause Requirement for Terminating A Franchise Agreement*, 28 Val. U. L. Rev. 785 (1994); Donald Horwitz & Walter Volpi, *Regulating the Franchise Relationship*, 54 St. John's L. Rev. 217 (1980); Ann Hurwitz, *Franchisor Market Withdrawal: "Good Cause" for Termination?*, 7 Franchise L.J. 3 (1987); *see also* Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 Vand. L. Rev. 1503, 1511 n. 27 (1990) (identifying relational franchise statutes that provide good cause protection).

33. Wis. Stat. § 135.03–.04. In most circumstances, proper notice consists of (1) written notice, (2) at least ninety days prior to the adverse action, (3) setting forth all the reasons for adverse action, and (4) providing the dealer with an opportunity to cure. Wis. Stat. § 135.04. For its part, an opportunity to cure is a sixty-day window in which a dealer is afforded the opportunity to rectify the deficiencies set forth in the notice. *Id*. Failure to provide proper notice or an opportunity to cure are independent violations of the WFDL, allowing the dealer to pursue injunctive relief, damages, or both, under the statute. *See* Lindevig v. Dairy Equip. Co., 442 N.W.2d 504, 506 (Wis. Ct. App. 1989); Al Bishop Agency, Inc. v. Lithonia-Div. of Nat. Serv. Indus., Inc., 474 F. Supp. 828, 835 (E.D. Wis. 1979).

34. Wis. Stat. § 135.06.

35. *Id.*

36. *Id.*

violation of the WFDL,[37] the court may award the dealer its actual costs of the action, including its attorney fees.[38] By all means, the WFDL has a "'sharp bite,' with significant protections for dealers."[39]

II. Differing Approaches to Community of Interest Standard

Through its brevity and lack of specificity, the WFDL invites judicial interpretation of the community-of-interest analysis—an invitation accepted repeatedly by Wisconsin state and federal courts. As it plays out, in the seminal *Ziegler v. Rexnord*[40] decision, the Wisconsin Supreme Court made clear that the existence of a community of interest turns upon a fact-intensive inquiry that must look beyond one or two aspects of a particular relationship to accommodate a comprehensive assessment of the parties' dealing that provides a full assessment of whether a dealer would suffer a "significant economic impact" from the grantor's attempted action.[41] The high court has reaffirmed this approach each decade since, including in the *Central Corp. v. Research Products Corp.*[42] and *Benson v. City of Madison*[43] decisions.

But the Seventh Circuit declined to follow the *Ziegler* precedent and understands a community of interest to be stringently limited to only two circumstances: (1) where the dealer derives a high percentage of its revenues from the parties' relationship, and/or (2) where a dealer makes significant specialized investments in the grantor's goods that cannot be easily recoverable upon termination.[44] Rather than demonstrating a significant economic impact, purported dealers must demonstrate that their grantor holds the dealer "over a barrel," restricting the dealer's ability to work with other business partners.[45] This test has proven not only to be less protective of dealers, but it is also inconsistent with Wisconsin law.

A. *Pre-Ziegler Primordial Soup*

Following the statute's enactment, the Wisconsin Supreme Court struggled with "formulating a definition sufficiently broad to encompass non-traditional business relationships which in fact fall under the dealership rubric, yet restrictive enough to avoid including every vendor/vendee relationship under [the

37. Wis. Stat. § 135.045.

38. Wis. Stat. § 135.06. The WFDL, like other franchise statutes, has an anti-waiver provision and plainly prohibits a party from contracting around its strictures. Wis. Stat. § 135.025; *see also* Wis. Lift Truck Corp. v. Mitsubishi Caterpillar Forklift Am., Inc., No. 20-CV-655, 2020 WL 2572806, at *1 (E.D. Wis. May 21, 2020); *see also* Maral Kilejian & Christianne Edlund, *Enforceability of Choice of Forum and Choice of Law Provisions*, 32 Franchise L.J. 81, 84–90 (2012) (explaining anti-waiver provisions in various state statutes).

39. Ziegler Co. v. Rexnord, Inc., 407 N.W.2d 873, 876 (Wis. 1987) (citing H. Phillips Co. v. Brown-Forman Distillers, 483 F. Supp. 1289, 1295 (W.D. Wis. 1980)).

40. *Ziegler*, 407 N.W.2d at 876.

41. *Id.* at 879.

42. Cent. Corp. v. Research Prods. Corp., 681 N.W.2d 178 (Wis. 2004).

43. Benson v. City of Madison, 897 N.W.2d 16 (Wis. 2017).

44. *See, e.g.*, Frieburg Farm Equip., Inc. v. Van Dale, Inc., 978 F.2d 395, 399 (7th Cir. 1992).

45. *Id.*

WFDL's] protective veil."[46] The court's first meaningful interpretation of the community-of-interest question came in *Kania v. Airborne Freight*.[47] There, the court held that the "financial interest" contemplated by the WFDL for a community of interest to exist must be "shared" by the purported dealer and grantor.[48] In other words, the statute "connotes an interest or stake that both the grantor and grantee share in the profitability of the alleged dealership business."[49] As this line of authority developed, state and federal courts rendered conflicting judgments about whether a dealer was also required to make a substantial investment in its relationship with its grantor to secure WFDL protection.[50]

Just less than a year later, in *Foerster v. Atlas Metal Parts*,[51] the Wisconsin Supreme Court built upon its *Kania* decision and held that the law also required the dealer make a "substantial financial investment" in the dealership.[52] In support of this finding, the *Foerster* court relied on an April 1973 press release[53] from Governor Lucey in which he stated that the law was intended to protect purveyors operating "filling stations, building materials and supply houses, lumber yards, sports equipment stores, motels, hotels, and restaurant chains."[54] From this statement, the court found that the WFDL was intended to "protect only those small businessmen who make a substantial financial investment in inventory, physical facilities or 'good will' as part of their association with the grantor of the dealership and is, thus, consistent with common or accepted perceptions of the words franchise or dealership."[55]

With this in mind, the *Foerster* court held that the purported dealer failed to demonstrate that the WFDL applied to the parties' relationship on two interrelated grounds. First, the court found that the dealer's failure to make a substantial investment in inventory, physical facilities, or a franchise fee was fatal to its WFDL claim.[56] Second, the court found the grantor's termination would not eviscerate the dealer's financial well-being because the grantor was merely one of five different manufacturers that the dealer represented.[57] In dicta, the *Foerster* court signaled that the "economic hardship" that the

46. Bush v. Nat'l Sch. Studios, Inc., 407 N.W.2d 883, 888 (Wis. 1987).
47. Kania v. Airborne Freight, 300 N.W.2d 63 (Wis. 1981).
48. *Id.* at 72.
49. *Id.* at 73.
50. Dittmar, *supra* note 28, at 178–80.
51. Foerster v. Atlas Metal Parts, 313 N.W.2d 60 (Wis. 1981).
52. *Id.* at 63.
53. As Dittmar points out, the upshot of the press release relied upon by the *Foerster* court is strikingly different from the governor's press release at the time of the WFDL's enactment. Dittmar, *supra* note 28, at 161–62 nn. 36–37. As mentioned below, the *Bush* court highlights that the governor's 1974 press release demonstrates that the WFDL is intended to protect a diverse range of businesses, including multi-line dealers. *See* Bush v. Nat'l Sch. Studios, Inc., 407 N.W.2d 883, 889 (Wis. 1987).
54. *Foerster*, 313 N.W.2d at 63.
55. *Id.* at 63.
56. *Id.* at 64.
57. *Id.* at 64–65.

WFDL sought to protect against would not arise in circumstances where the purported dealer dedicated less than fifty to sixty percent of its time and efforts to the sale of one company's products.[58]

In subsequent decisions, the Seventh Circuit differentiated *Foerster*. While in *Wilburn v. Jack Cartwright, Inc.*[59] the Seventh Circuit accepted *Foerster*'s framing that a company needed to draw fifty to sixty percent of its business from a grantor to qualify for protection,[60] in *Kealey Pharmacy v. Walgreen Co.*,[61] the Seventh Circuit found that "[t]he *Foerster* and *Wilburn* cases . . . merely determined that the WFDL does not apply to manufacturer's representatives."[62] The *Kealey* court explicitly rejected the grantor's reliance upon *Foerster* for the principle that WFDL protection reaches only those dealers that draw a majority of their business from one source, observing that the statute does not contain any such limitation.[63] Instead, the court noted, the WFDL commands courts to construe it liberally to "protect the thousands of small businessmen in Wisconsin,"[64] regardless of size.[65] In fact, the Seventh Circuit had previously granted injunctive relief to a dealer who derived a mere four percent of its business from the dealership.[66]

The Seventh Circuit's decision in *Moore v. Tandy*[67] represented a sea change from *Kealey*. Writing for the court, Judge Richard Posner stingingly criticized the WFDL as "protectionist" legislation that disrupted parties' ability to contract as they please.[68] (One might observe that Judge Posner correctly recognized the Wisconsin Legislature's policy goals, even if he differed in his assessment of their wisdom.) In *Moore*, the Seventh Circuit was tasked to determine whether a Radio Shack manager qualified as a dealer under the WFDL.[69] The grantor obligated the purported dealer to put up a $15,000 security deposit, supervise staff, maintain inventory records, and

58. *Id.*

59. Wilburn v. Jack Cartwright, Inc., 719 F.2d 262 (7th Cir. 1983). There, the Seventh Circuit determined, "Wilburn's association with JCI differs from the common conception of 'franchise' or 'dealership' in that Wilburn represented three manufacturers in addition to JCI and maintained only an office in his home [and although] Wilburn spent much of his time promoting JCI, his termination as JCI's representative did not gravely imperil his economic livelihood or cause the type of 'economic hardship which arises where 50% to 60% of the business is dedicated to the sale of one company's product line.'" *Id.* at 266. The *Wilburn* court further held that the WFDL "is directed to a franchise situated," and it saw no reason to "give the 'dealership' language the expansive construction Wilburn urges." *Id.*

60. *Id.*

61. Kealey Pharmacy & Home Care Servs., Inc. v. Walgreen Co., 761 F.2d 345 (7th Cir. 1985).

62. *Id.* at 348–49.

63. *Id.* at 349.

64. *Id.* (citing Foerster v. Atlas Metal Parts, 313 N.W.2d 60, 63 (Wis. 1981)).

65. *Id.* (citing Rossow Oil Co. v. Heiman, 242 N.W.2d 176, 202 (Wis. 1976)).

66. *Id.* (citing Reinders Bros. v. Rain Bird E. Sales Corp., 627 F.2d 44 (7th Cir. 1980)). In the year before the litigation, three of the plaintiffs purchased thirteen percent of their merchandise from the grantor, while five plaintiffs purchased over eight percent and two purchased over six percent of their merchandise from the grantor. *Id.* at 350 n.6.

67. Moore v. Tandy Corp., 819 F.2d 820 (7th Cir. 1987).

68. *Id.* at 822.

69. *Id.*

authorize returns.[70] In return, the dealer received fifty percent of the store's revenues, minus variable expenses.[71]

In assessing this claim, Judge Posner focused on the economic realities of the WFDL rather than the statute's text or development through case law.[72] Judge Posner's analysis of the dealership claim is premised on a rhetorical question: why are "dealers" and not employees protected by the WFDL?[73] Judge Posner answers the question first, and perhaps cynically, making the point that dealers, not employees, "have the political muscle to obtain protectionist legislation . . . designed to give a class of persons more than they could get from arm's-length bargaining in a free market,"[74] before providing his own economic rationale for the law.[75]

Judge Posner wrote that any legitimate application of the WFDL turns on a dealer's "financial investment" in a dealership, for "a person who makes an ill-liquid [sic] investment in a joint enterprise may unknowingly be placing himself at the mercy of his joint venturer."[76] A qualifying illiquid investment is one that "involves a risk of, or temptation to, opportunistic behavior by the supplier."[77] Applying this standard to the case at hand, the purported dealer

70. *Id.* at 821.

71. *Id.*

72. Chastised for unpredictability, improper delegation, and general inefficiency, malleable standards—like the community-of-interest standard—have long drawn the ire of the Chicago School of Economics. *See generally* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Studies 257 (1974); *see also* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 Univ. Chi. Legal Forum 207 (1996) (discussing Coasean bargaining); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979). Judge Posner has long been associated with this school of thought. For a detailed economic analysis of franchise-termination laws and their driving rationales, see James A. Brickley, et al., *The Economic Effects of Franchise Termination Laws*, 34 J. L. & Econ. 101 (1991). For a response to the Chicago School's approach to vertical restraints, see Jean Wegman Burns, *Vertical Restraints, Efficiency, and the Real World*, 62 Fordham L. Rev. 597, 631–48 (1993) (discussing non-economic factors, principally "fairness," addressed in dealership statutes).

73. *Moore*, 819 F.2d at 822.

74. *Id.*

75. A common criticism of Judge Posner (and one that he admits) is that he was outcome-driven. *See* Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, NY Times (Sept. 11, 2017) https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html ("I pay very little attention to legal rules, statutes, constitutional provisions . . . . A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?"). *See generally* Richard A. Posner, How Judges Think (2008). The *Moore* decision has been criticized for substituting analysis of the statute's text and earlier decisions for a lesson in microeconomics with the resulting opinion resembling something lining the pages of the Cato Journal and not what one would expect to see in the Federal Reporter. *See* Butler & Mandell, *supra* note 12, § 4.5. For more on Judge Posner's approach to franchise law, *see* Nicastro, *supra* note 32, at 813 (assessing Judge Posner's approach to good-cause protection, noting that "[Judge] Posner advocates that the role of the court is to promote efficiency by predicting and mimicking [and not] enforcing 'amorally redistributive' and 'systematically perverse' interest group statutes.").

76. *Moore*, 819 F.2d at 822.

77. *Id.* For more on the market forces underlying franchising, see, for example, Warren S. Grimes, *When Do Franchisors Have Market Power? Antitrust Remedies for Franchisor Opportunism*, 65 Antitrust L.J. 105 (1996); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan. L. Rev. 927, 948–55 (1990).

failed to make the kind of investment that triggered WFDL protection.[78] Rather, Moore's investment was "fixed, protected, and recoverable with only modest delay," as he could recapture the entirety of the security deposit by providing Radio Shack notice that he was terminating the agreement.[79] Critically, Moore's investment was not one sunk in "specialized resources . . . which would be worth less in another use," like grantor-specific advertising materials.[80] As a result, terminating Moore's relationship with Radio Shack simply did not jeopardize or imperil Moore's economic livelihood.[81] This decision provides the beginning of the framework that subsequently would be employed by the Seventh Circuit and persists in Wisconsin federal courts to the present day.

B. *The Wisconsin Supreme Court's Ziegler Decision Offers Form to the Community-of-Interest Inquiry.*

On June 25, 1987, just over six weeks after the *Moore* decision, the Wisconsin Supreme Court issued its decisions in *Bush v. National School Studios*[82] and *Ziegler v. Rexnord*.[83] In these decisions, issued in close succession, the Court reoriented its WFDL jurisprudence and potentially the statute's fate. As explained below, the *Bush* decision rejected the *Foerster* court's framing of the WFDL, while the *Ziegler* decision established a roadmap to guide courts, practitioners, and businesses alike.

In *Bush*, the Wisconsin Supreme Court addressed the inconsistency of WFDL jurisprudence up to that time. The *Bush* court noted that Wisconsin courts had struggled to come up with a definition "sufficiently broad to encompass non-traditional business relationships which in fact fall under the dealership rubric," but that would not bring every vendor/vendee relationship within the scope of the WFDL.[84] Conceptually, the *Bush* court looked at this question as placing the particular party on a continuum ranging from surefire dealerships, e.g., chain fast-food restaurants, to "the multi-product independent retailer," such as a hardware store selling products of competing manufacturers.[85]

In support of this continuum approach, the *Bush* court cited legislative history to bolster the notion that the WFDL was always intended to reach beyond the "traditional franchise operation."[86] In a press release explaining the WFDL's import, Governor Lucey, who championed the legislation creating the WFDL and signed the bill into law, had stated that a businessman may hold a franchise in products as diverse as clothing, hardware, fast

78. *Moore*, 819 F.2d at 822.
79. *Id.* at 823.
80. *Id.*
81. *Id.* at 824.
82. Bush v. Nat'l Sch. Studios, Inc., 407 N.W.2d 883 (Wis. 1987).
83. Ziegler Co. v. Rexnord, Inc., 407 N.W.2d 873 (Wis. 1987).
84. *Bush*, 407 N.W.2d at 888.
85. *Id.*
86. *Id.* at 889.

food, and gasoline.[87] Before the WFDL's enactment, the Legislature had also already enacted the Wisconsin Franchise Investment Law, which includes marketing-plan and franchise-fee requirements. Those requirements were omitted from the WFDL, a distinction with difference.[88] Had such requirements been included in the WFDL, then, as the court writes, it would have seemed reasonable to construe the law as limited to more traditional, prepackaged franchise relationships.[89]

The *Bush* court then turned to the 1977 amendments to the WFDL, which elucidated the statute's policy goals.[90] Section 135.025 of the WFDL not only instructs that it is to be "liberally construed"[91] but also provides that its underlying purposes aim to "enhance the bargaining position of business persons who are economically dependent upon commercial relationships with grantors" and to create a remedy for the "unfair treatment of these business persons engendered by this unequal bargaining relationship."[92] All of these circumstances militated against a finding that a dealership exists only in "telltale trappings of the traditional franchise."[93]

With this recognition in mind, the *Bush* court determined sufficient interdependence and shared financial interest to find that a community of interest existed between the purported dealer, Bush, and the purported grantor, National.[94] First, the court held that how the parties refer to one another is immaterial to the dealership analysis.[95] Despite the parties' contract labeling Bush as an employee and the fact that National treated him as an employee for tax purposes, the court was concerned with Bush's "actual duties and responsibilities," not the parties' naming conventions.[96] The court noted that "interdependence" was the essence of a dealership, and Bush assumed the "costs of advertising, set[ting] prices, [and] collect[ing] payment."[97]

87. *Id.* As Dittmar presaged, the court here quotes the press release at the time of enactment opposed to the press release at the time of introduction on which the *Foerster* court relied. Dittmar, *supra* note 28, at 161–62 nn. 36-37.

88. *Bush*, 407 N.W.2d at 889.

89. *Id.*

90. *Id.* at 889–90. Although not discussed in the *Bush* decision, the 1977 amendments also added the "situated in" Wisconsin language to the dealership test, preventing out-of-state dealers without a meaningful connection to Wisconsin from seeking refuge under the statute. *See generally* Eric J. Meier, *When Is a Business a "Wisconsin Business"?* Baldewein v. Tri–Clover: *A New Multifactor Approach to the "Situated in This State" Requirement of the Wisconsin Fair Dealership Law*, 2001 Wis. L. Rev. 1403 (2001). Recent case law has revealed that whether a party is situated in Wisconsin is a less exacting test than whether a dealership relationship exists in the first instance. *See*, *e.g.*, Brio Corp. v. Meccano S.N., 690 F. Supp. 2d 731, 745 (E.D. Wis. 2010) (whether a dealer was situated in Wisconsin was a triable issue of fact where dealer derived 4.2% of its total sales from within the state).

91. *Bush*, 407 N.W.2d at 887 (citing Wis. Stat. § 135.025).

92. *Id.* at 887 n.1.

93. *Id.* at 890.

94. *Id.*

95. *Id.* at 891.

96. *Id.*

97. *Id.*

Then, relying on *Kania*, the court found a shared financial interest, in that Bush collected forty percent of the net sales receipts, while National retained the remainder.[98] The court further found that a shared financial interest was exemplified by National's concern with and policing of the quality of Bush's output.[99] Addressing *Foerster*, the court held that neither Bush nor any dealer is required to "demonstrate a substantial financial investment in inventory, physical facilities or 'good will' to quality for the act's protection."[100] In other words, the *Bush* court expressly rejected the requirement of an "ill-liquid investment" that Judge Posner had engrafted onto the statute in *Moore*.[101]

In *Ziegler*, the Wisconsin Supreme Court prescribed a comprehensive framework for courts and parties to use when applying the community-of-interest standard.[102] There, the court was tasked with assessing whether a lower court correctly held that there was no possibility a community of interest existed between the Milwaukee-based industrial-equipment manufacturer, Rexnord, and its distributor, Ziegler.[103] Ziegler and Rexnord had worked together in varying capacities since 1920,[104] and, in 1981, the parties entered into a formal distribution agreement.[105] When its own economic troubles led Rexnord to attempt to change its relationship with Ziegler from a dealership to a "tight agency," Ziegler filed suit under the WFDL.[106]

Relying on *Foerster*, the circuit court granted summary judgment for Rexnord on the grounds that Ziegler simply did not derive a large enough share of its revenue from its relationship with Rexnord for the WFDL to apply.[107] This decision was affirmed by the court of appeals on the same rationale.[108] In reversing, the Wisconsin Supreme Court disavowed a "rigid, exclusive percentage test" and affirmatively held that a community of interest "cannot be reduced to a mathematical equation."[109] Before assessing the merits of Ziegler's claim, the court first established a pliant standard to encompass "an extraordinarily diverse set of business relationships" and ensure that the parties intended to be protected were not written out of protection by judicial constriction.[110]

98. *Id.* at 892.
99. *Id.*
100. *Id.* at 892 n.9.
101. It bears mentioning that *Moore* was decided mere months before *Bush* and *Ziegler* were decided. It is thus unlikely that *Bush* was responding to that decision. Indeed, the *Bush* court cites to the *Moore* district court opinion, and not the Seventh Circuit decision. *See id.* at 893.
102. Ziegler Co. v. Rexnord, Inc., 407 N.W.2d 873 (Wis. 1987).
103. *Id.* at 875–76.
104. In *Wipperfurth v. U-Haul Co.*, 304 N.W.2d 767 (Wis. 1981), the Wisconsin Supreme Court held that the WFDL does not apply to dealerships that were entered into before April 5, 1974, unless those dealerships were renewed or extended by the parties in the intervening years. Regardless, the parties' relationship potentially dating back fifty years prior to the WFDL was not a deciding issue for the *Ziegler* court.
105. *Ziegler*, 407 N.W.2d at 876.
106. *Id.*
107. *Id.* at 877.
108. *Id.*
109. *Id.* at 878.
110. *Id.*

To that end, the *Ziegler* court created two guideposts: "continuing financial interest" and "interdependence"[111] to aid courts in assessing whether a community of interest exists.[112] A "continuing financial interest" contemplates a "shared financial interest in the operation of the dealership or the marketing of a good or service," while "interdependence" is the "degree to which the dealer and grantor cooperate, coordinate their activities and share common goals in their business relationship."[113] The *Ziegler* court also enunciated ten non-exclusive factors to assist the factfinder in determining whether a "continuing financial interest" and "interdependence" are present in a given relationship:

(1) how long the parties have dealt with each other;
(2) the extent and nature of the obligations imposed on the parties in the contract or agreement between them;
(3) what percentage of time or revenue the alleged dealer devotes to the alleged grantor's products or services;
(4) what percentage of gross proceeds or profits the alleged dealer derives from the alleged grantor's products or services;
(5) the extent and nature of the alleged grantor's grant of territory to the alleged dealer;
(6) the extent and nature of the alleged dealer's uses of the alleged grantor's proprietary marks (such as trademarks or logos);
(7) the extent and nature of the alleged dealer's financial investment in inventory, facilities, and good will of the alleged dealership;
(8) the personnel which the alleged dealer devotes to the alleged dealership;
(9) how much the alleged dealer spends on advertising or promotional expenditures for the alleged grantor's products or services;
(10) the extent and nature of any supplementary services provided by the alleged dealer to consumers of the alleged grantor's products or services.[114]

None of these factors is dispositive,[115] and *Ziegler* directs courts to examine a "wide variety of facets, individually and in their totality" to determine whether a community of interest exists.[116] Even where both guideposts are met, a community of interest exists only if the proposed change in the parties' relationship would have a "significant economic impact" on the dealer.[117]

Applied to the case at hand, the court found a triable issue of fact as to whether a dealership existed.[118] The court did not methodically apply each facet to the parties' relationship and then tally up how many leaned in favor of and how many militated against finding a dealership; rather, the court assessed the totality of the parties' dealings and found that, although Ziegler derived a mere four percent of its total sales from Rexnord, such a percentage was offset by Ziegler's investment in facilities, cooperation, and

111. *Id*. at 879.
112. *Id.*
113. *Id.*
114. *Id.* at 879–80.
115. *Id.*
116. *Id*.
117. *Id.*
118. *Id.* at 882.

coordination with Rexnord, use of Rexnord's trademarks, and length of the parties' relationship.[119] Because of the fact-bound nature of the analysis, the court reversed the grant of summary judgment and remanded the case for a jury trial.

The Wisconsin Supreme Court reiterated its *Ziegler* holding in *Central Corp. v. Research Products Corp.*[120] and *Benson v. City of Madison*.[121] In its 2004 *Central Corp.* decision, the Wisconsin Supreme Court reaffirmed that whether a community of interest exists depends on a complex fact-dependent inquiry that should consider "all facets of a business relationship, as reflected in the parties' actual dealings."[122] Like in *Ziegler*, the Wisconsin Court of Appeals had affirmed the circuit court's grant of summary judgment in favor of the grantor on the dealership question, finding that "[n]o reasonable person could conclude that Central demonstrated a community of interest with Research."[123] Also like in *Ziegler*, the Wisconsin Supreme Court reversed and remanded the case for a jury trial.

During its analysis, the *Central Corp.* court reaffirmed that sales of a grantor's products need not comprise "a large percentage of [dealer's] gross revenues or profits" for a dealership to exist.[124] *Central Corp.* rejected the notion that the fact the dealer derived eight or nine percent of its revenues and roughly five percent of its profits from the parties' relationship was fatal to its claim.[125] The court did not evaluate the dealer's capital investments on an all-or-nothing basis; instead, it considered the dealer's investment in warehouse space—dedicating twenty-eight percent of its floor to the grantor—as a meaningful fact.[126] Likewise, even though all of it was resaleable, the court deemed the $70,000 worth of inventory stored by the dealer to be "substantial."[127] The court further found that the extent of the dealer's territory, the length of the parties' relationship, and the fact that the dealer stored spare parts on hand were all relevant to whether a community of interest existed.[128] Ultimately, the court determined that the trier of fact was tasked with determining whether these facts, and the inferences drawn from them, sufficed to constitute a community of interest; accordingly, it reversed the grant of summary judgment.[129]

119. *Id.* at 879–82.
120. Cent. Corp. v. Research Prods. Corp., 681 N.W.2d 178 (Wis. 2004).
121. Benson v. City of Madison, 897 N.W.2d 16 (Wis. 2017).
122. *Cent. Corp.*, 681 N.W.2d at 189.
123. Cent. Corp. v. Research Prods. Corp., 2003 WI App 188, ¶ 16, 266 Wis. 2d 1060 (Wis. Ct. App. 2003), *rev'd*, 681 N.W.2d 178 (Wis. 2004).
124. *Cent. Corp.*, 681 N.W.2d at 189.
125. *Id.*; *Cent. Corp.*, 2003 WI App 188, ¶ 11.
126. *Cent. Corp.*, 681 N.W.2d at 183, 189.
127. *Id.*
128. *Id.*
129. *Id.* at 182.

In 2017, the Wisconsin Supreme Court's decision in *Benson v. City of Madison* built off the *Ziegler* and *Central Corp.* decisions.[130] There, the City of Madison contracted with four golf professionals to operate the city's municipal golf courses. The golf pros were required to collect green fees, hire and manage attendants, supervise golfing, operate the clubhouse and pro shop, sell concessions, and give lessons—all on behalf of the city.[131] The city decided to terminate the golf pros' contracts because the municipality was losing money from operating the golf courses this way.[132] The golf pros filed suit under the WFDL, alleging that they each had a protected dealership with the city such that the city could not opt against renewing their contracts unless it had shown, and provided proper notice of, good cause.[133] As in earlier cases, the circuit court and the court of appeals dismissed the putative dealers' WFDL claims.[134]

But the Supreme Court found that a community of interest existed between the city and the golf pros.[135] The court did not analyze the *Ziegler* facets, and it expressly held that courts are not obligated to consider any of the facets when conducting a community-of-interest analysis.[136] Indeed, the Supreme Court's decision in *Benson* contains no discussion of the percentage of income derived from the relationship, nor is there any discussion of the liquidity of any financial investment made by the purported dealers. Rather, the court found that a continuing financial interest existed in the parties' sharing of revenue and the dealers' investment in training employees, purchasing supplies, and contributing less than $3,500 a year to a marketing plan, and interdependence existed in the parties' cooperation over the years.[137] Following the foregoing precedent, Wisconsin courts have routinely recognized that whether a dealership exists turns on the totality of the parties' relationship and the importance of the grantor to the dealer—not solely

130. Benson v. City of Madison, 897 N.W.2d 16 (Wis. 2017). The *Benson* decision, to the authors' knowledge, is the first (and thus far only) published decision in which a court has held that a municipality could be a grantor or franchisor under a dealership or franchise statute. In addition to *Benson*'s holding, which subjects municipalities to the WFDL, the Seventh Circuit has applied the statute to the relationship between Girl Scouts of the United States of America—a congressionally chartered non-profit—and its local Manitou council. *See* Girl Scouts v. Girl Scouts, 549 F.3d 1079, 1092 (7th Cir. 2008) ("[The WFDL's] stated concern is with 'fair business relations,' Wis. Stat. § 135.025(2)(a) . . . and it is beyond dispute that nonprofit corporations can be substantial businesses."). For a more detailed discussion of the application of the *Girl Scouts* decision and the state of the law, see Gary W. Leydig & Angela Toscas Gordon, *Girl Scouts of Manitou Council and the Application of Franchise and Dealership Laws to Nonprofits*, 31 Franchise L.J. 187 (2012).

131. *Benson*, 897 N.W.2d at 19–20.

132. *Id.* at 22.

133. *Id.*

134. *Id.* at 22–23.

135. *Id.* at 30.

136. *Id.* at 29 n.15.

137. *Id.* at 30.

on whether the dealer derives a high percentage of its business from the grantor or makes large grantor-specific investments.[138]

C. *The Seventh Circuit Evolves Away From Wisconsin Law in Applying the WFDL.*

In the years since *Moore*, the Seventh Circuit has continued to follow its own approach to assessing whether a community of interest exists. It has not altered its course in light of *Ziegler*, *Bush*, or *Benson*. In both *Fleet Wholesale Supply Co. v. Remington Arms Co.*[139] and *Moodie v. School Book Fairs, Inc.*,[140] the Seventh Circuit continued to rely on—and ultimately to address the community-of-interest question through—its perception of the economic realities addressed by the WFDL, rather than the Wisconsin Supreme Court's interpretation of the law. In *Fleet Wholesale*, the Seventh Circuit explained:

> The Wisconsin Act was designed to regulate the franchise relation, on the premise that the franchisor has the franchisee over a barrel after their business dealings begin. The franchisor (supplier) may be able to change the terms for the worse after the franchisee (dealer) has invested much of its capital in firm-specific promotion, training, design, and other features. Once the dealer is locked into the supplier, the supplier may seek to extract what an economist would call a quasi-rent. One can doubt the premise of the statute: the supplier's concern for its reputation would dissuade it from doing this if it planned to add outlets, and competition among firms may keep in line even franchisors that no longer want to line up new outlets. They cannot effectively raise their dealers' costs of business without diverting customers to other, cheaper sources of goods. Nonetheless, a state is entitled to conclude, as Wisconsin has, that exploitation by franchisors is a serious problem.[141]

Despite this explanation's absence from the statute, the *Moodie* court built from it and explained that the WFDL exists "to correct a 'market failure' by protecting dealers who have made such an investment—those faced with inherently 'superior bargaining power.'"[142] In evaluating the purported dealer's claim, the *Moodie* court assessed whether the grantor had the dealer "over the barrel" such that the dealer's economic livelihood would be imperiled by an adverse grantor action.[143]

In *Kenosha Liquor v. Heublein, Inc.*,[144] Judge Frank Easterbrook announced that there is no community of interest unless "a large portion of the business is committed to the supplier, or the reseller has substantial assets specialized

138. *See, e.g.*, Left Bank Wine Co. v. Bogle Vineyards, Inc., Bus. Franchise Guide (CCH) ¶ 16862, at 11–12 (Dane Cnty. Cir. Ct. Apr. 26, 2021); Webb & Gerristen, Inc. v. Vital Pharms., Inc., Case No. 2019CV1049 (Waukesha Cnty. Cir. Ct. Apr. 22, 2021).

139. Fleet Wholesale Supply Co. v. Remington Arms Co., 846 F.2d 1095 (7th Cir. 1988).

140. Moodie v. School Book Fairs, Inc., 889 F.2d 739 (7th Cir. 1989).

141. *Fleet Wholesale*, 846 F.2d at 1097.

142. *Moodie*, 889 F.2d at 742. The *Moodie* court also resurfaced the doubt that the Seventh Circuit had regarding the WFDL's adoption and the purposes of the statute. *Id.* at 742 n.5 ("An alternative, perhaps more cynical, explanation is simply that dealers and not employees or independent contractors had sufficient political clout to have a remedial law passed in their favor.").

143. *Id.* at 743.

144. Kenosha Liquor v. Heublein, Inc., 895 F.2d 418 (7th Cir. 1990).

to that supplier's goods."[145] The *Kenosha Liquor* court granted summary judgment on the grounds that 5.8% of total sales was not enough to constitute a dealership, despite arguments that the supplier served as a "door opener" or "magnet brand" and disputes over the extent of the parties' contractual obligations.[146] Whether a community of interest exists is a mixed question of law and fact.[147] Here, the *Kenosha Liquor* court ignored the factual disputes in an effort to provide "rules" to an otherwise "vapid law."[148] The determination that 5.8% is insufficient as a matter of law is seemingly irreconcilable with *Ziegler*, which calls for an analysis of the totality of the relationship.[149]

The sum of the Seventh Circuit's approach to the community-of-interest question is exemplified in its *Frieburg Farm Equipment v. Van Dale* decision.[150] There, Frieburg was a dealer of Van Dale's farm equipment in two rural Wisconsin counties.[151] At the outset of the parties' relationship, Frieburg purchased Van Dale's previous dealer's inventory and assets for approximately $45,000.[152] Just over three years into the relationship, Van Dale notified Frieburg that it planned to terminate the relationship.[153] Frieburg sued under the WFDL, and the district court found that it was a protected dealer under the WFDL over Van Dale's argument that there was no community of interest. The Seventh Circuit affirmed.[154]

The *Frieburg* court began its analysis by complaining that the statutory definition of "community of interest" is "vague and unhelpful . . . for it permits no ready way in which to differentiate a dealership from any ordinary vendor/vendee relationship."[155] The court acknowledged the *Ziegler* guideposts and noted that the Wisconsin Supreme Court "explicitly rejected an approach that would have required a business, to qualify as a 'dealer,' to have garnered a certain minimum percentage of its revenues from servicing or selling the grantor's products."[156] But rather than follow the guideposts, the *Frieburg* court "distilled the principles underlying Wisconsin cases" in providing that a community of interest may exist (1) when "a large proportion of an alleged dealer's revenues are derived from the dealership," or (2) when the "alleged dealer has made sizable investments . . . specialized in some way

145. *Id.* at 419.
146. *Id*.
147. *See* Moe v. Benelli U.S.A. Corp., 306 Wis. 2d 812, 820 (Ct. App. 2007).
148. *Kenosha Liquor*, 895 F.2d at 419. In oral argument, in *Home Protective Services, Inc. v. ADT*, Judge Easterbrook "wonder[ed] whether when you got one of these ten factor chop salad tests, seasoned to taste, whether it isn't the taste of the district court rather than the taste of the appellate court that matters." Home Protective Servs., Inc. v. ADT Sec. Servs., Inc., 2005 WL 6202864 (7th Cir. Oct. 27, 2005).
149. *See* Ziegler Co. v. Rexnord, Inc., 407 N.W.2d 873 (Wis. 1987).
150. Frieburg Farm Equip. v. Van Dale, 978 F.2d 395 (7th Cir. 1992).
151. *Id.* at 397.
152. *Id.*
153. *Id.* at 397–98.
154. *Id.* at 398.
155. *Id.*
156. *Id.* at 398–99.

to the grantor's goods or services."[157] The *Frieburg* court further stated that a combination of these two elements *may* also constitute a dealership.[158]

The court downplayed its departure from state precedent, stating that "[b]oth federal and state courts rest their decisions upon identical principles" and that it had merely reframed *Ziegler* to stand for the proposition that a "retailer is a dealer only if it has made the kind of investments that would tempt an unscrupulous grantor to engage in opportunistic behavior—in other words, to exploit the fear of termination that naturally attends a dealer's investment in grantor-specific assets."[159] "At root," the *Frieburg* court explained, state and federal courts are really saying the same thing:

> A grantor can exploit a dealer's fear of termination (our words) only if termination will have severe economic consequences (their words). Severe economic consequences will attend termination (theirs) because the dealer will be unable to recover its sunk costs (ours). The ten *Ziegler I* factors structure any inquiry into these matters.[160]

Turning to the case at hand, the Seventh Circuit affirmed the finding of a dealership.[161] To start, the parties agreed that whether a community of interest exists is a question of law—not fact.[162] Thus, based on the undisputed factual record, the court upheld the finding of a community of interest, relying primarily on Frieburg's exclusive two-county territory, investment in $70,000 worth of inventory and assets, decision to consolidate its operations at Van Dale's insistence, promotion of Van Dale at trade events and cooperation in advertising, service and maintenance of Van Dale equipment, as well as Frieburg potentially drawing eleven percent of its sales from the parties' relationship.[163] Paying little mind to the harsh test that it set forth within the same opinion, the *Frieburg* court's analysis is consistent with *Ziegler*—save for determining the community-of-interest question as a matter of law, rather than remanding it for further factual development.

Despite the immediate consistency, the approach endorsed by the *Frieburg* decision is irreconcilable with *Ziegler* in that it requires a dealer either derive a large portion of its profits from the parties' relationship or make a significant, illiquid investment.[164] In addition to limiting the inquiry, the court also moved the goalposts on the quantum of harm that is hanging over the dealer from the *Ziegler* court's requirement of "significant economic impact" to a new, higher bar of "severe economic consequences."[165] This analysis is a substantive change because an economic impact can be

157. *Id.* at 399.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 399–400.
162. *Id.* at 399.
163. *Id.* at 400.
164. *Id.* at 399.
165. *Compare id.* at 399 *with* Ziegler Co. v. Rexnord, Inc., 407 N.W.2d 873, 879 (Wis. 1987).

significant without being so severe as to threaten the business's survival.[166] The Seventh Circuit's imposition of a heightened standard also creates a subtest, requiring a dealer to prove that the grantor have it "over the barrel" for a community of interest to exist. Moreover, the *Frieburg* decision continues a trend for federal courts to assess whether a community of interest exists as a matter of law—even where there are lingering factual disputes that the Wisconsin Supreme Court has repeatedly held are properly understood as jury questions.

On balance, the Seventh Circuit's approach is considerably more grantor-friendly, and, when applied, it is less likely that a court can find that a community of interest exists and the WFDL confers protection than if the court were to apply the state-law approach to the same set of facts. Most commonly, federal courts have repeatedly found that percentages exceeding the four percent of revenue in *Ziegler* and the five percent of profits in *Central Corp.* were insufficient to create a triable issue of fact that there was a dealership—despite the Wisconsin Supreme Court reversing grants of summary judgment and remanding for jury trials in both *Ziegler* and *Central Corp*.

The distinction between the two approaches and its impact on the law are not lost on Wisconsin courts. In September 2023, the authors litigated a WFDL claim before a state court judge in Wisconsin, and the difference between the state and federal approaches became an issue. The judge questioned why the Seventh Circuit did not follow *Ziegler*, because there is now a meaningful difference whether a party litigates a WFDL claim in state court or federal court.[167] This judge is not alone in recognizing the inconsistencies between state and federal law; on several occasions over the past few years, state- and federal-court judges have made similar acknowledgments to the authors. Indeed, in most WFDL cases that the authors have litigated, counsel for the grantor cites a flurry of Seventh Circuit cases, while the dealer relies heavily on state law. This pattern generally holds regardless of whether the case is proceeding in state or federal court.

In *Water Quality Store, LLC v. Dynasty Spas, Inc.*,[168] the Wisconsin Court of Appeals rejected a grantor's argument that no community of interest existed because its dealer was not "over a barrel." The court made plain that "[f]ederal cases applying Wisconsin law do not have precedential authority for Wisconsin courts, although we may consider them for their persuasive value."[169] Thus, if "a federal case applying Wisconsin law conflicts with a decision of the Wisconsin Supreme Court or with a published decision of this court," Wisconsin courts must follow the Wisconsin case.[170] The court

166. Butler & Mandell, *supra* note 12, § 4.5.
167. Gen. Bev. Sales Co.—Milwaukee v. W.J. Deutsch & Sons, Ltd., No. 2023CV764 (Waukesha Cnty. Cir. Ct. Sept. 13, 2023).
168. Water Quality Store, LLC v. Dynasty Spas, Inc., 789 N.W.2d 595 (Wis. Ct. App. 2010).
169. *Id.* at 602.
170. *Id.*

affirmatively declined to adopt the Seventh Circuit's analysis in *Home Protective Services v. ADT Security Services, Inc.*[171]—a decision that restates the *Frieburg* framework—because it directly conflicted with *Central Corp.* and stated that the court of appeals does not "endorse or apply any standard other than that set forth in *Ziegler* and *Central Corp.*"[172]

Soon after the *Water Quality* decision, the Wisconsin Court of Appeals heard *Kelley Supply v. Chr. Hansen*.[173] At the circuit court, Judge Vincent Howard of Marathon County highlighted that the grantor's overreliance on federal decisions was misplaced.[174] Judge Howard restated the obvious, that Wisconsin courts are not compelled to follow federal law, before identifying that the Seventh Circuit's reliance on a fixed, tangible investment has no basis in Wisconsin law.[175] Instead, the "Wisconsin Supreme Court has indicated that, while a substantial financial investment is one way to satisfy the requirements of a community of interest, it is not the only way."[176] At the conclusion of a four-day bench trial, Judge Howard determined that a community of interest did exist.[177]

The grantor fared no better on appeal. There, the grantor argued that the community-of-interest standard turns on

> (1) what percentage of the putative dealer's business is made up of the supplier's products; and (2) what brand specific investments does the putative dealer have in the supplier's products. These two facts tend to be determinative because they go to whether the supplier has the putative dealer "over a barrel."[178]

The *Kelley Supply* court affirmed the circuit court's findings and resoundingly rejected the grantor's reliance on federal law, stating that "Wisconsin courts have never applied or adopted the strict 'over a barrel' analysis. . . . Nor have they focused exclusively or primarily on one or two factors."[179]

Despite these decisions rejecting the Seventh Circuit's spin on *Ziegler* and the well-worn rule that federal courts sitting in diversity should "apply the state law that would be applied in [a particular context] by the [Wisconsin] Supreme Court,"[180] Seventh Circuit courts have failed to consistently apply Wisconsin's community-of-interest standard when assessing WFDL

171. Home Protective Servs., Inc. v. ADT Sec. Servs., Inc., 438 F.3d 716, 720 (7th Cir. 2006) (couching the *Frieburg* framework in Wisconsin law).

172. *Water Quality Store*, 789 N.W.2d at 602–03 & n.4.

173. Kelley Supply, Inc. v. Chr. Hansen, Inc., 2012 WI App 40, 340 Wis. 2d 497 (Ct. App. Feb. 28, 2012).

174. Decision Following Trial, Kelley Supply, Inc. v. Chr. Hansen, Inc., No. 07-CV-1441 (Marathon Cty. Cir. Ct. July 6, 2010) (on file with authors).

175. *Id.* at 12–13.

176. *Id.* at 13 n.15 (citing Bush v. Nat'l Sch. Studios, Inc., 407 N.W.2d 883, 892 (Wis. 1987) Ziegler Co. v. Rexnord, Inc., 407 N.W.2d 873, 880 n.10 (Wis. 1987).

177. Decision Following Trial, *Kelley Supply, Inc.*, at 28.

178. *Kelley Supply, Inc.*, 2012 WI App 40, ¶ 15.

179. *Id.* ¶ 15.

180. *See, e.g.*, City Nat'l Bank of Fla. v. Checkers, Simon & Rosner, 32 F.3d 277, 281 (7th 1994).

claims.[181] In the 2022 *Watch Co., Inc. v. Citizen Watch Co. of America, Inc.*[182] decision, the Seventh Circuit affirmed the dismissal of a complaint for failing to allege a claim under the WFDL. There, the court relied on the *Frieburg* framework and found that the purported dealer did not allege any grantor-specific investments, nor did it allege that it was "over a barrel" in its dealing with its purported grantor.[183] Even more recently, in *Track, Inc. v. ASH North America, Inc.*,[184] Chief Judge James Peterson of the Western District of Wisconsin cited affirmatively to the *Watch Co.* decision, stating that "the existence of a community of interest depends on two questions, whether (1) the dealer derives a large share of its revenue from the dealership; and (2) the dealer made substantial and unrecoverable investments into the dealership."[185]

III. What Does This All Mean?

Regardless of the Wisconsin Supreme Court's approach, federal courts have continued to assess whether a dealership exists through the *Frieburg* framework.[186] The irreconcilability of that approach with the Wisconsin Supreme Court's analyses creates legal uncertainty for parties exercising their rights under the WFDL. The difference between choosing one approach over the other is not simply academic but could be outcome determinative, infringing on the fundamental purposes of the *Erie*[187] doctrine and creating significant issues for litigants.

181. *See, e.g.*, Keen Edge Co. v. Wright Mfg., No. 19-CV-1673-JPS, 2020 WL 492666, at *6 (E.D. Wis. Aug. 21, 2020) (containing the following citation: "*Frieburg Farm Equip., Inc. v. Van Dale, Inc.*, 978 F.2d 395, 399 (7th Cir. 1992) (holding that a community of interests exists when either a large proportion of revenues are derived from the dealership or when the dealer has made a 'sizable investment' in the dealership, or some combinations thereof.)").

182. Watch Co., Inc. v. Citizen Watch Co. of Am., Inc., No. 21-2943, 2022 WL 1535262 (7th Cir. May 16, 2022).

183. *Id.* at *3.

184. Track, Inc. v. ASH N. Am., Inc., No. 21-CV-786-JDP, 2023 WL 2733679 (W.D. Wis. Mar. 31, 2023).

185. *Id.* at *4.

186. *See, e.g.*, Sales & Mktg. Assocs., Inc. v. Huffy Corp., 57 F.3d 602, 606 (7th Cir. 1995); Kuraki Am. Corp. v. Dynamic Intl of Wis., Inc., No. 14-C-583, 2014 WL 2876014, at *2 (E.D. Wis. June 24, 2014); F & C Flooring Distribs., Inc. v. Junckers Hardwood, Inc., No. 08C0249, 2009 WL 4755260, at *1 (E.D. Wis. Dec. 4, 2009); Heat & Power Prods. v. Camus Hydronics Ltd., No. 07-C-639, 2007 WL 2751862, at *4 (E.D. Wis. Sept. 18, 2007); Miller-Bradford & Risberg, Inc. v. VT Leeboy, Inc., No. 06-C-1308, 2007 WL 218749, at *5–6 (E.D. Wis. Jan. 26, 2007) (concluding that "Seventh Circuit decisions, which emphasize the importance of percentage of revenue and sunk investment in a determination of community of interest, are still tenable in light of *Central Corp.*"); Bay Area Props, Inc. v. Dutch Hous., Inc., 347 F. Supp. 2d 619, 623 (E.D. Wis. 2004) ("[I]f any facet is more prominent than others, it is the presence (or absence) of tangible grantor-specific financial investment made by the alleged dealer, or what some courts have referred to as 'sunk costs.'"); Dynamic Movers, Inc. v. Paul Arpin Van Lanes, Inc., 956 F. Supp. 836, 838–39 (E.D. Wis. 1997); Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 914 F. Supp. 296, 300–01 (E.D. Wis. 1996); Beloit Beverage Co. v. Winterbrook Corp., 900 F. Supp. 1097, 1104 (E.D. Wis. 1995).

187. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

To refresh, the *Erie* doctrine provides that "federal courts, when applying any substantive state law, must defer to the respective state's highest court."[188] The *Erie* doctrine stands, in part, "for the idea that, in areas under legitimate state control, state officials (whether legislators or judges) are supposed to have exclusive authority to determine the rules of conduct to which people are subject."[189] To that end, *Erie* serves "to protect and expand state sovereignty by recognizing that states are entitled to define rights and duties under state law not only through statutory and constitutional provision, but also by way of judicial decisions."[190] A state's "highest court is the best authority on its own law,"[191] and, thus, once it has spoken on an issue, the federal court is obligated to follow such rulings.[192] At bottom, the *Erie* doctrine offers predictability, promotes fairness to the parties, and short-circuits forum shopping.[193] None of these goals is served by the current split between the state and federal courts on applying the WFDL.

First, risk assessment plays a significant role in litigation, and the differing standards create uncertainty for both dealers and grantors prior to and throughout litigation.[194] Before litigation, it is important for purported dealers to understand their rights and ability to contest a grantor's action. The inverse is true for grantors who base decisions—*e.g.*, whether to terminate or substantially change a relationship with another party—on the same legal framework. Yet, given the current status of the law, there is little certainty, or even predictability, for litigants in either position.

In the fifty years since the WFDL's enactment, the Wisconsin Supreme Court has held, time and again, that whether the law applies to a particular relationship is a fact-intensive inquiry that necessarily encompasses the totality of the parties' dealings, but the Seventh Circuit has adopted an approach that significantly restricts the inquiry to the percentage of revenue derived from the parties' relationship and to whether the dealer made so much in grantor-specific investments that it will fail absent the court recognizing statutory protection. While both grantor and dealer can reasonably expect consistency in state court, the same is not true in Wisconsin district courts that are pulled in two directions by their obligations to faithfully apply state law and to follow Seventh Circuit precedent. Although most district courts choose Seventh Circuit precedent when push comes to shove, the paradoxical positions imposed upon these courts create unpredictability.

188. Connor Shaull, *An Erie Silence: Erie Guesses and Their Effects on State Courts, Common Law, and Jurisdictional Federalism*, 104 Minn. L. Rev. 1133, 1137 (2019).

189. Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 Notre Dame L. Rev. 1207, 1238 (2022).

190. *Id.*

191. Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967).

192. Jed I. Bergman, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 Colum. L. Rev. 969, 976 (1996).

193. Joseph P. Bauer, *The* Erie *Doctrine Revisited: How A Conflicts Perspective Can Aid the Analysis*, 74 Notre Dame L. Rev. 1235, 1237 (1999).

194. *Id.* at 1237 n.5.

This unpredictability surfaces throughout the litigation process. A significant percentage of dealership cases are resolved at the temporary injunction stage; if the dealer is successful, the parties often settle their dispute, and, if the dealer fails, the case often dissipates. That said, for the cases that do continue deeper into litigation, the differing standards deprive litigants of clear information to predict how their cases will shape up at summary judgment, for trial, or in post-trial briefing. Likewise, even parties who are successful at various stages of litigation face a measurably increased risk of having their decision overturned. This unpredictable legal terrain makes it difficult for parties to vindicate their rights or negotiate a fair settlement that accounts for risk.

This lack of predictability in the law, whatever a party's particular view about the law, undermines fairness for all of the parties involved. As Judge Posner disdainfully recognized, the WFDL embodies Wisconsin's public policy in favor of protecting dealers with relationships situated in Wisconsin,[195] and Wisconsin courts have interpreted the statute consistent with those overt policy goals.[196] The Seventh Circuit has not—substituting its own economic framed analysis that does not appear to be firmly rooted in the statutory text and instead promulgating a more grantor-friendly and more exacting test than state law contemplates or countenances. In *Moodie*, the Seventh Circuit recognized the existence of an *Erie* problem. As recited above, the court explained the economic rationale justifying the WFDL and followed with a footnote stating:

> An alternative, perhaps more cynical, explanation is simply that dealers and not employees or independent contractors had sufficient political clout to have a remedial law passed in their favor. *See Moore*, 819 F.2d at 822. Remedial statutes such as the WFDL, under this view, must be viewed as private contracts with the benefits of the contract to be accorded to the proper group only insofar as the bargain struck grants these benefits. There is no indication that the Wisconsin courts have adopted this view, *see, e.g., Foerster v. Atlas Metal Parts Co.*, 105 Wis. 2d 17, 313 N.W.2d 60 (Wis.1981); *Zeigler*, 139 Wis. 2d 593, 407 N.W.2d 873, and therefore, we are not free to adopt it. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny.[197]

While the Seventh Circuit has acknowledged that it is not free to supplant the WFDL's purposes, in practice it has not followed *Erie*'s mandate. This is borne out by the fact that grantors favor litigating WFDL matters

195. *See* Al Bishop Agency, Inc. v. Lithonia-Div. of Nat. Serv. Indus., Inc., 474 F. Supp. 828, 835 (E.D. Wis. 1979) ("In passing the Wisconsin Fair Dealership Law, the Wisconsin Legislature apparently determined that willy nilly terminations of dealerships disserved the public interest and that it served the public interest to permit termination only upon a showing of good cause. This Court will not question the validity of the legislature's findings and thus will find that the public interest will not be disserved by the issuance of a preliminary injunction.").

196. Cent. Corp. v. Rsch. Prods. Corp., 681 N.W.2d 178, 187 (Wis. 2004) ("While the WFDL has been characterized as protectionist in nature, because it regulates the free market, we note that it is up to the legislature to determine such policy matters. To this end, we must apply the policy adopted by the legislature.").

197. Moodie v. Sch. Book Fairs, Inc., 889 F.2d 739, 742 n.5 (7th Cir. 1989).

in Wisconsin federal courts, where arguments in favor of the Seventh Circuit's unduly exacting approach to the community-of-interest analysis are better received. The forum shopping incentivized by divergent state- and federal-court approaches contributes to inconsistent outcomes and limits meritorious claims. As alluded to above, despite a slew of Wisconsin case law indicating that a percentage as low as four percent of total revenues derived from the relationship can be sufficient to find a community of interest, a dealer with such a percentage would be unlikely to pursue such a claim to judgment in federal court, due to the Seventh Circuit's repeated emphasis on needing higher percentages.

And, even where a dealer does derive a significant portion of its revenue from the relationship, the absence of a grantor-specific investment could doom its claim. Consider, for example, *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*[198] There, the putative dealer derived eighteen percent of its revenue from sales of its grantor products—over twice as much as in *Ziegler*—made nearly $40,000 worth of investments to promote the grantor, and spent substantial time on warranty/service work, training personnel, and advertising.[199] Despite these facts, the federal court granted summary judgment in the grantor's favor on the dealer's WFDL claim, because, in part, the dealer did not undertake a large enough grantor-specific investment.[200] It seems likely that, if this case were assessed under the state-law approach, the dealer would have at least survived summary judgment. A decision on the merits of a case should not depend on the courthouse in which the case is litigated, yet *Cabinetree* is one of several glaring examples of decisions that probably would have ended differently in state court.

These issues are compounded by the fact that most WFDL claims arise in, or are removed to, federal court. In recent years, courts in the Seventh Circuit have heard more WFDL claims than Wisconsin circuit courts, and removal is common due to the nature of a dealership relationship situated in Wisconsin (i.e., that the grantor is often a citizen of a state other than Wisconsin).[201] Because federal courts hear the majority of WFDL cases, their decisions increasingly comprise the bulk of decisional law on the statute; those decisions are also far more accessible than Wisconsin circuit court opinions, which are not published and are not easily found online.

198. Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 914 F. Supp. 296 (E.D. Wis. 1996).

199. *Id.* at 300–01.

200. *Id.*

201. Needless to say, arbitration and mediation remain popular forms of dispute resolution, and actions brought under the WFDL bear no exception. *See, e.g.*, Christopher R. Drahozal, "*Unfair*" *Arbitration Clauses*, 2001 U. Ill. L. Rev. 695 (2001); Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. Legal Stud. 549 (2003); Cheryl L. Mullin, Alyson Conwell & Christopher Howard, *Injunctive Relief Pending Arbitration: The Evolving Role of Judicial Action*, 38 Franchise L.J. 547 (2019). For a detailed discussion of the arbitration in the franchise setting, see Robert W. Emerson & Zachary R. Hunt, *Franchisees, Consumers, and Employees: Choice and Arbitration*, 13 Wm. & Mary Bus. L. Rev. 487, 540–70 (2022).

The consequence is that the federal-court approach is applied and restated at a significantly greater rate than the state-court approach, creating a false impression that the federal-court approach represents the true status of Wisconsin law. This accretion of federal case law on the WFDL presents a real challenge to, if not a slow erosion of, the law as stated by the Wisconsin Supreme Court, which should be the final say on what Wisconsin statutes mean.

Conclusion

The Wisconsin judiciary's duty is to interpret and establish Wisconsin substantive law, applicable to and binding on each of its seventy-two circuit courts and on federal courts presented with claims arising under Wisconsin substantive law. The Wisconsin Supreme Court has spoken numerous times about the meaning of the WFDL and established a broad community-of-interest approach, providing dealers operating within a diverse set of commercial arrangements protection under the law. The Seventh Circuit, however, has promulgated its own narrower understanding of what a community of interest is and has created authority inconsistent and irreconcilable with the Wisconsin Supreme Court's decisions in this area of law. It follows that parties litigating WFDL claims must be keenly aware of the differences between the state and federal case law and advise their clients that, in this instance, the choice of forum will often prove decisive. In addition, a dissatisfied dealer litigating in federal court may wish to take a run at having the Seventh Circuit address the community of interest issue *en banc* to see if the Seventh Circuit will realign its jurisprudence with that of the Wisconsin Supreme Court. Such a strategy carries risk as an *en banc* ruling that favored the Seventh Circuit's existing test may make it even more difficult for dealers to succeed in federal court cases. Time will tell if any headway can be made in convincing federal courts to realign themselves with the state court approach.