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SURVEY OF STATE DEALER LAWS[1]

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The purpose of this paper is to acquaint the reader with the breadth of legislation specifically affecting dealerships and to highlight the similarities and many differences among these statutes.

Not surprisingly, the numerous statutes affecting dealerships have one common denominator. All are intended to afford dealers certain rights and remedies that they would not necessarily possess if left with only the terms of their dealership agreements to turn to. These statutes are all, to one degree or another, protectionist legislation—created to compensate for the real or perceived lack of bargaining equality between dealers and their suppliers.[2] Like the broad range of statutes themselves, the rights afforded under these statutes vary tremendously. Some of these rights are simply procedural—such as the right to receive written notice before the termination of a dealership. Some of these rights are more substantive (and substantial)—such as the requirement that the manufacturer-supplier have good cause to terminate, not renew, or substantially change the competitive circumstances of a dealership or dealership agreement. The remedies available to dealers under these statutes also vary widely. Some state dealer laws afford the dealer the right to have its inventory repurchased

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[1] This paper is an adaptation of portions of a paper prepared and presented by Gary Leydig at the American Bar Association's 33rd Annual Forum on Franchising, held in San Diego, CA on October 13-15, 2010. Gary Leydig is *of Counsel* to the law firm of Riordan Fulkerson Hupert & Coleman in Chicago, Illinois. His biography and practice description can be found at LeydigLaw.com .

[2] *See, e.g.,* Wisconsin Fair Dealership Law, Wis. Stat. § 135.025(2):

> The underlying purposes and policies of this chapter are:
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> (a) To promote the compelling interest of the public in fair business relations between dealers and grantors, and in the continuation of dealerships on a fair basis;
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> (b) To promote dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships;
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> (c) To provide dealers with rights and remedies in addition to those existing by contract or common law;
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> (d) To govern all dealerships, including any renewals or amendments, to the full extent consistent with the constitutions of this state and the United States.

upon termination (but not necessarily any right to prevent the termination in the first place). Others specifically authorize injunctive relief to prevent termination, nonrenewal, or any "substantial change in competitive circumstances"—together with the recovery of damages, costs, and attorneys' fees. Correctly identifying the dealership statute or statutes that may affect a particular dealer agreement is critical to understanding, and in turn counseling about, the full breadth of the parties' rights and obligations.

I. STATUTES OF GENERAL APPLICABILITY

A. Franchise Statutes

When dealerships are involved, franchise statutes should simply be viewed as one form of dealership legislation. Granted, it is legislation devoted to a single type of dealership—*i.e.*, a franchised dealership—but it is dealership legislation nonetheless. Statutory definitions of franchises are very clear on this point. While most discussions of statutory definitions of a "franchise" identify three key elements—*i.e.*, (i) trademark use, (ii) the existence of either a "community of interest" between the parties or the presence of a "marketing plan" established by the franchisor, and (iii) the payment of a franchise fee[3]—there is in fact a fourth necessary element. Essentially every statutory definition of a "franchise" begins with the following words: "Franchise" means a contract or agreement whereby "a franchisee is granted *the right to engage in the business of offering, selling or distributing goods or services*."[4] In its most basic form, these words describe a dealership or a distributorship relationship. Everything that follows those words in any particular definition simply determines how broadly or narrowly that particular statute circumscribes the types of dealership agreements that fall within its particular definition of "franchise."

Much has been written about the application of franchise laws to dealership and distributorship relationships.[5] While that fulsome discussion is beyond the scope of this paper, any evaluation of a client's rights and obligations under a dealership agreement must start with the determination of whether or not that relationship is governed by a franchise statute. If a franchise statute applies—in particular, a franchise "relationship" law addressing how a franchisee must be treated after the franchise agreement has already been entered into—it will typically give the franchisee/dealer the greatest array of extra-contractual rights, and will give the franchisor/manufacturer-supplier the greatest heartburn. A franchise relationship statute, if it applies, typically is the broadest of dealership statutes.

When evaluating potentially applicable franchise laws, one is well-advised not to get hung up on any pre-conceived notion of what a franchise is or is not, or what it

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[3] *Fundamentals of Franchising*. (Rupert M. Barkoff & Andrew C. Selden eds. 3d ed. 2008) at 188-89.

[4] 815 Ill. Comp. Stat. 705/3(1)(a) (emphasis added); *see also* Minn. Stat. § 80 C.01 Subdiv. 4(a)(1); Fla. Stat. § 817.416(b)(2).

[5] *See, e.g.*, Mark H. Miller, *Unintentional Franchising*, 36 St. Mary's L.J. 301 (2005); Thomas J. Collin, *State Franchise Laws and Small Business Franchise Act of 1999: Barriers to Efficient Distribution*, 55 The Business Lawyer 1699 (August 2000); Pitegoff, *Ways to Avoid Being a Franchise*, 12 Franchise L.J. 67 (Fall 1992).

should or should not be. A "franchise" is whatever the statute says it is.[6] If that affronts one's policy sensibilities, take it up with the legislature, not the courts.[7]

The consequence of failing to recognize the applicability of a franchise statute to a dealership can be significant. For example, in *Pyramid Controls Inc. v. Siemens Industrial Automation, Inc.*,[8] a dealer in industrial automation equipment was terminated by its manufacturer under the no-cause-for-termination provision in the parties' dealer agreement. Failing to recognize the dealership relationship likely satisfied the definition of a "franchise" under the Illinois Franchise Disclosure Act, the dealer's longtime personal and corporate lawyer advised his client he was "cooked" under the express terms of the parties' contract.[9] By the time the dealer received a second opinion from an attorney recognizing the potential application of the franchise statute, the statute of limitation had run and the dealer's statutory franchise rights and remedies were barred.[10]

Sixteen states, plus the U.S. Virgin Islands, have franchise relationship statutes.[11] If the dealership satisfies the definition of "franchise" under these statutes, the dealer may be the beneficiary of numerous rights not typically contained in a manufacturer-drafted agreement, including the right to be terminated only for good cause,[12] the right to have the dealership renewed except for good cause,[13] the right to cure defaults before

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[6] *See To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 152 F.3d 658, 659-60 (7th Cir. 1998) ("Legal terms often have specialized meanings that can surprise even a sophisticated party. The term 'franchise,' or its derivative 'franchisee,' is one of those words."). Mr. Leydig represented the plaintiff in this case.

[7] *Id*. at 666 ("Like many manufacturers, MCFA simply did not appreciate how vigorously Illinois law protects 'franchisees.' ... While we understand MCFA's concern that dealerships in Illinois are too easily categorized as statutory franchisees, that is a concern appropriately raised to either the Illinois legislature or Illinois Attorney General, not to this court.").

[8] *Pyramid Controls Inc. v. Siemens Indus. Automation, Inc.*, 172 F.3d 516 (7th Cir. 1999). Mr. Leydig represented the plaintiff-dealer in this action.

[9] *Id.* at 517.

[10] *Id.* at 520.

[11] Arkansas (Ark. Code. Ann. §§ 4-72-201 to -210); California (Cal. Bus. & Prof. Code §§ 20000-20043); Connecticut (Conn. Gen. Stat. §§ 42-133e to -133h); Delaware (Del. Code. Ann. tit. 6, §§ 2551-2556); Hawaii (Haw. Rev. Stat. §482E-6); Illinois (815 Ill. Comp. Stat. 705/1 to /44); Indiana (Ind. Code §§ 23-2-2.7-1 to 7.7); Iowa (Iowa Code §§ 523H.1-.17; Iowa Code §§ 573A.10-.17); Michigan (Mich. Comp. Laws §§ 445.1501-1545); Minnesota (Minn. Stat. §§ 80C.01-.30); Mississippi (Miss. Code Ann. §§75-24-51 to -63); Missouri (Mo. Rev. Stat. §§407.400-.420); Nebraska (Neb. Rev. Stat. §§ 87-401 to -410); New Jersey (N.J. Stat. Ann. §§ 56:10-1 to -11); Virginia (Va. Code Ann. §§13.1-557 to -574); Washington (Wash. Rev. Code §§ 19.100.010-.940); Virgin Islands (V.I. Code Ann. Tit. 12A §§ 130-139. Idaho and Louisiana also have limited franchise relationship laws (Idaho Code § 29-110; LA Rev. Stat. Ann. 23:921(F)). Finally, as discussed *infra* at Section I.B., Wisconsin, Rhode Island, Alaska, and Puerto Rico have very broadly drafted dealership laws that typically get included in lists of franchise relationship laws.

[12] *See*, *e.g.*, Cal. Bus. & Prof. Code § 20020; 815 Ill. Comp. Stat. § 705/19; Minn. Stat. § 80C.14 Subd. 3.

[13] *See*, *e.g.*, Iowa Code §523H.8; Minn. Stat. §80C.14 Subd. 4.

termination or nonrenewal,[14] and the right to injunctive relief, damages, and attorneys' fees if the franchise statute has been violated by the manufacturer-supplier.[15]

Typically, any attempt by the manufacturer-supplier to contract around these or other rights created by the statute will be deemed void as against public policy.[16]

In the first instance, therefore, a dealer looking to enhance or enlarge its rights beyond those found in the written dealership agreement will want to identify any state's franchise statute that may be applicable. Typically, that will be the franchise statute for the state wherein the dealership is physically located or doing business.[17] A dealership with a multi-state territory may have a different state's franchise statute applying to its operations in each of the states of its operation. And, occasionally, a dealer may be able to convince a court to apply the franchise statute of the state where the franchisor's business is located or the state whose laws have been contractually chosen by the parties, even if the dealer does not operate in those states. Because of the favorable treatment that can be afforded to a dealer under a franchise statute, this multi-state approach to identifying potentially applicable statutes is almost always warranted. Likewise, from the manufacturer-supplier's side of the equation, all of these statutes need to be understood in order to appreciate the potential consequences of any particular action taken against a dealer.

B. Dealership Laws of General Applicability

As a general proposition, franchise statutes are not concerned with the type of goods or services that are the subject of the parties' agreement. As discussed above, once one gets past the necessary condition established by essentially all definitions of "franchise"—*i.e.*, the presence of a contract for the offering, selling or distributing of goods or services—certain key elements must also be met to satisfy the statutes' definitions of a "franchise." Statutory definitions focus on the presence of three or four (depending on the statute and how one counts) key elements: (i) the right to use the franchisor's mark; (ii) the presence of, or the right to adopt, the franchisor's marketing plan; (iii) a community of interest among the parties; and/or (iv) the payment of a franchise fee.[18] Notably missing from these criteria is any requirement that the franchise be dedicated to any particular type of good or service.

With the exception of the handful of important statutes that are discussed below, dealership statutes are, in contrast to franchise laws, subject matter specific. The subject matter may be very broad—for example, any and all "equipment"—or it may be very narrow—just motorcycles—but there is a specific focus to the dealership statute.

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[14] *See*, *e.g.*, Ark. Code Ann. § 4-72-204(b); Iowa Code § 537A.10.7(b); Minn. Stat. § 80C.14 Subd. 3(a).

[15] *See, e.g.*, Ark. Code Ann. § 4-72-208; 815 Ill. Comp. Stat. § 705/26.

[16] *See*, *e.g.*, 815 Ill. Comp. Stat. §705/41 ("Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this Act or any other law of this State is void.").

[17] For a thorough survey of choice of law jurisprudence, *see* Allan P. Hillman, *Public Policy Versus Choice of Law – Is the Best the Enemy of the Good?* 26 Franchise L.J. 180 (Spring 2007).

[18] *See* footnote 3, *supra*.

One is either in or out of the statute based on *what* is being sold. These subject matter dealership statutes are the subject of section II, *infra*.

To prove the general rule that dealership statutes are typically subject matter specific, there are, as always, some extremely significant exceptions to the rule. Wisconsin,[19] Rhode Island,[20] Puerto Rico,[21] and Alaska[22] have dealership laws of very broad application. These statutes are not subject matter specific and, in that sense, they closely resemble franchise statutes. Indeed, the Wisconsin, Rhode Island, and Puerto Rico *dealer* laws typically find their way onto most franchise commentators' lists of *franchise* relationship laws.[23] They cover dealer agreements for the sale and distribution of all goods, not just one type or category. Further setting these laws apart from most dealership laws, these broadly drafted statutes apply to the sale of both goods and services. More typically, dealership laws are concerned with the sale and distribution of goods only.[24] Also, the four broadly applicable dealership statues addressed here, like their franchise statute counterparts, contain some heightened relational element that must be present for the statutes to apply. In Alaska, a "joint interest" between the dealer and the manufacturer must be present.[25] In Wisconsin and Rhode Island, a "community of interest" between the parties must exist.[26] And in Puerto Rico, the dealer must "actually and effectively take[] charge of the distribution."[27]

The Wisconsin Fair Dealership Law ("WFDL") is one of the oldest and most litigated dealership statutes on the books. Accordingly, it is often looked to by courts trying to interpret other states' franchise and dealership statutes containing similar language. The definition of a "dealership" under the WFDL is:

> A contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is a community of interest in the business of

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[19] Wis. Stat. § 135.01 et seq.

[20] R.I. Gen. Laws § 6-50-1 et seq.

[21] P.R. Laws Ann. tit. 10 § 278.

[22] Alaska Stat. § 45.45.700 *et seq.*

[23] *Fundamentals of Franchising*, note 3 *supra*, at p. 187.

[24] *See infra* at Section II.

[25] Alaska Stat. § 45.45.790(3).

[26] Wis. Stat. § 135.02(3); R.I. Gen. Laws § 6-50-2(3).

[27] 10 L.P.R.A. § 278(b).

> offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise.[28]

Like its franchise counterparts, the WFDL's definition begins with the same broad directive that it applies to a person who is "granted the right sell or distribute goods or services." It is the requirement that there be a "community of interest" that has given courts the most difficulty under the WFDL's definition.[29] In the end, the Seventh Circuit's colloquial take on the term may express the concept the best:

> 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.[30]

Consistent with the WFDL's stated purposes and policies,[31] the law has been applied very liberally in the protection of dealers from overreaching by their "grantors." For example, in *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*,[32] the Seventh Circuit Court of Appeals recently found a local, nonprofit Girl Scout Council to be a dealer and the national nonprofit organization to be a grantor under the WFDL.[33]

In addition to prohibiting grantors from terminating, canceling, not renewing, or substantially changing the competitive circumstances of a dealership agreement without good cause,[34] dealers are granted other substantial rights under the WFDL. Ninety days notice of any of the above enumerated actions by the grantor against the dealership, plus sixty days to cure, is mandated under the statute.[35] A dealer is authorized under the

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[28] Wis. Stat. § 135.02(3). This section also contains a separate definition of dealers of intoxicating liquor. *Id.*

[29] "The Wisconsin Fair Dealership Law, Wis. Stat. ch. 135, governs the relations between a supplier and its "dealers" but does not define "dealer" except by saying that a dealer is a distributor in a "community of interest" with the supplier, § 135.02(2), (3), which just pushes the lack of a definition to a new level of abstraction." *Fleet Wholesale Supply Co. v. Remington Arms Co*., 846 F.2d 1095, 1096 (7th Cir. 1988).

[30] *d*. at 1097.

[31] *See* footnote 2, *supra*.

[32] *Girl Scouts of Manitou Council, Inc., v. Girl Scouts of the United States of* America, 549 F.3d 1079 (7th Cir. 2008). Mr. Leydig represented the plaintiff in this case.

[33] *Id.* at 1090-94.

[34] Wis. Stat. § 135.03.

[35] Wis. Stat. § 135.04. If the reason for the termination, etc. is insolvency, an assignment for the benefit of creditors or bankruptcy, the notice requirements are waived. Id. If the circumstances of the termination,

WFDL to bring suit against the grantor for "damages sustained" as a consequence of the grantor's violation of the WFDL, together with actual costs of the action, including attorneys' fees.[36] "Actual costs" has been interpreted by the courts to include most litigation expenses, including expert witness fees.[37] A dealer may also seek injunctive relief.[38] A violation of the WFDL by the dealer "is deemed an irreparable injury to the dealer for determining if a temporary injunction should be issued."[39] Any term of a contract that attempts to vary the protections of the WFDL is void.[40] The Wisconsin Fair Dealership Law is as broad as any franchise relationship statute.

Rhode Island's Fair Dealership Act[41] is of recent vintage; becoming effective June 14, 2007.[42] It is similar to the WFDL and has obviously borrowed heavily from it. Its stated purposes and policies, as well as its definition of "dealership" are essentially identical.[43] The Rhode Island Fair Dealership Act is unclear, however, on whether or not a grantor needs good cause for termination, cancellation, or nonrenewal of the dealership. The statute contains a definition of "good cause,"[44] but then omits the typical section that articulates when good cause is required.[45] Instead, the Rhode Island Act jumps straight to notice requirements stating:

> Notwithstanding the terms, provisions, or conditions of any agreement to the contrary, a grantor shall provide a dealer sixty (60) days prior written notice of termination, cancellation, or nonrenewal. The notice shall state all the reasons for termination, cancellation, or nonrenewal and shall provide that the dealer has thirty (30) days in which to

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etc., are non-payment of sums due under the dealership agreement, the dealer is entitled to notice but only a ten day cure period. *Id.*

[36] Wis. Stat. § 135.06.

[37] *Bright v. Land O'Lakes, Inc.*, 844 F.2d 436, 444 (7th Cir. 1988) ("[T]he actual costs language [contained in the WFDL] authorize[d] a shift of the full cost of the expert witness fees from the successful plaintiff to the defendant."); *Kealy Pharmacy & Homecare Service, Inc. v. Walgreen Co.,* 607 F.Supp. 155, 170 (W.D. Wis. 1984) (allowing recovery of expert fees as "actual costs" under WFDL), *aff'd in part*, *vacated in part on other grounds*, 761 F.2d 345 (7th Cir. 1985).

[38] Wis. Stat. § 135.06.

[39] Wis. Stat. § 135.065.

[40] Wis. Stat. § 135.025(3).

[41] R.I. Gen. Laws § 6-50-1 *et seq.*

[42] *Pascale Serv. Corp. v. Int'l & Engine Corp.*, 558 F.Supp. 2d 217, 219 (D. R. I. 2008).

[43] Compare R.I. Gen. Laws § 6-50-2(3) and Wis. Stat. §135.02(3) (definitions of "dealership"); R.I. Gen Laws § 6-50-3 and Wis. Stat. § 135.025 (purposes and policies).

[44] R.I. Gen. Laws § 6-50-2(4).

[45] Comparing it to the WFDL, which it closely mimics, the Rhode Island Fair Dealership Act seems to omit § 135.03 of the WFDL, which provides: "No grantor, directly or through any officer, agent or employee, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause. The burden of proving good cause is on the grantor." Wis. Stat. § 135.03.

> cure any deficiency; provided that a dealer has a right to cure three (3) times in any twelve (12) month period during the period of the dealership agreement. …[46]

The question ripe for litigation is whether or not the stated "reasons for termination" must rise to the level of "good cause," as defined earlier in the Act. Some hint to the answer is given in the section of the Act that addresses arbitration:

> This chapter shall not apply to provisions for the binding arbitration of disputes contained in a dealership agreement, if the criteria for determining whether good cause existed for a termination, cancellation, or nonrenewal, and the relief provided is no less than that provided for in this chapter.[47]

This language strongly suggests that good cause is in fact a prerequisite for a termination, cancellation, or nonrenewal. Regardless, violations of the Rhode Island Fair Dealership Act entitle the dealer to bring an action for the recovery of damages and attorneys' fees.[48] Injunctive relief against wrongful termination and nonrenewal is also provided.[49] The statute presumes irreparable injury.[50]

The Puerto Rico Dealership Act of 1964, generally referred to as "Law 75," provides broad protection to dealers of goods and services.[51] The definitional scheme is different from other statutes of this type. A "dealer's contract" is defined as follows:

> Relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise or of the rendering of a service, by concession or franchise, on the market of Puerto Rico.[52]

"Dealer," in turn, is defined as a "[p]erson actually interested in a dealer's contract because of his having effectively in his charge in Puerto Rico the distribution, agency, concession or representation of a given merchandise or service."[53]

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[46] R.I. Gen. Laws § 6-50-4(a).

[47] R.I. Gen. Laws § 6-50-6.

[48] *Id.* at § 6-50-7.

[49] *Id.*

[50] *Id.* at § 6-50-8.

[51] P.R. Laws Ann. tit. 10 § 278 *et seq.*

[52] *Id.* at § 278(b).

[53] P.R. Laws Ann. tit. 10 § 278(a).

Terminations and nonrenewals are forbidden, as is "any act detrimental to the established relationship," except for "just cause."[54] Law 75 expressly entitles a wrongfully terminated dealer to recover the good will of the lost business, and lists several factors that may be considered when determining the value of that lost good will.[55] Reflecting its strong parochial intentions, Law 75 provides that the principal's rules of conduct or its distribution quotas or goals must "adjust to the realities of the Puerto Rican market at the time of the violation or nonperformance by the dealer."[56]

Alaska's distributorship legislation[57] is also of fairly recent vintage, with an effective date of August 1, 2002.[58] It has broad application to any "distributorship agreement" which is defined as:

> [A]n agreement, whether express, implied, oral, or written, between two or more persons
>
> (A) by which a person receives the right to
>
> (i) sell or lease merchandise or services at retail or wholesale; or
>
> (ii) use a trade name, trademark, service mark, logotype, advertising, or other commercial symbol; and
>
> (B) in which the parties to the agreement have a joint interest, whether equal or unequal, in the offering, selling, or leasing of the merchandise or services[.] [59]

As with the previously discussed dealership laws, there is no attempt to restrict the scope of the Alaska statute's reach to any particular commodity, industry or service.

The protectionist approach taken by the Alaska Distributorship Law is quite different, however. It does not prohibit terminations or nonrenewals.[60] Rather, it just makes terminations and nonrenewals—apparently, even if for cause—extremely expensive. In addition to having to buy back the dealer's stock of merchandise,[61] the statute provides that:

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[54] *Id.* at § 278a.

[55] *Id.* at § 278b(c).

[56] *Id.* at § 278a-1(c).

[57] Alaska Stat. § 45.45.700 *et seq*.

[58] 2002 Alaska Sess. Laws 15.

[59] Alaska Stat. § 45.45.790(3).

[60] By definition, "terminate" includes failure to renew. Alaska Stat. § 45.45.790(5).

[61] Alaska Stat. § 45.45.710.

> [I]f a distributor terminates a distributorship agreement or makes substantial changes in the competitive situation of the distributor's dealer with regard to distribution of the merchandise or services that are the subject of the distribution agreement, the distributor shall (1) purchase that portion of the dealer's business directly affected by the distributorship agreement or the change, including assets and machinery, at commercially reasonable business valuations; and
>
> (2) reimburse the dealer for the expenses that were necessarily incurred by the dealer
>
> (A) for that portion of the dealer's business covered by the distributorship agreement; and
>
> (B) during the 12 months before the termination or change.[62]

If the distributor—defined to include manufacturers, wholesalers and others[63]—fails to make these required payments, then the dealer can recover damages and/or obtain an injunction.[64] The Alaska law also prohibits various forms of coercion, such as threatening the termination of the distributorship agreement to force the dealer to sell or dispose of a contract or property, or to make an expenditure that the dealer had not contracted to make.[65] The law also prohibits certain contract provisions, such as waivers of a trial by jury, requirements that disputes be arbitrated unless agreed to when the dispute arises, requirements to pay the distributor's attorneys' fees, and choice of law provisions that provide for any law other than that of Alaska.[66]

Because all of these dealer laws pull within their purview essentially all dealership agreements, they run the risk of duplicating or conflicting with coverage already provided to specific types of dealerships under product or industry-specific dealership statutes already on these states' books. Accordingly, all of these broad-based dealer laws expressly exempt from their coverage dealerships that are covered under other particularized statutes. Thus, excluded or exempted from these statutes are petroleum dealerships, motor vehicle dealerships, alcoholic beverage dealerships, insurance agencies and door to door sales.[67] Alaska has a further interesting exemption, removing from its coverage "a distributorship agreement for the sale or distribution of, or

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[62] *Id.* at § 45.45.740(a).

[63] *Id.* at § 45.45.790(2).

[64] *Id.* at § 45.45.760(a) and (b).

[65] *Id.* at § 45.45.700.

[66] *Id.* at § 45.45.750(a).

[67] *See* Alaska Stat. § 45.45.770; R.I. Gen. Laws § 6-50-9; Wis. Stat. § 135.07.

other transaction involving, cigarettes, food, drink, or a component of food or drink[.]"[68] This language not only exempts food distribution networks, such as grocer distributors, but restaurant and food based franchises as well. Absent this exemption, it appears that the Alaska statute would be broad enough to include those franchises. Finally, the Alaska statute exempts "a manufacturer with 50 or fewer employees."[69]

II. INDUSTRY-SPECIFIC STATUTES

Once one moves past these broadly defined franchise and dealership statutes, one is faced with dealership statutes that are industry or product specific in their application. Even here, however, one must be extremely careful not to underestimate the reach of these statutes. Many of these statutes' definitions of "equipment" draw within their coverage broad swaths of farm, industrial, commercial, construction, utility, forestry, and any number of other types of equipment, including consumer-oriented equipment. Other statutes are more narrowly drafted to cover more specific types of equipment or products. On these pages we will discuss many, but not all, of these industry-specific statutes. We will leave for another paper a discussion of the statutes covering motor vehicle dealers, motor fuel dealers and alcoholic beverages dealers.

A. Equipment Dealer Statutes

Besides being product or industry specific, equipment dealer laws are distinguishable, in part, from the franchise and quasi-franchise statutes discussed above due to the absence in their operative definitions of having to establish a trademark license and some special relationship between the parties. All that is typically required is the existence of a contract for the sale and distribution of the target product. "Dealer agreement" is defined in most statutes much like the definition found in Colorado's law: "an oral or written contract or agreement of definite or indefinite duration between a supplier and an equipment dealer that prescribes the rights and obligations of each party with respect to the purchase or sale of equipment."[70] A dealership agreement that meets this straightforward definition is covered. The dealer has no need to establish the grant of a trademark license, a marketing plan, a community of interest, the payment of a fee, or any of the other hallmarks associated with franchise laws. If there is a contract and the subject of that contract is the "equipment" identified in the statute, there is coverage.

As will be seen below, however, it is not always that easy to determine if the product being sold and distributed is the "equipment" that is the concern of the statute.

When approaching equipment dealership statutes, perhaps the best advice one can give is to ignore the actual names of the statutes. It often seems these statutes' given names are primarily intended to deceive the unsuspecting lawyer. For example, Kentucky's Retail Sales of Farm Equipment statute actually applies to dealers of "farm implements, tractors, farm machinery, consumer products, utility and industrial equipment, construction and excavating equipment, and any attachments, repair parts,

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[68] Alaska Stat. § 45.45.770(a)(7).

[69] *Id.* at § 45.45.770(a)(8).

[70] Colo. Rev. Stat. § 35-38-102(1).

or superseded parts for the equipment."[71] "Consumer products," in turn, "means machines designed for or adapted and used for horticulture, floriculture, landscaping, grounds maintenance, or turf maintenance, including but not limited to lawnmowers, rototillers, trimmers, blowers, and other equipment used in both residential and commercial lawn, gardening, or turf maintenance, installation, or other applications."[72] Arizona's expansively titled "Equipment Dealers" legislation, on the other hand, applies only to dealers of "machines designed for or adapted and used for agriculture, livestock, grazing, light industrial and utility purposes. Equipment does not include earthmoving and heavy construction equipment, mining equipment or forestry equipment."[73] California's similarly titled "Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act," envisions a very different concept of "Equipment":

> (1) "Equipment" means all-terrain vehicles and other machinery, equipment, implements, or attachments used for, or in connection with, any of the following purposes:
>
> (A) Lawn, garden, golf course, landscaping, or grounds maintenance.
>
> (B) Planting, cultivating, irrigating, harvesting, and producing agricultural or forestry products.
>
> (C) Raising, feeding, or tending to, or harvesting products from, livestock and any other activity in connection with those activities.
>
> (D) Industrial, construction, maintenance, mining, or utility activities or applications, including, but not limited to, material handling equipment.
>
> (2) Self-propelled vehicles designed primarily for the transportation of persons or property on a street or highway are specifically excluded from the definition of equipment.[74]

Minnesota's "Heavy and Utility Equipment Manufacturer and Dealer Act" sounds very specific and, at first glance, its definitions would seem consistent with the title:

> "Heavy and utility equipment," "heavy equipment," or "equipment" means equipment and parts for equipment including but not limited to:

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[71] Ky. Rev. Stat. § 365.800(3).

[72] *Id*. at § 365.800(5).

[73] Arizona Rev. Stat. § 44-6701(2).

[74] Cal Bus & Prof *Code* § 22901(j).

> (1) excavators, crawler tractors, wheel loaders, compactors, pavers, backhoes, hydraulic hammers, cranes, fork lifts, compressors, generators, attachments and repair parts for them, and other equipment, including attachments and repair parts, used in all types of construction of buildings, highways, airports, dams, or other earthen structures or in moving, stock piling, or distribution of materials used in such construction;
>
> (2) trucks and truck parts; or
>
> (3) equipment used for, or adapted for use in, mining or forestry applications.[75]

The introductory phrase to this definition, however, states rather clearly that any combination of the words "heavy and utility equipment" simply means "equipment." And, while the definition makes it clear that a heavy duty road grader is without question a piece of equipment, the same definition could arguably encompass a garage door opener. In the end, the courts will be forced to discern what the Minnesota legislature meant by its seemingly all-inclusive term "equipment."

Maine's "Franchise Laws for Power Equipment, Machinery and Appliances,"[76] true to its title, covers essentially anything that is powered. The operative word in this statute is "goods" and it is defined to mean

> residential, recreational, agricultural, farm, commercial or business equipment, machinery or appliances that use electricity, gas, wood, a petroleum product or a derivative of a petroleum product for operation.[77]

This sampling of equipment dealership statutes should make clear that any preconceived notion of what constitutes "equipment" needs to be checked at the door. Equipment means whatever a particular statute says it means. On top of that, it is often extremely difficult to discern what exactly any given statute's definition of equipment means.

Another common characteristic of equipment dealer laws – in contrast to franchise relationship laws and the broad dealership laws discussed *supra* – is that they

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[75] Minn. Stat. § 325E.068 Subdiv. 2. "Truck," in turn, is defined as "a motor vehicle designed and used for carrying things other than passengers, … [and] does not include a pickup truck or van with a manufacturer's nominal rated carrying capacity of three-fourths ton or less." *Id*. at Subdiv. 6.

[76] Me. Rev. Stat. tit. 10 § 1361 *et seq*.

[77] *Id.* at § 1361(8). The only exclusions from this broad definition are motor vehicles and recreational vehicles, which are covered by other statutes. *Id*. Interestingly, not excluded from the definition of goods is farm machinery, which is also covered in great detail in another statute. *See* Me. Rev. Stat. tit. 10 § 1285 *et seq*. A dealer in farm machinery would appear to be covered by both Maine statutes.

typically apply only to dealers engaged in retail sales.[78] Some, however, provide protection to both retail dealers and wholesale distributors,[79] or just wholesale distributors.[80]

The advantages to a dealer who qualifies under an equipment dealer law are typically substantial. In place of contract provisions that will almost always heavily favor the manufacturer-supplier, equipment dealer statutes may prohibit terminations and substantial changes to a dealership's competitive circumstances absent "good cause."[81] Similarly, nonrenewal of the dealership agreement will require good cause.[82] Manufacturers will usually be required to give notice substantially in advance of a termination, nonrenewal or substantial change to competitive circumstances, and to designate in the notice the specific good cause upon which the manufacturer is relying.[83] Coupled with the notice requirement will be the dealer's right to cure the noticed deficiency. If cured, the notice will be deemed void.[84] A manufacturer's demand that the dealer undertake costly building expansions may require an extended advance notice period and an even longer period for completion of the required work.[85]

Very typical of almost all equipment dealer statutes is their inclusion of extensive provisions specifying the manufacturer's required repurchase of inventory following a termination, nonrenewal or other contingency, such as the death of the dealer principal.[86] If the dealer agreement already contains an inventory buy-back provision, the dealer is generally given the right to choose the buy-back terms – statutory or contractual – that are best for the dealer.[87] It is also not unusual in these statutes to find provisions mandating fair and prompt payment of a dealer's warranty work.[88] Finally, most of these statutes address issues of succession; typically removing restrictions on succession and transfer that one might expect to find in an unregulated dealer agreement.[89]

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[78] *See*, *e.g.*, Ariz. Rev. Stat. § 44-6701; Fla. Stat. § 686.402; Mass. Gen. Laws ch. 93G, § 1; 815 Ill. Comp. Stat. § 715/2; Miss. Code Ann. § 75-77-1.

[79] *See*, *e.g.*, Minnesota Heavy and Utility Manufacturer and Dealer Act, Minn. Stat. § 325E.068 Subdiv. 4.

[80] *See*, *e.g.*, Maryland Fair Distributorship Act, Md. Code Ann., Com. Law § 11-1301.

[81] *See*, *e.g.*, Colo. Rev. Stat. § 35-38-104(2); Mich. Comp. Laws § 445.1457a Sec. 7a(1).

[82] Mich. Comp. Laws § 445.1457a Sec. 7a(1); Neb. Rev. Stat. § 87-705(1).

[83] *See*, *e.g.*, Colo. Rev. Stat. §35-38-104(1)(b); Mich. Comp. Laws § 445.1457a Sec. 7a(2).

[84] *See*, *e.g.*, Mich. Comp. Laws § 445.1457a Sec. 7a(2).

[85] *See*, *e.g.*, Neb. Rev. Stat. § 87-704(5); Texas Bus. & Com. Code Ann. § 55.057.

[86] *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 44-6705; Cal. Bus. & Prof. Code § 22905.

[87] *See*, *e.g.*, Mich. Comp. Laws § 445.1455; Neb. Rev. Stat. § 87-706.

[88] *See*, *e.g.*, Miss. Code Ann. § 75-77-6.

[89] *See*, *e.g.*, *id.* at § 75-77-13.

Violations of these provisions by the manufacturer-supplier will usually give rise to a cause of action for the recovery of damages, including costs of suit and attorney's fees.[90] The threat of a wrongful termination, nonrenewal or substantial change to the competitive circumstances of the dealer agreement will entitle the dealer to injunctive relief.[91]

While all of these protections may not be found in every equipment dealer statute, many of these provisions are found in most of the statutes. There are, however, states whose laws are far more manufacturer oriented. Illinois is a prime example. Illinois has the Equipment Fair Dealership Law.[92] It covers retail dealers of "farm implements, farm machinery, attachments, accessories and repair parts, outdoor power equipment, construction equipment, industrial equipment, attachments, accessories and repair parts."[93] Unlike the laws found in other states, the Illinois law limits itself essentially to a requirement that the manufacturer buy back the dealer's inventory upon termination.[94] The law also takes the further and very unusual step of providing that dealers and manufacturers subject to the Equipment Fair Dealership Law are *not* subject to Illinois' franchise relationship law; thereby depriving dealers who sell the wide range of products covered by the Equipment Fair Dealership Law from the protections dealers of other types of goods are entitled to under Illinois' franchise relationship, disclosure, and registration law.[95]

B. Miscellaneous Industry-Specific Dealer Statutes

A number of states have dealer laws that address more specialized classes of products than those covered by the "equipment" dealer laws discussed above. But for the more restricted class of products, however, these statutes are structured like, and provide the same range of protections as, the previously discussed equipment dealer laws. Coverage under these statutes potentially provides a dealer with protection in the following areas: the requirement that terminations, nonrenewals, and substantial changes in competitive circumstances be based on good cause; mandatory inventory buy-back requirements upon termination or nonrenewal; ownership succession rights; freedom from certain forms of manufacturer coercion or unfair trade practices; mandatory choice of law and venue provisions favoring the dealer's state of operations; and the right to sue for damages, injunctive relief and to recover attorneys' fees and costs. Just as with the broader-based equipment statutes, the only thing that is uniform between all of these laws is that they are not uniform. All of the protections outlined

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[90] *See, e.g.,* Ark. Code Ann. § 4-72-208; Minn. Stat. § 80C.17 Subdiv. 3.

[91] *See, e.g.,* Ariz. Rev. Stat. Ann. § 44-6708(B).

[92] 815 Ill. Comp. Stat. 715/1 *et seq.*

[93] *Id*. at 715/2.

[94] *Id*. at 715/3.

[95] *Id*. at 715/10.1. This rather draconian provision was added at the insistence of the manufacturer lobby following the decision in *To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 152 F.3d 658 (7th Cir. 1998). *See* 91st Gen. Assem., Senate Proceedings, May 7, 1999, at 87-89. *To-Am* found an Illinois lift truck dealer was a "franchisee" and entitled to the protections of the Illinois Franchise Disclosure Act, 815 Ill. Comp. Stat. 705/1 *et seq*.

above are certainly not guaranteed, and a review of any potentially available statute must be undertaken with care.

1. Watercraft and Vessel Dealer Statutes

Several states have statutes pertaining exclusively to the distribution of watercraft and vessels.[96] Their coverage varies widely. For example, the Maine and Virginia statues only provide for warranty payment protection.[97] The New York and Texas statutes also provide warranty payment protection; however, these two statutes go on to provide the full range of dealer protections.[98]

As seen with regard to other dealer legislation, state legislatures are equally creative in their efforts to define watercraft and vessels. Virginia defines "watercraft" as "any vessel used or capable of being used for navigation or floatation on or through the water."[99] New York's and Maine's definitions are comparable.[100] Other states' statutes provide more limitations on the type of vessels they govern. For example, the Texas statute defines "boat" to mean "a motorboat" or "any other vessel that is more than 14 feet in length and is designed to be propelled by sail."[101] Missouri, in turn, defines "personal watercraft" as "a class of a vessel, which is less than sixteen feet in length, propelled by machinery which is designed to be operated by a person sitting, standing or kneeling on the vessel, rather than … inside the vessel."[102] A "vessel" is defined as "every motorboat … every ... motorized watercraft, and any watercraft more than twelve feet in length which is powered by sail alone or by a combination of sail and machinery, used or capable of being used as a means of transportation on water, but not any watercraft having as the only means of propulsion a paddle or oars."[103]

The Michigan and Texas statutes make it unlawful for any manufacturer to sell to a dealer, and for a dealer to buy from a manufacturer, in the absence of a written agreement that is in compliance with the specific terms of the statutes.[104] The mandatory dealer agreements must include the dealership's territory or market area, the

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[96] *See* Maine Watercraft Manufacturers, Distributors and Dealers Act, Me. Rev. Stat. tit. 10 § 1197; Michigan Watercraft and Out Board Motor Manufacturers, Distributors and Dealers Act, Mich. Comp. Laws § 445.541-47; Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.1360-70; New York Vessel Dealer Agreements Act, NY Gen. Bus. Law § 810-816; Texas Boat Manufacturers, Distributors and Dealers Act, Tex. Occ. Code Ann. § 2352.001-203; and Virginia Watercraft Dealer Licensing Act, Va. Code Ann. § 29.1-828-29.

[97] *See* Me. Rev. *Stat*. tit. 10 § 1197; Va. Code Ann. § 29.1-828.

[98] Tex. Occ. § *2352*.105; NY Gen. Bus. Law § 813.

[99] Va. Code Ann. § 29.1-828.

[100] NY Gen. Bus. Law § 810(6); Me. Rev. Stat. tit. 10 § 1196(6).

[101] Tex. Occ. Code Ann. § 2352.001(2)(A)-(B).

[102] Mo. Rev. Stat. § 407.1360(11).

[103] *Id*. at § 407.1360(12).

[104] Mich. Comp. Laws § 445.543; Tex. Occ. Code Ann. § 2352.051.

length of the agreement, the performance and marketing standards, the notice provisions for termination, cancellation or nonrenewal, delivery and warranty obligations, buy-back provisions and dispute resolution procedures.[105]

The Missouri, New York and Texas watercraft statutes all address termination of a dealership agreement, and each establish requirements for good cause and notice. The Maine, Michigan and Virginia statutes do not address termination.

Under the Missouri law, "[n]o boat, marine, vessel, or personal watercraft manufacturer … may terminate, cancel or fail to renew a dealership agreement … without good cause."[106] The Texas law requires good cause for termination, but does not require good cause for nonrenewal.[107] Carrying a competing line of boats or outboard motors does not constitute good cause under the Texas law.[108]

The New York statute addresses termination, but only in a limited way. Terminations may proceed with or without cause, with the primary effect simply being the scope of the manufacturer's inventory buy-back obligations after the termination.[109]

2. Motorsport or Powersport Vehicle Dealer Statutes

Closely related to the watercraft dealership statutes, six states have motorsport or powersport vehicle dealership statutes. These statutes operate under various titles, such as motorsports (Montana and Washington), personal sports mobiles (Maine), recreational vehicles (North Dakota), and powersport (Colorado and Utah).[110] As with other industry statutes, the scope of these statutes varies widely. The North Dakota statute is extremely limited, imposing only inventory repurchase obligations on the manufacturer.[111] Montana's law is spread out between several statutes, including the Cancelled Dealership and Contract Repurchase Requirements Act and the Sales and Distribution of Motor Vehicles statute, covering mostly definitions, and rights and

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[105] Mich. Comp. Laws § 445.544. Sec. 4(a) – (g); Tex. Occ. Code Ann. § 2352.052(a) – (b). The Texas statute includes the additional requirement that the dealership agreement establish standards for inventory, working capital, facilities and tools. *Id*.

[106] Mo. Rev. Stat. § 407.1362.

[107] Tex. Occ. Code Ann. § 2353.053(a) – (b).

[108] *Id*. at § 2353.053(c).

[109] NY Gen. Bus. Law § 812.

[110] Utah Powersport Vehicle Franchise Act, Utah Code Ann. § 13-35-101-307; Colorado Powersports Vehicles, Colo. Rev. Stat. 12-6-501-33; Montana Cancelled Dealership Repurchase Requirements, Mont. Code Ann. § 30-11-701-13; Montana Sales and Distribution of Motor Vehicles Act, Mont. Code Ann. § 61-4-132-50; Montana Motorsports Manufacturer Unfair Trade Practices, Mont. Code Ann. § 30-14-2501-03; North Dakota Recreational Vehicle Franchises, N.D. Cent. Code § 51-20-01-02; Washington Motorsports Vehicles – Dealer and Manufacturer Franchises, Wash. Rev. Code § 46.93.010-901; and Maine Personal Sports Mobile, Manufacturers, Distributors and Dealers, Me. Rev. Stat. tit. 10 § 1241-1250J.

[111] N.D. Cent. Code § 51-20-01.

limitations of succession.[112] Another Montana statute, titled Motorsports Manufacturer Unfair Trade Practices Act, regulates business practices between dealers, distributors and manufacturers. [113]

Again, definitions of the targeted products cover the spectrum. Washington's definition of a "motorsports vehicle" includes motorcycles, mopeds, motor-driven cycles, personal watercraft, snow mobiles and four-wheel all-terrain vehicles."[114] The Montana Motorsports Manufacturer Unfair Trade Practices Act's definition of "motorsports vehicle" is similar but also includes "quadricycles" and "off-highway vehicles."[115] North Dakota's statute covering "recreational vehicles," covers most of the same vehicles, but adds as additional categories "trailers for transporting snowmobiles, travel trailers and motorboats."[116]

Colorado requires "just cause," while Maine, Washington and Utah each require "good cause" to terminate, cancel or not renew a dealership agreement under their respective statutes.[117] Under the Washington and Utah statutes, at the request of the dealer, an administrative law judge may determine whether or not good cause exists.[118] The Montana legislation entitles a dealer to receive treble damages, court costs and attorneys' fees for violations of its succession provisions.[119]

3. Aircraft Dealer Statutes

Oklahoma has a dealership law affecting the sale of aircraft.[120] "Aircraft" is defined as "any contrivance, now known or hereafter invented, used or designed for navigation of or flight in the air or airspace, manufactured by mass production or individually constructed or assembled, which are subject to registration with the Federal Aviation Administration."[121] This dealer protection law follows a format similar to what we have seen for other types of equipment, including prohibitions against termination, cancellation and nonrenewal of the dealership agreement without good cause.[122] The remedies for a wrongfully terminated or not renewed dealer are quite liberal, allowing for

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[112] Mont. Code Anno. § 30-11-701.

[113] Mont. Code Anno. § 30-14-2501.

[114] Wash. Rev. Code. § 46.93.200.

[115] Mont Code Ann. § 30-14-2501(8).

[116] N.D. Cent. Code § 51-20-101(4).

[117] Colo. Rev. Stat. § 12-6-523(1)(d); Me. Rev. Stat. tit. 10 § 1213(3)(N).; Wash. Rev Code § 46.93.030; Utah Code Ann. § 13-35-301.

[118] Utah Code Ann. § 13-25-304; Wash. Rev. Code § 46.93.030.

[119] Mont. Code Ann. § 61-4-137.

[120] Okl. Stat. tit. 3 § 254.2 – 254.6.

[121] *Id.* at § 252.

[122] *Id*. at § 254.4.

"a private right of action against the manufacturer for the recovery of the fair market value of the business affected and to recover treble actual and special damages, and such other relief to which it might be entitled at law or in equity."[123] A prevailing dealer is also entitled to recover its reasonable attorneys' fees and all expenses and costs incurred in the litigation.

More than anything, what makes this particular statute unusual is that it is strictly retroactive. By its terms, it "shall apply only to dealers of new or used aircraft … which have agreements or contracts with manufacturers in effect *prior* to July 1, 2007, and all revisions, modifications, extensions, amendments and replacements of such agreements or contracts. ... [It] shall *not* apply, except as provided in this section, to dealers which have agreements or contracts with manufacturers entered into on or after July 1, 2007."[124]

4. Office Machine Dealer Statutes

While certain equipment dealership statutes will likely pull within their coverage what one would normally think of as office machines — *see*, *e.g.*, Maine's Franchise Laws for Power Equipment, Machinery and Appliances[125] — Hawaii would appear to be the only state that has a dealership statute dedicated exclusively to office machine dealers.[126] The statute covers agreements whereby a dealer is granted the right "to sell products on behalf of a distributor to consumers and other end-users."[127] "Products" is defined to include, but not be limited to, "typewriters, copiers, electronic cash registers, dictating equipment, calculators, offset printers, letter openers, computers, or word processing equipment, but does not include such items as pencils, erasers, stationery, paperclips, or other such miscellaneous material normally used in an office."[128] The Hawaii Office Machine Products Dealerships Law does not apply if the dealership is already covered under Hawaii's Franchise Investment Law.[129]

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[123] *Id*. at § 254.5(A).

[124] *Id*. at § 254.6 (emphasis added).

[125] Me. Rev. Stat. tit. 10 § 1361 *et seq*.

[126] Haw. Rev. Stat. § 481G-1 – G-8.

[127] *Id*. at § 481G-1.

[128] *Id*.

[129] *Id*. at § 4814G-2. The Hawaii Franchise Investment Law can be found at Haw. Rev. Stat. § 482E.