Constructive Termination in Franchise Law: When Manufacturers Own Appreciating Dealership Facilities

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It is an economic fact of life for franchised automobile dealerships that prices and rents for commercial real estate tend to rise, especially in densely populated areas.[1] When dealers must extend or renew the terms of their leases, increased rents demanded by property owners may materially affect the profitability of those dealerships.[2]

Dealers may believe themselves constrained to pay higher rents because relocation of automobile dealerships is difficult.[3] In many jurisdictions, zoning designations limit the number of sites that permit automobile-dealership use.[4] Franchise agreements typically provide that a dealer must obtain manufacturer approval of any relocation.[5] If approved by the manufacturer, relocation to a new facility may impose prohibitive costs on a dealer (e.g., brokerage

1. Olivia Lavecchia, *How Rising Commercial Rents Are Threatening Independent Businesses, and What Cities Are Doing About It*, Institute for Local Self-Reliance (Apr. 20, 2016), https://ilsr.org/affordable-space.

2. Ryan Kerrigan, *The Implications of Rising Dealership Real Estate Values*, Kerrigan Advisors, *reprinted from* Dealer Magazine (June 1, 2016), https://www.kerriganadvisors.com/the-implications-of-rising-dealership-real-estate-values ("As a benchmark, the average dealership, according to NADA, has a rent factor that is ~1.2% of sales or 7% of gross profit. As a rule of thumb, dealers should strive for a rent factor that does not surpass 10% of total gross profit.").

3. The strength of the landlord's bargaining position may be limited by the number of other franchised dealerships available as a replacement tenant. Bradley R. Carter, *The Rise of the Market for Auto Dealerships: Bad News for Landlords?*, Real Estate Issues, no. 3, 2014, at 33, 37, http://www.cre.org/wp-content/uploads/2016/05/39_3.pdf ("There are a limited number of manufacturers, and . . . each grants their dealers an exclusive territory; therefore, there is a finite number of auto dealerships that can operate in a given area.").

4. *See, e.g.*, Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1214 (11th Cir. 1995).

5. *But see, e.g.*, N.Y. Veh. & Traf. Law § 463(2)(dd) (limiting a manufacturer's discretion to refuse approval of a dealer's relocation request).

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commissions for the purchase or lease of the new site, costs of advertising the new location, and moving expenses).[6]

State law may also expressly limit the ability of dealerships to relocate. For example, under New York law, unless exempt, another dealer may protest a dealer's relocation to a new site within the protesting dealer's "relevant market area."[7] State statutes typically require the manufacturer to notify affected dealers of a proposed relocation. If a dealer with standing protests the relocation, the manufacturer bears the burden of proof that "good cause" exists to justify it.[8]

In some instances, manufacturers own dealership facilities and lease them to dealers. Leases between manufacturers and their dealers raise legal issues not present when dealers lease from third parties. In particular, a manufacturer may, among other things, increase rent to reflect then current conditions in the local real estate market. This situation is especially notable in densely populated areas where available property is scarce and high demand has caused property values to soar. A dealer may object that an increase in rent would reduce profitability to an extent that threatens its viability. Among the causes of action a dealer-tenant may consider in such an instance is a claim for constructive or *de facto* termination.

This article will present, first, a recent example of how exploding property values may impact a dealer-tenant. The article will next review generally the law of constructive or *de facto* termination in the manufacturer-dealer context. It will then discuss the extent to which constructive termination principles might be implicated in leasing transactions between manufacturers and dealers in the current national real estate market.

I. Surf City—A Recent Example of Constructive Termination

A recent unpublished opinion, *Surf City Corporation v. Mitsubishi Motors North America, Inc.*,[9] involved a manufacturer's decision to sell property then occupied by its franchised dealer. The dealer, Surf City, operated a Mitsubishi dealership in Huntington Beach, California, pursuant to a dealer agreement with Mitsubishi Motors North America, Inc. (MMNA). MMNA owned the dealership facility and leased it to Surf City. The term of the lease and the term of the dealer agreement were scheduled to expire concurrently in December 2015.[10] In 2013, MMNA sold the property to a real estate

6. Manufacturers also frequently request that dealers renovate new facilities to incorporate new trademarks, trade dress, or brand-image features, including the exterior appearance of the facility, signs, and interior finishes. *See* Carter, *supra* note 3, at 33. Even if a manufacturer is willing to pay or provide financing for some or all of the cost of renovation, a reassessment of the facility may result in higher *ad valorem* taxes.

7. *See, e.g.*, N.Y. Veh. & Traf. Law §§ 462(15), 463(2)(cc)(2).

8. *See, e.g.*, N.Y. Veh. & Traf. Law § 469.

9. Surf City Corp. v. Mitsubishi Motors N. Am., Inc., No. G052053, 2017 WL 5662582 (Cal. Ct. App. Nov. 27, 2017) (unpublished).

10. MMNA and Surf City entered into two dealer agreements. The first, dated 2007, expired in 2010. Although Surf City continued to operate, the dealer agreement was not extended or

developer for $8.6 million, approximately twice the value estimated in an appraisal that MMNA had recently requested. The developer subsequently notified Surf City that it would not extend or renew Surf City's lease.

In December 2013, Surf City sued MMNA for breach of contract and breach of the implied covenant of good faith and fair dealing. Surf City claimed that MMNA's sale of the leased property constructively terminated, and thereby breached, the dealer agreement. Surf City further claimed that MMNA's constructive termination of the dealer agreement breached its implied covenant of good faith and fair dealing. Surf City continued to operate its dealership on the property even following its commencement of the suit.

The California Court of Appeal affirmed the trial court's grant of summary judgment to MMNA. The court looked to the express terms of the dealer agreement and concluded that there had not been a breach of contract. Neither the lease nor the dealer agreement prohibited MMNA's sale of the property. Further, because there was no evidence of MMNA's failure to abide by the terms of the agreements, the court affirmed the grant of summary judgment on Surf City's claim that MMNA breached the implied covenant of good faith and fair dealing.

Surf City's claims in this case did not, strictly speaking, include a cause of action for constructive termination. Surf City claimed, rather, that MMNA breached the parties' contract and violated the implied covenant of good faith and fair dealing by selling the property and thereby constructively terminating the dealer agreement. As a result, the opinion does not disclose the principle on which Surf City alleged that sale of the dealership property amounted to constructive termination of the dealer agreement. Instead the court disposed of both the breach of contract and the breach of good faith claims and, by extension, the underlying allegation of constructive termination, by concluding that MMNA had no contractual obligation to retain ownership of the property.

Perhaps the court's opinion simply failed to reflect a more fully pleaded and argued allegation of constructive termination. Perhaps, too, Surf City intentionally chose not to plead constructive termination as an independent cause of action. In any case, the court's opinion does raise a question about the basis of Surf City's assertion of constructive termination. More broadly, it raises the question how rising real estate values and rents may affect the rights and obligations of manufacturers and dealers who are parties to both a dealer agreement and a lease.

renewed until 2012, when the parties entered into a new dealer agreement having a three-year term. *Id.* at *2. Surf City's complaint alleged breach of the 2007 dealer agreement only, but the court concluded that its opinion would be the same if Surf City had pleaded breach of the 2012 agreement. *Id.* at *6.

II. Constructive Termination Generally

Courts addressing constructive termination claims refer to them as both common law claims[11] and statutory claims.[12] Neither federal nor state statutes specifically provide for a constructive termination cause of action. Courts have instead recognized constructive termination claims as arising out of express statutory provisions. For example, under the Federal Automobile Dealer Day in Court Act (ADDCA),[13] courts have inferred a constructive termination claim if a dealer's "voluntary" termination was coerced or otherwise forced or necessitated by the manufacturer.[14] Similarly, in the absence of any state statutes expressly providing for dealers' constructive termination claims, courts have permitted dealers to assert claims alleging that certain manufacturer conduct effectively terminated the dealer agreement.[15] Courts construe termination under these circumstances to be "constructive" because it occurs outside of any statutory framework for termination requiring good cause, notice, and an opportunity to contest.[16]

A. *Federal Law—Automobile Dealer Day in Court Act*

Under certain circumstances, a manufacturer's bad-faith conduct may support a claim under the ADDCA for constructive termination. "Constructive termination may serve as the basis for violation of the [ADDCA] if it is the result of actions taken by a manufacturer with the intent to intimidate, threaten or coerce."[17] A successful claim of constructive termination under the ADDCA requires a showing that the manufacturer's coercion or intimidation (or the threat of either) caused the alleged harm.[18]

The ADDCA authorizes suits by dealers to recover damages incurred as a result of a manufacturer's failure to act in good faith in (a) performing its obligations under the franchise dealer agreement, or (b) terminating or not renewing a franchise.[19] The ADDCA defines "franchise" as "the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights

11. *See, e.g.*, Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc., 975 A.2d 510, 520 (N.J. Super. App. Div. 2009).

12. *See, e.g.*, Robert Basil Motors, Inc. v. Gen. Motors Corp., No. 03–CV–315A, 2004 WL 1125164 (W.D.N.Y. Apr. 17, 2004).

13. Automobile Dealer Day in Court Act, 15 U.S.C. § 1221 *et seq.* (1956).

14. *See* Am. Motors Sales Corp. v. L.G. Semke, 384 F.2d 192, 195 (10th Cir. 1967) (terming the dealer's cause of action "wrongful termination" rather than constructive termination).

15. *See, e.g.*, Bob Robinson Chevrolet-Oldsmobile-Cadillac, Inc. v. Gen. Motors Corp., No. 5:01CV145, slip op. at 9 (N.D. W. Va. June 13, 2003) (noting that eleven percent decline in net income or sales "may or may not rise to the level of 'substantial decline' in net income required to justify a finding of constructive termination"); Jay Auto. Grp., Inc. v. Am. Suzuki Motor Corp., No. 4:11–CV–129, 2012 WL 425984, at *7 (M.D. Ga. Feb. 9, 2012) ("[I]f a franchisor forces the termination of a franchise agreement in bad faith or without good cause and/or notice, the Court finds the franchisee has a claim.").

16. *Jay Auto. Grp., Inc.*, 2012 WL 425984, at *7.

17. Imperial Motors, Inc. v. Chrysler Corp., 599 F. Supp. 1312, 1316 (10th Cir. 1967).

18. *Id.* at 1315; *Semke*, 384 F.2d at 195.

19. 15 U.S.C. § 1222.

and liabilities of the parties to such agreement or contract."[20] Furthermore, the ADDCA narrowly defines good faith to mean "the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party."[21]

In a 1967 case, *American Motors Sales Corporation v. L.G. Semke*,[22] the Tenth Circuit stated that no court previously had recognized a cause of action for wrongful termination under the ADDCA. Semke claimed that American Motors had coerced it into an apparently voluntary termination of its dealer agreement by (a) refusing to honor its orders for vehicles unless it also ordered models it did not want, and (b) refusing to authorize warranty repairs. At trial, a jury awarded the dealer lost future profits resulting from the termination. In affirming the jury award, the court held that the ADDCA provided a cause of action for wrongful termination "where the dealer was forced to terminate because of the coercive and intimidative acts of the manufacturer."[23] Although the court referred to "wrongful termination" in making its ruling, subsequent opinions have cited *Semke* for the proposition that the ADDCA authorizes a cause of action for "constructive termination."[24]

The U.S. District Court for the District of Massachusetts, in *Imperial Motors, Inc. v. Chrysler Corp*., cites *Semke* for the proposition that "[c]onstructive termination may serve as the basis for a violation of the [ADDCA] if it is the result of actions taken by a manufacturer with the intent to intimidate, threaten or coerce."[25] In *Imperial Motors*, a dealer objected to Chrysler's approval of the relocation of a competing dealer to a location closer to the plaintiff. Following the "vigorous protest," Chrysler's subsidiary, Chrysler Credit, reduced the dealer's line of credit and demanded an additional $70,000.00 dealer investment before it would reinstate the full amount of the loan.[26] When the dealer was unable to contribute additional capital to the dealership (or to sell the dealership), it gave the business back to the prior dealership owner. The court held that the dealer's allegations were sufficient to survive the manufacturer's motion for summary judgment because whether Chrysler Credit reduced the dealer's line of credit to intimidate or coerce the dealer was an issue of fact.[27]

20. 15 U.S.C. § 1221(b). "Franchise" is not necessarily limited to the dealer agreement alone. "If other written agreements are so interwoven with the document ostensibly designated as the franchise as to affect materially the legal significance of the latter, they must be regarded as part of the franchise agreement." *See* Kavanaugh v. Ford Motor Co., 353 F.2d 710, 715 (7th Cir. 1965).

21. 15 U.S.C. § 1221(d).

22. *Semke*, 384 F.2d 192.

23. *Id.* at 195.

24. Imperial Motors, Inc. v. Chrysler Corp., 599 F. Supp. 1312, 1315 (10th Cir. 1967); Grimes Buick-GMC, Inc. v. GMAC, LLC, No. CV 12–73–H–CCL, 2013 WL 5348103, at *5 (D. Mont. Sept. 23, 2013).

25. *Imperial Motors*, 559 F. Supp. at 1315.

26. *Id*. Of note, the line of credit was necessary for the dealer to order and have on site new and potentially popular vehicle models for the showroom. *Id.*

27. *Id*. at 1314

In *Grimes Buick-GMC, Inc. v. GMAC, LLC*, the plaintiff-dealer claimed that GMAC, as General Motors' agent, acted "wrongfully and in bad faith" in violation of the ADDCA and, in so doing, coerced the dealer into terminating its franchise.[28] Grimes had made a check to GMAC that was returned for insufficient funds.[29] Grimes claimed that the insufficiency was small and that it had remedied the shortfall within seventy-two hours.[30] According to Grimes, GMAC used the insufficiency to exercise remedies under its loan documents intending to force Grimes to cease operation of its dealership business as part of a general plan to reduce the number of GM dealers. Those remedies included reducing the dealer's floorplan, increasing the interest rate on the loan, and controlling the dealer's cash receipts.[31] Grimes claimed that GMAC thereby forced it to sell its dealership at a deflated price. The U.S. District Court for the District of Montana, citing *Semke* and *Imperial Motors*, held that the dealer's claim for constructive termination under the ADDCA would survive GMAC's motion to dismiss.[32] Claims of constructive termination under the ADDCA are necessarily "fact intensive because they must focus on the motivations and intentions of the manufacturer to intimidate, threaten, or coerce a dealer in violation of the [ADDCA]."[33] If the evidence is sufficient, a jury should resolve the factual questions.[34]

These cases make clear that the successful prosecution of an ADDCA claim requires a dealer to show that a manufacturer acted in bad faith and that those actions forced the dealer to terminate its franchise. Bad faith under the ADDCA means threats, intimidation, or coercion. The ADDCA "is not as concerned with what the parties did as it is concerned with why they did it."[35]

B. *Other Theories of Constructive Termination*

Outside of the ADDCA, theories of constructive termination vary. Those theories may generally be described, however, as terminations occurring (a) because a manufacturer's unilateral modification of the franchisee's dealer agreement resulted in a substantial decline in a franchisee's income, (b) because a manufacturer unilaterally modified a franchisee's dealer agreement causing a substantial interference with the benefits of the franchise, or (c) by reason of the manufacturer's bad-faith conduct as defined under state law.[36] Underlying each of these theories of constructive termination is the

28. *Grimes Buick-GMC*, 2013 WL 5348103, at *2.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at *6.
33. *Id.* at *4.
34. *Id.* (citing Imperial Motors, Inc. v. Chrysler Corp., 599 F. Supp. 1312, 1315 (10th Cir. 1967)).
35. *Imperial Motors*, 599 F. Supp. at 1314 (citing York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., 447 F.2d 786, 791–92 (5th Cir. 1971)).
36. *See* discussion *infra* at Part III.B.2–4.

threshold issue of whether the court requires that the dealer have actually abandoned its business and ceased operations.

1. Abandonment Requirement

Some courts have held or assumed that constructive termination claims may proceed even if the dealer remains in business.[37] Other courts have held, however, that no constructive termination can occur if a dealer continues to operate under the terms of the dealer agreement.[38] The latter proposition, sometimes referred to as the abandonment requirement, reflects the common-sense point of view that there can exist no constructive termination in the absence of an actual termination.[39]

An oft-cited precedent for the abandonment requirement is *Mac's Shell Service, Inc. v. Shell Oil Products Co. LLC*,[40] a case decided under the Petroleum Marketing Practices Act (PMPA).[41] Under their franchise agreements, Shell's franchisees leased their service station facilities from Shell. Historically, Shell had subsidized rents under the franchise agreements for each gallon of fuel sold in excess of a monthly target. Shell provided the rent subsidy, which was not part of the franchise agreement, by annual notices expressly providing that Shell could withdraw the subsidies in its discretion.[42]

In 1998, Shell assigned its rights under its franchise agreements to Motiva Enterprises, a joint venture among Shell and other oil companies. Motiva subsequently rescinded the subsidy arrangements for franchisees and required, in newly executed franchise agreements, that a majority of franchisees pay higher rents.[43] The franchisees claimed that withdrawal of the subsidies constructively terminated their franchise agreements in contravention of the PMPA and that the revised terms of the new franchise agreements amounted to constructive nonrenewal.[44]

The U.S. Supreme Court held that a "necessary element" of a constructive termination claim is that the "complained-of conduct forced an end to the franchisee's use of the franchisor's trademark, purchase of the franchisor's

37. *See, e.g.*, Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1182 (2d Cir. 1995) ("[T]otal abrogation of a franchise is not required to trigger [Connecticut Franchise] Act's protections. . . ."); Bob Robinson Chevrolet-Oldsmobile-Cadillac, No. 5:01CV145, slip op. at 9 (N.D. W. Va. June 13, 2003).

38. Bedford Nissan, Inc. v. Nissan N. Am., Inc., No. 1:16 CV 423, 2016 WL 6395799, at *10 (N.D. Ohio Oct. 28, 2016) ("Because Nissan NA has not terminated the franchise agreement, and Plaintiffs continue to operate their dealerships, the Court rejects Plaintiffs [*sic*] contention that Nissan NA has breached the DSSA by constructively terminating Plaintiffs [*sic*] dealerships."); Bright Bay GMC Truck, Inc. v. Gen. Motors Corp., 593 F. Supp. 495 (E.D.N.Y. 2009).

39. As discussed later, voluntary termination is integral to constructive termination claims under the ADDCA.

40. Mac's Shell Service, Inc. v. Shell Oil Products Co. LLC, 559 U.S. 175 (2010).

41. Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq*.

42. *Mac's Shell*, 559 U.S. at 180.

43. *Id.*

44. *Id.* The PMPA prohibits termination of franchise agreements except for reasons expressly provided in the statute. 15 U.S.C. § 2802(a)–(b). Termination of any individual franchise agreement required the franchisor to give statutorily mandated notice. *Id.*

fuel, or occupation of the franchisor's service station."[45] The PMPA prohibits a franchisor's termination of a franchise except in specific circumstances and then only after notice. Under the PMPA, "[t]he term 'termination' includes cancellation,"[46] but it does not define either term. The Supreme Court, therefore, looked to their "ordinary meanings."[47]

To determine ordinary meaning, the Supreme Court relied, among other things, on the dictionary definition and the Uniform Commercial Code (UCC) treatment of the term "termination." In ordinary usage, "terminate" means "to put an end to" something.[48] Under the UCC, a termination "occurs only when a terminating party 'puts an end to the contract.'"[49] The Court also analogized the doctrine of constructive termination to constructive discharge in employment law and constructive eviction in landlord-tenant law, both of which require termination of the relationship at issue, either employment or tenancy. Termination in these contexts is "constructive" for the reason that it is the plaintiff (employee or tenant) "who formally puts an end to the particular legal relationship."[50]

The Supreme Court further addressed the plaintiffs' claim that the changed terms of the franchise agreement offered to renewing franchisees amounted to constructive nonrenewal. Some of the Shell plaintiffs had entered into new franchise agreements providing for higher rents. In the view of the Supreme Court, just as they could not claim constructive termination without ceasing their business, the plaintiffs could not claim constructive nonrenewal if the franchise agreement had been renewed.[51]

Two cases in the manufacturer-dealer context, each decided earlier than *Mac's Shell*, refused to recognize constructive termination claims.[52] In both cases, the courts held no constructive termination could occur in the absence

45. *Mac's Shell*, 559 U.S. at 181.
46. *Id.* at 182.
47. *Id.*
48. *Id.*
49. *Id.* at 183.
50. *Id.* at 185.
51. The franchise agreement at issue in *Mac's Shell* expressly included a landlord-tenant relationship between the franchisor and its franchisees. *Id.* at 180. Thus, the Supreme Court did not have to confront the question whether a lease between franchisor and franchisee was part of the franchise relationship to which the PMPA was addressed. *Surf City*, however, presented that very question to the California Court of Appeal, either directly or implicitly. There, the court held in effect that, because the dealer agreement did not refer to it, the dealer's lease of the property was not part of the franchise relationship governed by California law. Surf City Corp. v. Mitsubishi Motors N. Am., Inc., No. G052053, 2017 WL 5662582, at *11 (Cal. Ct. App. Nov. 27, 2017). The court reasoned that the dealer was able to remain in possession of the property until expiration of the franchise agreement, and nothing in the franchise agreement or lease prohibited sale of the property to a third party. *Id.* Thus, unless the franchise agreement explicitly refers to the lease of the dealership facility, it is likely that a court will find that no breach occurs when the lease is not renewed.
52. Bright Bay GMC Truck, Inc. v. Gen. Motors Corp., 593 F. Supp. 2d 495 (E.D.N.Y. 2009); L&B Truck Servs., Inc. v. Daimler Trucks N. Am. LLC, No. 1:09–CV–74, 2009 WL 3584346 (D. Vt. Oct. 26, 2009); *see also* Cent. GMC, Inc. v. Gen. Motors Corp., 946 F.2d 327 (4th Cir. 1991); Hassett Lincoln-Mercury, Inc. v. Isuzu Motors Am., Inc., No. 06-CV-00367, 2009 WL 10697258 (E.D.N.Y. Mar. 9, 2009).

of an actual cessation of the business. In *Bright Bay GMC Truck, Inc. v. General Motors Corp.*, the plaintiff was a single-line GMC dealer. General Motors had announced a strategy of "dualing" GMC with Pontiac and Buick dealerships, but the plaintiff alleged that GM refused to grant the dealer, or subsidize the dealer's purchase of, a Pontiac or Buick franchise.[53] The U.S. District Court for the Eastern District of New York held that, because the dealer continued to conduct dealership operations under the GMC dealer agreement, no constructive termination occurred.[54] GM had "merely encouraged" dealers to align their Pontiac, Buick, and GMC franchises with each other, and GM's failure to give to the plaintiff, or assist in plaintiff's purchase of, additional franchises did not operate to terminate the plaintiff's GMC franchise.[55]

In *L&B Truck Services, Inc. v. Daimler Trucks North America LLC*, a dealer purchased the assets of a Sterling, Western Star, and Freightliner dealership for $6 million.[56] Before purchasing the assets, the dealer "engaged in extensive discussions and meetings" with Daimler and Sterling (a subsidiary of Daimler) concerning the dealer's plan to undertake a $700,000 expansion of its existing facility to accommodate the new truck lines. The dealer began construction in September 2008. In October 2008, Daimler announced that it would cease production of Sterling trucks in January 2009. The plaintiff alleged that Daimler's cessation of production of Sterling trucks constituted a termination of the dealer agreement. The termination was "constructive," the dealer claimed, because Daimler failed to comply with provisions of Vermont Motor Vehicle Manufacturers, Distributors & Dealers Franchising Practices Act (MVFPA)[57] prohibiting termination without notice to the dealer and good cause for termination. The U.S. District Court for the District of Vermont noted that, under the MVFPA, a franchise agreement between a manufacturer and dealer may consist in part of dealer's agreement to provide service to the manufacturer's vehicles. Here, despite losing the ability to sell new Sterling trucks, the dealer retained the right under the dealer agreement to sell Sterling parts and perform service on Sterling trucks. The court held that the dealer agreement, therefore, remained in effect. Because there had been no actual termination of the franchise, the dealer failed to state a claim under the MVFPA.[58]

In a case decided after *Mac's Shell*, the U.S. District Court for the Northern District of Ohio, in *Bedford Nissan, Inc. v. Nissan North America, Inc.*,

53. *Bright Bay*, 593 F. Supp. 2d at 497.
54. *Id.* at 498.
55. *Id.*
56. *L&B Truck Servs.*, 2009 WL 3584346, at *1.
57. Vt. Stat. Ann. tit. 9, §§ 4083–4100.
58. *L&B Truck Servs.*, 2009 WL 3584346, at *3. The dealer argued that a constructive termination occurred nonetheless because Daimler's actions had a sufficiently adverse effect on the dealer's franchise. The court did not reach the question whether a dealer agreement can be constructively terminated if a manufacturer's acts have an adverse effect on the franchise because the plaintiff failed to plead adequately that such a termination occurred. *Id.*

addressed constructive termination claims, among others, by several dealers.[59] The dealers alleged that Nissan had paid upfront cash and quarterly incentive payments to a preferred dealer group in Northeast Ohio. Those payments allowed the preferred dealers to sell new vehicles at a lower price than the plaintiffs could offer, having not received such incentive payments. The plaintiffs further alleged that, "by employing a discriminatory pricing scheme, Nissan sought to eliminate intra-brand competition among its dealers in Northeast Ohio, reconfigure its dealer network in Northeast Ohio, and drown the plaintiffs, thus causing the constructive or actual termination of the plaintiffs' franchises."[60] Citing *Bright Bay* and *L&B Truck Services*, the court held that, because the plaintiffs' dealer agreements remained in effect, the manufacturer had not constructively terminated them.[61]

Accordingly, to support a constructive termination claim, many courts will require a dealer show that it is no longer in business—of any kind—with the manufacturer.

2. Reduction in Income

When evaluating the issue of constructive termination, several manufacturer-dealer cases[62] follow the reasoning of the Second Circuit in *Petereit v. S.B. Thomas, Inc.*[63] In *Petereit*, decided under the nonautomotive Connecticut Franchise Act,[64] the court articulated a standard for determining whether constructive termination occurs:

> "[I]t appears that something greater than a *de minimis* loss of revenue—and less than the stark scenario of driving a franchisee out of business—must be shown in order to justify a finding of constructive termination. We think such may be found when a franchisor's actions result in a *substantial decline* in franchisee net income."[65]

The court in *Petereit* expressly did not require that a franchisee be driven out of business as a condition of maintaining a constructive termination claim.

The dispute in *Bob Robinson Chevrolet-Oldsmobile-Cadillac, Inc. v. General Motors Corp.* arose from GM's decision to phase out its Oldsmobile brand—an action the dealer claimed would eliminate eleven percent of its sales.[66] Although the dealer remained in business, it claimed that, by eliminating

59. Bedford Nissan, Inc. v. Nissan N. Am., Inc., No. 1:16 CV 423, 2016 WL 6395799 (N.D. Ohio Oct. 28, 2016).

60. *Id.* at *10.

61. *Id.* The court ultimately did not dismiss the count of which the constructive termination claim was a part because the plaintiffs also alleged breach of Nissan's implied covenant of good faith and fair dealing. *Id.*

62. *See* Grimes Buick-GMC, Inc. v. GMAC, LLC, No. CV 12–73–H–CCL, 2013 WL 5348103, at *5 (D. Mont. Sept. 23, 2013); Bob Robinson Chevrolet-Oldsmobile-Cadillac, No. 5:01CV145, slip op. at 8 (N.D. W. Va. June 13, 2003).

63. Petereit v. S.B. Thomas, Inc., 63 F.3d 1169 (2d Cir. 1995).

64. *Id.* at 1181 (citing Conn. Gen. Stat. § 42-133e *et seq.*).

65. *Id.* at 1183.

66. Bob Robinson Chevrolet-Oldsmobile-Cadillac, Inc. v. Gen. Motors Corp., No. 5:01CV145, slip op. at *9 (N.D. W. Va. June 13, 2003).

the Oldsmobile brand, GM constructively terminated the Oldsmobile dealer agreement. In response to GM's motion to dismiss for failure to state a claim, the U.S. District Court for the Northern District of West Virginia stated that, although West Virginia courts had not addressed de facto or constructive termination, it was persuaded by the *Petereit* reasoning. The court held that failure to recognize constructive termination under the West Virginia manufacturer-dealer statute would allow manufacturers to "accomplish indirectly what the statute plainly prohibits them from accomplishing directly—that is, terminating a dealer agreement through unilateral action without appropriate notice to the dealer and without good cause shown."[67] Because the dealer pleaded more than a *de minimis* loss of revenue, the court found that it had stated a claim for constructive termination.[68]

The plaintiff in *Grimes Buick-GMC* brought a claim for constructive termination under state law in addition to its claim under the ADDCA.[69] The U.S. District Court for the District of Montana denied the defendant's motion to dismiss the plaintiff's claims for constructive termination under the Montana Motor Vehicle Dealer Act (MMVDA).[70] Citing *Petereit*, the court found that one purpose of the MMVDA is to protect the dealer in instances when a manufacturer may unfairly exercise economic leverage. It "seems reasonable to believe that the legislature intended that MMVDA dealer protections would extend to indirect terminations."[71] The court also approvingly cited *Petereit* for the proposition that a "franchise need not be completely ruined but must be greatly reduced in value to evidence constructive termination of franchise."[72]

The cases holding or suggesting that constructive termination occurs when acts of the franchisor cause the franchisee to incur a substantial decline in income do not provide much guidance as to what would constitute a "substantial" decline. *Bob Robinson Chevrolet-Oldsmobile-Cadillac* alone suggests that a certain percentage decline (eleven percent) may, as a factual matter, represent a "'substantial decline' in net income required to justify a finding

67. *Id.* at *8.

68. *Id*. at *9. In *Robert Basil Motors, Inc. v. General Motors Corp.*, No. 03–CV–315A. 2004 WL 1125164 (W.D.N.Y. Apr. 17, 2004), another plaintiff claimed constructive termination due to the GM's *decision* to phase out the Oldsmobile brand. The court approvingly cited *Petereit* for the proposition that the intent of the New York Franchised Motor Vehicle Dealer Act was to protect the dealer from the manufacturer's unfair exercise of economic leverage. *Id.* at *3. The court held that the dealer's constructive termination claim survived a motion to dismiss without articulating a standard for determining whether constructive termination occurred. *Id.* at *5 ("At this stage of the proceedings the Court cannot conclude that the plaintiff can prove no set of facts which would entitle the plaintiff to relief under the [constructive termination] claim.").

69. Grimes Buick-GMC, Inc. v. GMAC, LLC, No. CV 12–73–H–CCL, 2013 WL 5348103, at *5 (D. Mont. Sept. 23, 2013).

70. The court also denied the defendant's motion to dismiss an ADDCA claim. *See* discussion *supra* Part III.A; *Grimes Buick-GMC*, 2013 WL 5348103, at *4.

71. *Grimes Buick-GMC*, 2013 WL 5348103, at *5.

72. *Id*.

of constructive termination.[73] The court held that eleven percent is "something greater than a de minimus [*sic*] loss of revenue" sufficient to state a claim of constructive termination.[74]

3. Unilateral Modification of Franchised Business

Another approach to constructive termination appears in two cases, both from Florida federal courts.[75] Each sets forth a standard for constructive termination that would liberalize the already generous *Petereit* standard. Although each articulated a standard for constructive termination, each ultimately held that no constructive termination occurred.

First, in *Bert Smith Oldsmobile, Inc. v. General Motors Corp*., another case arising from GM's decision to phase out its manufacture of the Oldsmobile line in 2000, the dealer argued that GM's notice of intent not to renew the dealer agreement following phaseout constituted a *de facto* termination.[76] The U.S. District Court for the Middle District of Florida stated that *de facto* or constructive termination occurs when the manufacturer unilaterally modifies the terms of the dealer agreement in a way that "substantially interferes" with the dealer's realization of the benefits of the original dealer agreement.[77] The court found that the plaintiff had not alleged facts sufficient to find that GM unilaterally modified the dealer agreement. As support for that finding, the court stated that the "parties continue to perform under the Dealer Agreement, even during the pendency of this lawsuit."[78] Further, GM did not initiate a *de facto* termination by giving notice of its intent not to renew at expiration.[79]

Second, in *Hopkins Pontiac GMC, Inc. v. Ally Financial Inc.*, the plaintiff, a single-line GMC dealer, alleged that, beginning in 2009, GM led it to think it would also become a Buick franchisee. The dealer expected that GM would permit it to conduct jointly its GMC and Buick operations. The dealer claimed that, relying on GM's representations, it refinanced its dealership facility and obtained from its shareholders commitments to contribute additional equity to the corporation. In March 2010, GM advised that it that it would not grant the dealer a Buick franchise but that it would assist the dealer in selling its GMC business to another dealer and pay a portion of

73. Bob Robinson Chevrolet-Oldsmobile-Cadillac, No. 5:01CV145, slip op. at 9 (N.D. W. Va. June 13, 2003).

74. *Id.*

75. Bert Smith Oldsmobile, Inc. v. Gen. Motors Corp., No. 8:04CV2666T-27EAJ, 2005 WL 1210993 (M.D. Fla. May 20, 2005); Hopkins Pontiac GMC, Inc. v. Ally Fin. Inc., 60 F. Supp. 3d 1252 (N.D. Fla. 2014).

76. *Bert Smith Oldsmobile*, 2005 WL 1210993, at *3.

77. *Id.* (citing Banc One Fin. Servs., Inc., v. Advanta Mortg. Corp. USA, No. 00 C 8027. 2002 WL 88154 (N.D. Ill. Jan. 23, 2002) (where constructive termination of a loan servicing agreement was at issue)). The *Banc One* case, in turn, cites *Petereit*.

78. *Bert Smith Oldsmobile*, 2005 WL 1210993, at *3.

79. The dealer appears to have argued only that GM's notice of its intent not to renew the dealer agreement constituted constructive termination. The court discusses constructive termination more broadly under the standard of unilateral modification, in addition to addressing the plaintiff's specific allegation.

the sale price. The dealer claimed that GM reneged on its agreement to pay a portion of the GMC sale price. As a result of this alleged series of events, the dealer was forced to sell its GMC business to another dealer at a reduced sale price.

The U.S. District Court for the Northern District of Florida dismissed the dealer's constructive termination claim. Citing *Bert Smith Oldsmobile*, the court stated that constructive termination occurs when one party unilaterally modifies the franchise agreement in a manner substantially interfering with the benefits otherwise available to the other party.[80] The court found that the dealer failed to allege that GM unilaterally modified the GMC dealer agreement at all. In the court's words, the dealer "has not alleged that General Motors did anything other than fail to make good on its promise to give [the dealer] a Buick franchise, an allegation that has nothing to do with the [GMC dealer agreement]."[81]

In addition to these two cases, a recent decision by a New York administrative law judge, *Wide World of Cars, LLC dba Wide World Maserati v. Maserati North America, Inc.*, also addressed a dealer's claim that the manufacturer unilaterally modified the existing franchise agreement.[82] Maserati changed its pricing of vehicles by reducing dealers' holdback from four percent to two percent, and offering dealers an opportunity to earn bonuses of up to three-and-a-half percent, of a vehicle's price.[83] The administrative law judge found that Maserati's determinations whether dealers qualified for bonuses were inherently subjective.[84] Maserati's substitution of the bonus program for the historical holdback had significant impacts on the dealer's return on investment and, therefore, represented an unlawful modification of the existing franchise arrangement.[85]

Finally, although Wide World Maserati apparently did not allege constructive termination of the Maserati dealer agreement, in *Brentlinger Enterprises v. Volvo Cars of North America, LLC*,[86] a plaintiff did plead constructive termination based on Ford's newly established bonus system that rewarded dealers operating exclusive facilities.[87] Nonetheless, the U.S. District Court for the District of Ohio held that, because Ford's program was functionally available to the plaintiff, it was not the proximate cause of an alleged destruction of the dealer's business sufficient to constitute constructive termination.[88] The holding in *Brentlinger* does suggest that a constructive termination claim might succeed if a manufacturer's bonus program is not

80. *Hopkins Pontiac GMC*, 60 F. Supp. 3d at 1259.
81. *Id.*
82. Wide World of Cars, LLC, dba Wide World Maserati v. Maserati N. Am., Inc., Case No. FMD 2017-03 (N.Y Dep't of Motor Vehicles Div of Safety & Bus. Hearings Aug. 1, 2017).
83. *Id.* at 2.
84. *Id.* at 5–6.
85. *Id.* at 6 (citing Beck Chevrolet Co., Inc. v. Gen. Motors LLC, 27 N.Y.3d 379 (2016)).
86. Brentlinger Enters. v. Volvo Cars N. Am., LLC, No. 2:14–CV–360, 2016 WL 4480343 (S.D. Ohio Aug. 25, 2016).
87. *Id.* at *8.
88. *Id.*

functionally available to a plaintiff-dealer *and* is the proximate cause of significant economic losses.

4. Bad Faith Claims Under State Law

Several cases hold that a dealer can maintain a constructive termination claim if it can show economic detriment caused by a manufacturer's bad-faith actions—as "bad faith" is defined under state law. In *Carrol Kenworth Truck Sales, Inc. v. Kenworth Truck Co.*, the manufacturer offered the plaintiff-dealer a one-year renewal of the three-year dealer agreement previously offered to the dealer.[89] One reason for the reduced term was that the dealer had failed to meet its sales quota after Kenworth changed its method of computing quotas. Rather than fix quotas based on the dealer's actual percentage of sales in its local market, Kenworth began calculating the dealer's quota based on Kenworth's target for market penetration.[90] In addition, Kenworth recommended that the dealer employ additional personnel.[91]

The dealer claimed that the manufacturer's offer of a one-year dealer agreement, along with its recommended additions to the dealer's sales staff, constructively terminated the franchise relationship in bad faith.[92] The Eleventh Circuit concluded that there was insufficient evidence of bad faith as defined under the ADDCA.[93] The applicable Alabama law, however, defined the term "good faith," with reference to the UCC definition, as "[h]onesty in fact and the observation of reasonable commercial standards of fair dealing."[94] Under this more liberal definition, the court held that the record included evidence sufficient for a jury to conclude that the manufacturer did not act in good faith.[95]

Similarly, in *Jay Automotive Group, Inc. dba Jay Suzuki v. American Suzuki Motor Corp.*, the dealer claimed that Suzuki's fraudulent conduct over a number of years imposed on the dealer economic loss, loss of reputation, and the inability to continue operations profitably.[96] The U.S. District Court for the Middle District of Georgia, interpreting Georgia law, concluded that the Georgia statute prohibiting franchise termination unless a manufacturer acts in good faith was "essentially indistinguishable" from the Alabama statute at issue in *Carroll Kenworth Truck Sales*.[97] Consequently, the district court held the dealer's assertion that the manufacturer's bad-faith conduct forced the constructive termination of the franchise agreement stated a claim upon

89. Carrol Kenworth Truck Sales, Inc. v. Kenworth Truck Co., 781 F.2d 1520, 1523 (11th Cir. 1986).
90. *Id.*
91. *Id.* at 1524.
92. *Id.*
93. *Id.* at 1528.
94. *Id.* (citing Ala. Code § 8-20-3(8)).
95. *Id.* at 1528–29.
96. Jay Auto. Grp., Inc. dba Jay Suzuki v. Am. Suzuki Motor Corp., No. 4:11–CV–129, 2012 WL 425984, at *1.
97. *Id.* at *6.

which relief could be granted.[98] In the court's words, "if a franchisor forces the termination of a dealer agreement in bad faith or without good cause and/or notice, the court finds that the franchisee has a claim even if the franchisor did not explicitly use the magic words: 'we terminate the franchise.'"[99]

5. A Note on Uses and Meanings of "Bad Faith"

Constructive termination cases note at least four contexts in which a manufacturer's good faith may be at issue: a manufacturer's general obligation to act in good faith in the franchise relationship,[100] the requirement that any modification of a franchise be undertaken in good faith,[101] the requirement that a manufacturer terminate a franchise in good faith,[102] and the manufacturer's implied covenant of good faith and fair dealing.[103] In *Carroll Kenworth Truck Sales*, the court apparently was concerned only with the Alabama statute that "requires that a manufacturer act in good faith when terminating a dealership."[104] In *Jay Suzuki*, the court found that the dealer had sufficiently pled under Georgia statutes requiring that a manufacturer must act in good faith in terminating a franchise[105] and that a franchisor must act in good faith "in connection with the operation of a dealer's business pursuant to a franchise" or "in any of its business transactions with a dealer."[106]

To complicate matters further, definitions of "good faith" under State law vary significantly. Under the Alabama and Georgia statutes discussed in *Carrol Kenworth Truck Sales* and *Jay Suzuki*, good faith is defined in accordance with the UCC standard.[107] In New York, "good faith" is defined to mean the UCC standard plus "any common law definitions of that term."[108] The Colorado statute imports the language from the ADDCA.[109] One New Hampshire case interpreting Michigan law defines bad faith as "arbitrary, reckless, indifferent or intentional disregard of the interests of the person owed a duty."[110]

It is beyond the scope this article to review the law of dealer claims of manufacturers' bad-faith conduct. The limited observation here is that,

98. *Id.* at *7.
99. *Id.*
100. *See*, *e.g.*, Ga. Code Ann. § 10-1-620; Ohio Rev. Code Ann. § 4157.559(A)(1); N.H. Rev. Stat. Ann. § 357-C:3.
101. N.Y. Veh. & Traf. Law § 463-1(ff).
102. *Id.* § 463-1(e)(2); N.H. Rev. Stat. Ann. § 357-C:3.
103. *See* Surf City Corp. v. Mitsubishi Motors N. Am., Inc., No. G052053, 2017 WL 5662582 (Cal. Ct. App. Nov. 27, 2017).
104. *See* Carrol Kenworth Truck Sales, Inc. v. Kenworth Truck Co., 781 F.2d 1520, 1528 (11th Cir. 1986); Ala. Code § 8-20-5.
105. *See* Jay Auto. Grp., Inc. dba Jay Suzuki v. Am. Suzuki Motor Corp., No. 4:11–CV–129, 2012 WL 425984, at *7; Ga. Code Ann. § 10-1-631(a).
106. *Jay Suzuki*, 2012 WL 425984, at *7; Ga. Code Ann. § 10-1-631(a)(1).
107. *Carrol Kenworth Truck Sales*, 781 F.2d at 1528; *Jay Suzuki*, 2012 WL 425984, at *7.
108. N.Y. Veh. & Traf. Law § 462 8-a.
109. Colo. Rev. Stat. § 12-6-102.
110. Fuller Ford, Inc. v. Ford Motor Co., No. CIV. 00–530–B, 2001 WL 920035, at *11 (D.N.H. Aug. 6, 2001) (citing Maida v. Ret. & Health Servs. Corp., Nos. 93-1625, 93-1635, 1994 WL 514521 (6th Cir. Sept. 19, 1994)).

given the uses and definitions of "good faith" in manufacturer-dealer law, the bad-faith theory of constructive termination could lead to a Pandora's box of variations, inconsistent results across jurisdictions, and a lack of certainty for manufacturers conducting interstate commerce.

IV. Manufacturer-Dealer Lease Negotiations and Constructive Termination

As discussed earlier, the opinion in *Surf City* does not address directly a constructive termination cause of action. The dealer's fundamental claims were breach of contract and breach of the implied covenant of good faith and fair dealing. The dealer pleaded constructive termination as the basis of the principal causes of action. The facts of *Surf City* do, however, suggest a question concerning application of constructive termination principles in lease negotiations between a manufacturer and a dealer. The value of the Surf City site appreciated considerably between the time of MMNA's last appraisal and the date of sale. MMNA presumably concluded that it could realize a greater economic benefit by selling the Surf City site than by selling automobiles from it. Another manufacturer might have come to a different conclusion. Sales of a high-volume brand could theoretically offer a greater return to a manufacturer than selling appreciated real estate. As leases by manufacturers to dealers mature and renew, however, manufacturers will reasonably request increased rents from their dealers. As with the Shell dealers in *Mac's Shell*, a dealer might object that renewal rents, if sufficiently high, could adversely affect the dealer's business.

Assuming that relocation of its dealership is not a realistic possibility, the prospect of increased rent under a proposed new lease from a manufacturer presents a dealer with limited options. The dealer could enter into the new lease and, assuming no significant change in the dealership's business, continue less profitable operations. If the dealer decides not to execute the new lease, the dealer could sell its dealership business to a new operator or simply terminate. Given these choices, most dealers' natural preference would be sale of the dealership business. Unless the successor dealer already owns or leases a dealership facility in an area exempt from risk of protest by other dealers, however, purchase of the dealership will require that the successor enter into the new lease with the manufacturer.[111]

If the dealer elects to execute the new lease and stay in business, no constructive termination claim would be available to the dealer under the ADDCA, even if the dealer could show that the manufacturer acted in bad faith as narrowly defined in the ADDCA. An ADDCA constructive termination claim is possible only if actual termination occurs.

111. Higher rent will tend to reduce the value of the dealership business. *See* Kerrigan, *supra* note 2 ("At some threshold, the risk of high rent will push down the market value of a dealership.").

No matter the course chosen by the dealer, any state-law claim for constructive termination would initially have to survive the objection that it fails to satisfy the abandonment requirement articulated in *Mac's Shell*. Assuming that the dealer's claim survives assertion of the abandonment requirement, the dealer's options for pursuing a state-law constructive termination claim require the dealer to show that (a) the manufacturer acted in bad faith under state-law definitions, or (b) the manufacturer unilaterally modified the terms of the franchise relationship resulting in either a substantial reduction in the dealer's income from operations (*Petereit*) or (satisfying the lower standard articulated in *Bert Oldsmobile*) a substantial interference with the dealer's realization of the benefits of the dealer agreement.[112]

Moreover, for a unilateral-modification claim to succeed, a court would have to conclude that the lease is part of the franchise relationship.[113] The revised lease would not amend the dealer agreement itself. As suggested by *Wide World of Cars*, some courts take an expansive view of what, in addition to the dealer agreement, is included in the franchise. A court's determination, however, that a lease between a manufacturer and a dealer is integral to the franchise would, as a practical matter, obligate the manufacturer to retain ownership of the property so long as the dealer is in business. By selling, a manufacturer would relinquish control of an important component of the franchise relationship, and no potential purchaser would assume an obligation to lease to a dealer. Although not expressly stated, these considerations may have influenced the court in *Surf City*, when it refused to hold that sale of dealership property worked a constructive termination.

The dealer could attempt to claim that the manufacturer's request for more rent rises to the level of bad faith under provisions of the ADDCA. To maintain a claim under the ADDCA, however, the dealer would have to voluntarily terminate and allege that the manufacturer sought intentionally to force the termination through coercion, intimidation, or threats of either. Without more, a manufacturer's request for market-level rents would not satisfy the ADDCA definition of bad faith.

The dealer could consider a claim of bad-faith constructive termination under state law whether or not it remains in business. Under the *Carrol Kenworth Truck Sales* test, the dealer would have to show that the manufacturer's conduct was not honest in fact or consistent with reasonable commercial

112. In *Grimes Buick-GMC*, for example, the court allowed a constructive termination claim to proceed although the dealer had sold its business to a third party at what it claimed to be a deflated price. Grimes Buick-GMC, Inc. v. GMAC, LLC, No. CV 12–73–H–CCL, 2013 WL 5348103, at *2 (D. Mont. Sept. 23, 2013).

113. *Bethesda Ford, Inc. v. Ford Motor Co.*, 572 F. Supp. 623 (D. Md. 1983), provides modest support for the proposition that the lease is part of the franchise relationship. Faced with a dealer's assertion that the "franchise" excluded a lease between the manufacturer and the dealer, the court stated that it "perceives no reason for such a restrictive definition of the term 'franchise;' the term should instead encompass all oral or written understandings between the franchisor and franchisee." *Id.* at 630.

standards of fair dealing.[114] The considerations regarding the manufacturer's subjective intent would be similar those pertinent to a claim under the ADDCA. But in response to the dealer's contention that a rise in rents is not consistent with reasonable commercial standards of fair dealing, the manufacturer can justifiably respond that real-estate market conditions support a rise in rents to market levels. As noted earlier,[115] the range of definitions and applications of "bad faith" in manufacturer-dealer law creates the risk that the *Carrol Kenworth Truck Sales* approach could be expanded in ways creating uncertainty for both dealers and manufacturers.

The dealer's best tactical alternative may be to sell its dealership assets to a transferee dealer and attempt thereafter to claim constructive termination. Voluntary termination of the dealer agreement in connection with the sale to a third party[116] leaves open the possibility of a claim under the ADDCA and avoids the uncertainty presented by the abandonment requirement. Without evidence of intent to coerce or intimidate, however, a claim under the ADDCA will fail. Because considering a lease to be integral to the franchise leads to an untenable result, state-law causes of action available to the dealer would be limited to an attempt to show that the manufacturer's bad-faith conduct forced termination of the dealer agreement.[117] In the final analysis, however, the dealer's enemy is the rising value of commercial property, a condition attributable to economic conditions, not a manufacturer's request for market rents.

114. *See also* Bedford Nissan, Inc. v. Nissan N. Am., Inc., No. 1:16 CV 423, 2016 WL 6395799, at *10 (N.D. Ohio Oct. 28, 2016) (applying the same standard under Ohio law).

115. *See* cases and statutes cited *supra* notes 100–10.

116. In *Len Stoler, Inc. v. Volkswagen Group of America, Inc.*, 232 F. Supp. 3d 813 (E.D. Va. 2017), the court recognized that losses on the sale of a dealer's assets due to diminished franchise value constitute compensable damages.

117. Although not a constructive termination claim, in certain jurisdictions a dealer might contend that a manufacturer's conduct deprived the dealer of the opportunity to realize fair value or reasonable compensation for its franchise. *See* N.Y. Veh. & Traf. Law § 466(2) ("It shall be deemed an unreasonable restriction upon the sale or transfer of a dealership for a franchisor (i) directly or indirectly to prevent or attempt to prevent a franchised motor vehicle dealer from obtaining the fair value of the franchise or the fair value of the dealership business as a going concern."). *But see* JJM Sunrise Auto., LLC v. Volkswagen Grp. of Am., Inc., 997 N.Y.S.2d 270 (Sup. Ct. 2014) (noting that court dismissed plaintiff's claim because the defendant's alleged attempts to prevent realization of fair value were statutorily permitted under New York law); Schieffelin & Co. v. Piaggio Grp. Ams., Inc., No. 5:01CV145, slip op. 33085(U) (N.Y. Sup. Ct. Dec. 9, 2013) (indicating that the court dismissed the plaintiff's claim because it was based on the unsupportable premise that the defendant had an obligation to award the plaintiff additional franchises, thereby enhancing the value of the plaintiff's existing franchise).