

# Michigan Law Review

---

Volume 37 | Issue 1

---

1938

## CONTRACTS - CONSIDERATION - DEALERS' CONTRACTS

Richard S. Brawerman  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Contracts Commons](#)

---

### Recommended Citation

Richard S. Brawerman, *CONTRACTS - CONSIDERATION - DEALERS' CONTRACTS*, 37 MICH. L. REV. 132 (1938).

Available at: <https://repository.law.umich.edu/mlr/vol37/iss1/13>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

CONTRACTS — CONSIDERATION — DEALERS' CONTRACTS — Defendant manufacturer, reserving the right to sell to enumerated persons, granted plaintiff dealer a franchise to sell certain of defendant's products in a defined territory. Plaintiff in turn promised to establish a place of business and develop the territory to the satisfaction of defendant. All orders received by defendant were to be subject to acceptance by defendant; defendant agreed to fill accepted orders as promptly as practicable; and plaintiff expressly released defendant from liability for loss or damage arising from failure of defendant to fill the plaintiff's orders. A clause, originally part of the agreement, allowing either party to cancel

or terminate the agreement at any time, was later rescinded. After the agreement was thus amended, defendant repudiated it. In a suit for damages for breach of contract the trial court dismissed the complaint on the ground that the agreement lacked mutuality and was too indefinite to constitute a contract. *Held*, judgment reversed. Defendant, having granted plaintiff an exclusive franchise, impliedly undertook not to employ any other dealer in the territory. This was itself consideration to support plaintiff's promises. Defendant also impliedly promised to use an honest judgment in passing upon orders submitted by plaintiff, treating them equally with other orders received and weighing all orders against available supply. *Jay Dreher Corp. v. Delco Appliance Corp.*, (C.C.A. 2d, 1937) 93 F. (2d) 275.

A dealer's contract commonly involves a grant to the dealer of an exclusive franchise for the sale of the manufacturer's product in a defined territory, and an undertaking by the dealer to purchase a certain quantity of the product or to establish a place of business and develop the territory to the satisfaction of the manufacturer. The contract usually contains no promise by the manufacturer to sell and deliver, and may expressly relieve him from liability for failing to deliver. Frequently also it reserves to the manufacturer a right to cancel the contract.<sup>1</sup> Certain older cases have held such a contract void for want of "mutuality" because the manufacturer was released from liability for non-delivery.<sup>2</sup> The view represented in these cases seems to be that the undertaking, implicit in the grant of an exclusive franchise by the manufacturer, not to employ any other dealer in the territory is too profitless to the dealer to have been a bargaining factor; that, though such an undertaking involves a legal detriment to the manufacturer, it is presumably not the agreed exchange for what is undertaken by the dealer, therefore is not consideration.<sup>3</sup> Other cases, though not recogniz-

<sup>1</sup> For a general discussion, see 31 COL. L. REV. 830 (1931). Cases are listed in 27 COL. L. REV. 838 at 841 (1927).

<sup>2</sup> *Goodyear v. Koehler Sporting Goods Co.*, 159 App. Div. 116, 143 N. Y. S. 1046 (1913), noted 12 MICH. L. REV. 321 (1913), *affd.* 220 N. Y. 749, 116 N. E. 1047 (1917); *Wood v. Glen Falls Automobile Co.*, 174 App. Div. 830, 161 N. Y. S. 808 (1916) (company shall not be liable for any failure of performance on its part, when such failure shall be "due to fires, strikes, accidents, or any other cause whatsoever"); *Oakland Motor Car Co. v. Indiana Automobile Co.*, (C. C. A. 7th, 1912) 201 F. 499 (no order shall be binding upon the manufacturer unless accepted by him at least 30 days prior to the date for delivery); *Weil v. Chicago Pneumatic Tool Co.*, 138 Ark. 534, 212 S. W. 313 (1919). In *Meade v. Poppenberg*, 167 App. Div. 411 at 414, 153 N. Y. S. 182 (1915), the contract provided that if "by reason of fires, strikes, or any other cause" the defendant should be unable to make deliveries as per specifications, defendant should return the deposit to plaintiff and not be liable for commissions or damages. The court said, "By said clause it was only agreed that defendant should be relieved in case he was 'unable to make deliveries.' This did not mean that he could arbitrarily refuse to deliver, but clearly intended to cover only those cases where by act of God or otherwise delivery was put beyond his power." But see *Gile v. Interstate Motor Car Co.*, 27 N. D. 108, 145 N. W. 732 (1914), noted L. R. A. 1915B 109, 62 UNIV. PA. L. REV. 633 (1914); 12 MICH. L. REV. 677 (1914).

<sup>3</sup> "I am unable to see that the appointment of plaintiff as defendant's agent cured

ing the contract as valid from its inception, have construed it to be an offer to enter into a unilateral contract<sup>4</sup> or a series of bilateral contracts.<sup>5</sup> The case of *Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc.*,<sup>6</sup> took a far more liberal view.<sup>7</sup> In that case it was held that the undertaking by the manu-

the lack of mutuality, because the position of agent to sell automobiles was an empty thing, unless backed up by an enforceable agreement on defendant's part to deliver such automobiles as plaintiff might be able to sell." *Goodyear v. Koehler Sporting Goods Co.*, 159 App. Div. 116 at 117, 143 N. Y. S. 1046 (1917), *affd.* 220 N. Y. 749, 116 N. E. 1047 (1917).

<sup>4</sup> *Erskine v. Chevrolet Motor Co.*, 185 N. C. 479, 117 N. E. 706, 32 A. L. R. 196 at 209 (1923). The original agreement provided for its cancellation by either party upon 5 days written notice. Later, plaintiffs refused to incur the expense involved in establishing agencies and working the territory unless assured that the agreement would not be cancelled during the current year and that the cars ordered would be delivered. Upon being assured of this, plaintiffs went ahead and performed. In an action for breach of contract by the manufacturer's failure to deliver, it was held that though the original agreement may not have been binding, the agreement as modified by parol constituted an offer to enter into a unilateral contract. In establishing agencies and working the territory, plaintiffs accepted the offer.

<sup>5</sup> *Buick Motor Co. v. Thompson*, 138 Ga. 282, 75 S. E. 354 (1912). The court found an implied promise to deliver, and construed the agreement as an offer to enter into a series of bilateral contracts. The dealer accepted by sending orders.

<sup>6</sup> (C. C. A. 2d, 1928) 29 F. (2d) 3.

<sup>7</sup> The manufacturer promised not to sell any cars within a defined territory except to the dealer, who in turn promised to buy 900 cars to be chosen between two specified models, to sell no other make of cars anywhere, to set up shop, and to push sales. The manufacturer reserved the right to cancel the contract for the violation of any of the conditions, or in case of dissension within the dealer's organization, prejudicial to the market. The contract further provided: "This contract is subject to change in price or design on all models without further notice." The manufacturer repudiated the agreement; whereupon the dealer sued for damages for breach of contract. It was held that the dealer's promise to buy the 900 cars from several models without specifying the model did not make the contract too indefinite to be enforced: "damages might at least be measured by the least profitable to the maker of any models which the dealer might choose." *Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc.*, (C. C. A. 2d, 1928) 29 F. (2d) 3 at 5. *Contra*: *Oakland Motor Car Co. v. Indiana Automobile Co.*, (C. C. A. 7th, 1912) 201 F. 499; *Nebraska Aircraft Corp. v. Varney*, (C. C. A. 8th, 1922) 282 F. 608. The Moon case also held that a right reserved to the manufacturer to change price or design on all models without notice did not make the contract too indefinite and that the right reserved to the manufacturer to cancel the contract for the violation of any of its conditions, or in case of dissension in the dealer's organization prejudicial to the market, did not destroy the consideration. *Contra*: *Huffman v. Paige-Detroit Motor Car Co.*, (C. C. A. 8th, 1919) 262 F. 116.

In *Velie Motor Car Co. v. Kopmeier Motor Car Co.*, (C. C. A. 7th, 1912) 194 F. 324 at 328, where the manufacturer reserved the "right to return deposits and cancel the contract, and a letter by them to the party of the second part shall have been sufficient notice," it was held that the manufacturer could "arbitrarily, and without assigning cause, cancel the contract" and that this destroyed "mutuality." See also *Oakland Motor Car Co. v. Indiana Automobile Co.*, (C. C. A. 7th, 1912) 201 F.

facturer not to employ any other dealer in the territory was itself consideration for the dealer's promises. The court, however, refused to find an implied promise by the manufacturer to sell and deliver. The dealer's recovery was to be measured by the number of cars the manufacturer would in fact have delivered if he had abided by the contract.<sup>8</sup> In the instant case the court continued in the course it had set for itself in the *Moon Motor Car* case. Although the court found an applied promise by the manufacturer to use an honest judgment in passing upon orders submitted by plaintiff, treating them equally with other orders received and weighing all orders against available supply, it preferred to rest its decision upon the exclusiveness of the franchise.<sup>9</sup> The dealer's recovery was to be measured by two factors, the extent of the dealer's orders and

499 at 501 (contract "may be cancelled for just cause by either party giving a 30 days written notice . . . Any violation of this contract by either party may be considered sufficient cause for terminating the same without the notice prescribed").

Reservation of a right to cancel for cause, or by written notice, or after a definite period of time, or by returning a deposit, does not destroy the consideration. 1 WILLISTON, CONTRACTS, rev. ed., § 105 (1936). See also Corbin, "The Effect of Options on Consideration," 34 YALE L. J., 571 (1925); 31 COL. L. REV. 830 (1931); Munro, "The Necessity for 'Mutuality' and the Right of Termination in Sales Agencies," 28 ILL. L. REV. 800 (1934). In *Ellis v. Dodge Bros. (C. C. A. 5th, 1917)* 246 F. 764, reversing (D. C. Ga. 1916) 237 F. 860, the court found an implied promise by the manufacturer to sell and deliver, and held that the clause providing for cancellation upon 15 days written notice did not destroy the consideration, since the contract "would always be effective for at least the 15 days required for written notice." It was concluded that though the manufacturer had had the right to cancel, he had permitted the term of the contract to expire without exercising the right and was now bound by his implied promise to sell and deliver. Cf. *Wilson v. Studebaker Corp. of America, (D. C. Pa. 1917)* 240 F. 801; *Gile v. Interstate Motor Car Co., 27 N. D. 108, 145 N. W. 732 (1914)*.

<sup>8</sup> "Suppose that the dealer has promised to buy, and the maker has not promised to sell. Nevertheless the dealer had his monopoly by virtue of which the maker must sell to him if he would sell at all. . . . We cannot say that it was an impossible task to show, with certainty enough to support a verdict, how many cars the maker would in fact have delivered under pressure of this limitation, even though he was not legally bound to deliver any at all." *Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc., (C. C. A. 2d, 1928)* 29 F. (2d) 3 at 4.

Where the breach by the manufacturer consists in selling directly to consumers in the dealer's territory, the dealer is allowed to recover the regular commissions on all such sales made by the manufacturer. *Schiffman v. Peerless Motor Car Co., 13 Cal. App. 600, 110 P. 460 (1910)*; *Sparks v. Reliable Dayton Motor Car Co., 85 Kan. 29, 116 P. 363, Ann. Cas. 1912C 1251 at 1252 (1911)*.

<sup>9</sup> Defendant urged that the clause whereby the manufacturer was released from liability for any loss or damage arising from failure to fill the dealer's orders gave him the right to breach the contract with impunity and destroyed the consideration. It was held that the purpose of this clause was to deprive the dealer of recourse over in case the manufacturer defaulted after accepting the dealer's order, and thereby rendered the dealer liable on his corresponding engagements with customers; that it did not release the manufacturer from liability on the contract generally. *Jay Dreher Corp. v. Delco Appliance Corp., (C. C. A. 2d, 1937)* 93 F. (2d) 275.

the extent to which the manufacturer, acting in good faith, would have filled them. It is submitted that the earlier cases, holding the dealer's contract void for want of "mutuality,"<sup>10</sup> cannot be sustained. Since an exclusive franchise will exert a pressure upon the manufacturer to deliver, in order to keep a market for his product in the territory,<sup>11</sup> and since it assures the dealer against the competition of other dealers whom the manufacturer would otherwise be free to employ in the territory, it would seem that an exclusive franchise is something worth bargaining for and is therefore of sufficient "value" to constitute a legal consideration.

*Richard S. Brawerman*

<sup>10</sup> "It is often stated, as if it were a requisite in the formation of contracts, that there must be mutuality. This form of statement is likely to cause confusion as however limited it is at best an unnecessary way of stating that there must be valid consideration. . . . The particular error which is traceable to this misleading use of the word 'mutuality' as a requirement for the formation of contracts, is a tendency observable in some cases to hold a contract invalid because the obligation undertaken on one side is not commensurate with that undertaken on the other." 1 WILLISTON, CONTRACTS, rev. ed., § 141 (1936).

<sup>11</sup> "The maker had to keep up his metropolitan market, and would certainly do his best to allocate his full stint to the dealer, through whom alone he could sell. . . . The absence of an express promise [to deliver] probably indicated an unwillingness to give more than the security arising from the monopoly." *Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc.*, (C. C. A. 2d, 1928) 29 F. (2d) 3 at 4.