COMBATTING
Constructive Terminations:

Lessons from an Ohio
BMW-MINI Case

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Since founding Anderson Economic Group L.L.C. in 1996, Patrick L. Anderson and his team of experts have established the boutique firm as a national leader in franchise industries. Under his two decades of leadership, AEG has conducted numerous territory assignment analyses, and its respected experts have testified frequently in auto dealer and other franchise cases.

Mr. Anderson authored *Economics of Business Valuation* (Stanford Press, 2012), four national award-winning journal articles, and the chapter on commercial damages in *Litigation Economics* (Elsevier, 2009). As a leading U.S. expert in damages cases, he is renowned for *the Ohio BMW-MINI*, *Alaska Rent-A-Car*, *Beck's Beer,* and *Tesla* cases, among others.

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Mr. DeVito represents multi-line, location groups, and single-point, family-owned dealerships. He practices before primarily Midwest administrative, state, and federal courts, and has successfully litigated termination, relocation, add-point, transfer, lack of good faith, discrimination, declaratory judgment, injunctive relief, and monetary damages cases.

As president of Morganstern, MacAdams & DeVito Co., L.P.A., Mr. DeVito is a civil litigator concentrating on automobile dealerships, business-to-business disputes, and plaintiff personal injury cases. He is a graduate of the University of Notre Dame (BBA finance and economics 1987) and the Ohio State University College of Law (JD 1990). He has also been recognized by his peers and chosen multiple times as a "Super Lawyer" and "Leading Lawyer" in the State of Ohio.

Presentation Outline

I. Introduction

II. The BMW-MINI Case

    A. Factual Setting

    B. Expert Issues

III. Presenting the Case

    A. Legal Arguments & Trial Strategy

    B. Expert Testimony

IV. Conclusions

    A. Keys for the Dealer, Attorney, and Expert

    B. Lessons for Future Cases

    C. Application for Non-Auto Cases

Introduction

This presentation covers lessons learned in an case involving a manufacturer's effort --purportedly based upon fulsomely documented performance evaluations--to prevent the sale of a dealership to a well-qualified individual. Importantly:

- The case does not represent a battle over one key factor, such as sales performance or market territory. Instead, it is a battle over the use of *data analysis methods*.

- The case illustrates how *effective discovery and expert testimony* can overcome manufacturer decisions purportedly based on objective criteria.

As the use of data analytics grows in automotive and other industries, these lessons will grow in importance.

The BMW-MINI Case: Factual Setting

I. Buy-Sell presented to BMW-MINI

II. BMW-MINI "Balanced Scorecard" (BSC) used to evaluate and reject prospective dealer who was the existing general manager

III. Manufacturer attempted to exercise ROFR to consolidate the market, and constructively terminate the existing dealer

Retailer Balanced Scorecard.

BMW Group
Canada

*RBS Image publicly available.
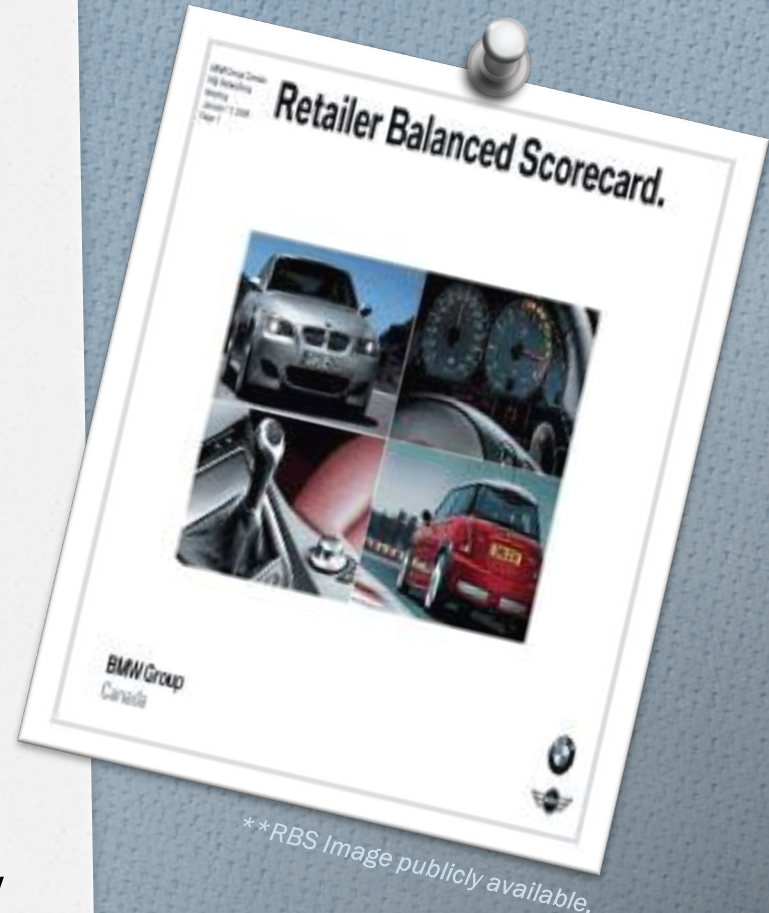
The BMW-MINI Case: Factual Setting

(continued)

IV. History of MINI in the U.S. and Northeast Ohio market area

V. Dealers involved in the dispute were all experienced

VI. MINI's secret national market plan to consolidate and reduce the number of MINI dealers in the U.S.

VII. MINI's actions to facilitate its Cleveland consolidation plan

The BMW-MINI Case: Expert Issues

I. Presumed "reasonableness" of written manufacturer evaluations

A. Hearing officer *presumed* that written dealer evaluations were reasonable.

B. Expert needed to rebut presumption.

C. Evidence that such evaluations were used across many dealers was also considered a rebuttable presumption of reasonableness.

D. Implication:
Expert needed to address the entire superstructure of the evaluation process.

The BMW-MINI Case: Expert Issues
(continued)

II. Demonstrating "unreasonableness" of a full-scale evaluation method

A. Expert must assess the manufacturer's underlying logic and data *for the entire method*.

B. Expert must demonstrate an alternate, more reasonable assessment of the dealer's performance.

C. Alternate assessment must be logical, and consistent with industry practice.

D. Expert must have the ability to withstand cross-examination.

Presenting the Case

Legal Arguments, Trial Strategy, and Expert Testimony

Presenting the Case: Legal Arguments and Trial Strategy

Real-world results of turn-down and ROFR:

- *Termination of the existing dealer without notice.*
- *No protection from state laws requiring that manufacturers establish cause.*

There is no substitute for a good lawyer.

"Strong legal advocacy was needed to demonstrate the *nexus* between turn-down, ROFR, and the manufacturer's desired market consolidation."

Presenting the Case: Legal Arguments and Trial Strategy

I. **Before Trial**

   A. Motion for summary judgment arguing that a ROFR is not recognized in Ohio because it circumvents the termination statute.

   B. Motion to strike expert report of Urban Science

   C. Motion to quash subpoena on Honda

Presenting the Case:
Legal Arguments and Trial Strategy

II. **During Trial**

A. Opening statement and cross-examination with TrialPad.

B. Theme of secret plan to consolidate MINI dealers.

C. Failure to use evaluation factors listed in the Ohio Dealer Act. BMW-Mini only used the "balanced score card," which we asserted was flawed.

Presenting the Case: Expert Testimony

Strong expert testimony was essential to demonstrate the unreasonableness of the "balanced score card" evaluation method.

- Complaining about one or two indicators? *Not enough.*

- Saying the dealer would do better? *Not enough.*

Expert had to rebut the presumption that the entire method was "reasonable."

Presenting the Case: Expert Testimony

Key elements of expert testimony:

1. Recognition of valid, industry standard evaluation methods, consistent with statute and contract.

2. Demonstration that the "BSC" was not such a valid, industry-standard evaluation.

3. Demonstration that "BSC" factors could not be replicated, and assertion that this was inherently unreasonable.

4. Demonstration of absurdities in BSC method.

Presenting the Case:
Expert Testimony

1. *Example of expert testimony:*
   Unreasonable BSC compared to reasonable factors

   a. Recognize in SSA obligations of franchisee, and then identify valid evaluation factors for these obligations.

   b. Compare these valid, industry standard evaluation factors with what was in the BSC.

Presenting the Case: Expert Testimony

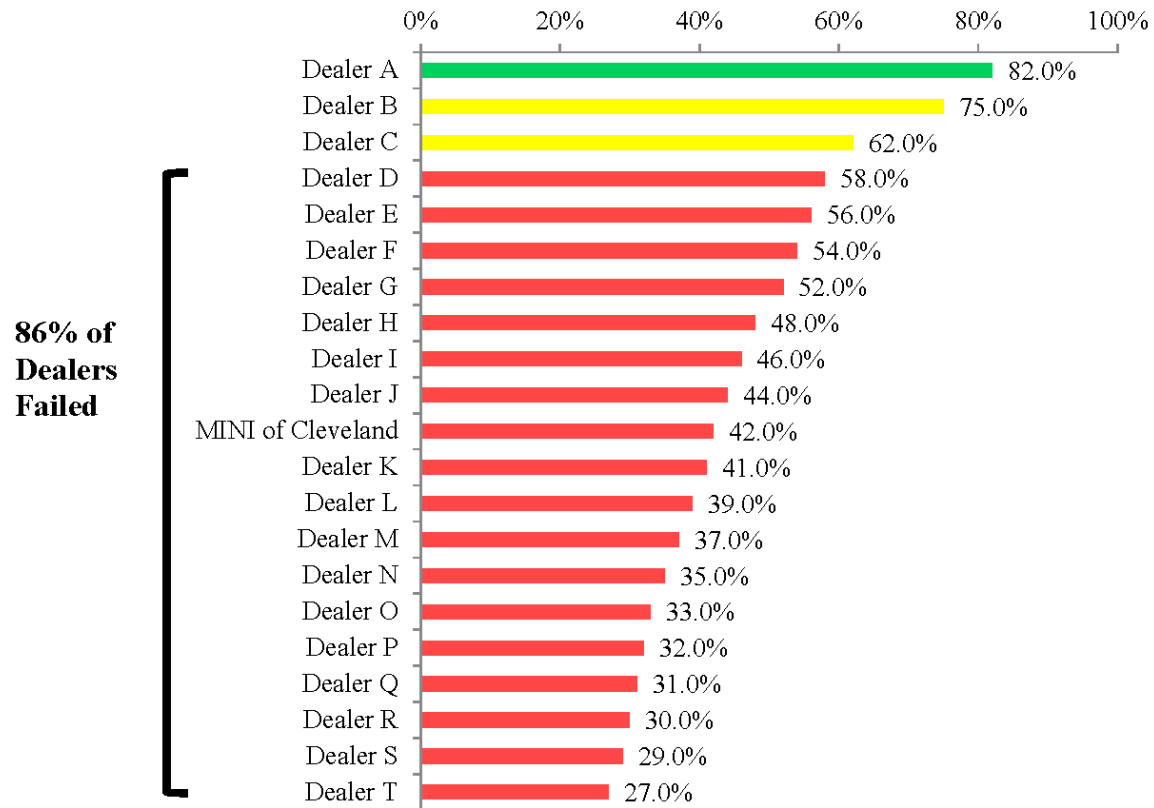2. *Example of expert testimony:*
Non-replicable factors

   a. Identify evaluation factors—or calculations involving such factors—that are opaque, non-replicable, or impossible for a dealer to understand.

   b. Conclude that any non-replicable, unreproducible data or calculations are inherently "unreasonable."

Presenting the Case: Expert Testimony

3. *Example of expert testimony:*
    Absurdities of Manufacturers' Method

    a. Re-present manufacturer's own rankings, calculations, or summary scores.

    b. Demonstrate that these results are absurd.

        i.   "Lake Wobegon Syndrome"

        ii. Failure of manufacturer to act as if "deficient" dealers are actually deficient

        iii. Show how well-performing, middle-of-the-pack dealers are suddenly "deficient" or "failing"

Illustration of the BSC Index, MINI Dealers in the Central Region, 2017

86% of Dealers Failed

Dealer	Value
Dealer A	82.0%
Dealer B	75.0%
Dealer C	62.0%
Dealer D	58.0%
Dealer E	56.0%
Dealer F	54.0%
Dealer G	52.0%
Dealer H	48.0%
Dealer I	46.0%
Dealer J	44.0%
MINI of Cleveland	42.0%
Dealer K	41.0%
Dealer L	39.0%
Dealer M	37.0%
Dealer N	35.0%
Dealer O	33.0%
Dealer P	32.0%
Dealer Q	31.0%
Dealer R	30.0%
Dealer S	29.0%
Dealer T	27.0%

Note: Data obfuscated to comply with the protective order in this case.
Source: AEG illustration of Balance Score Card figures.
Analysis: Anderson Economic Group

Illustration of 2017 Sales by MINI Dealers in the Central Region
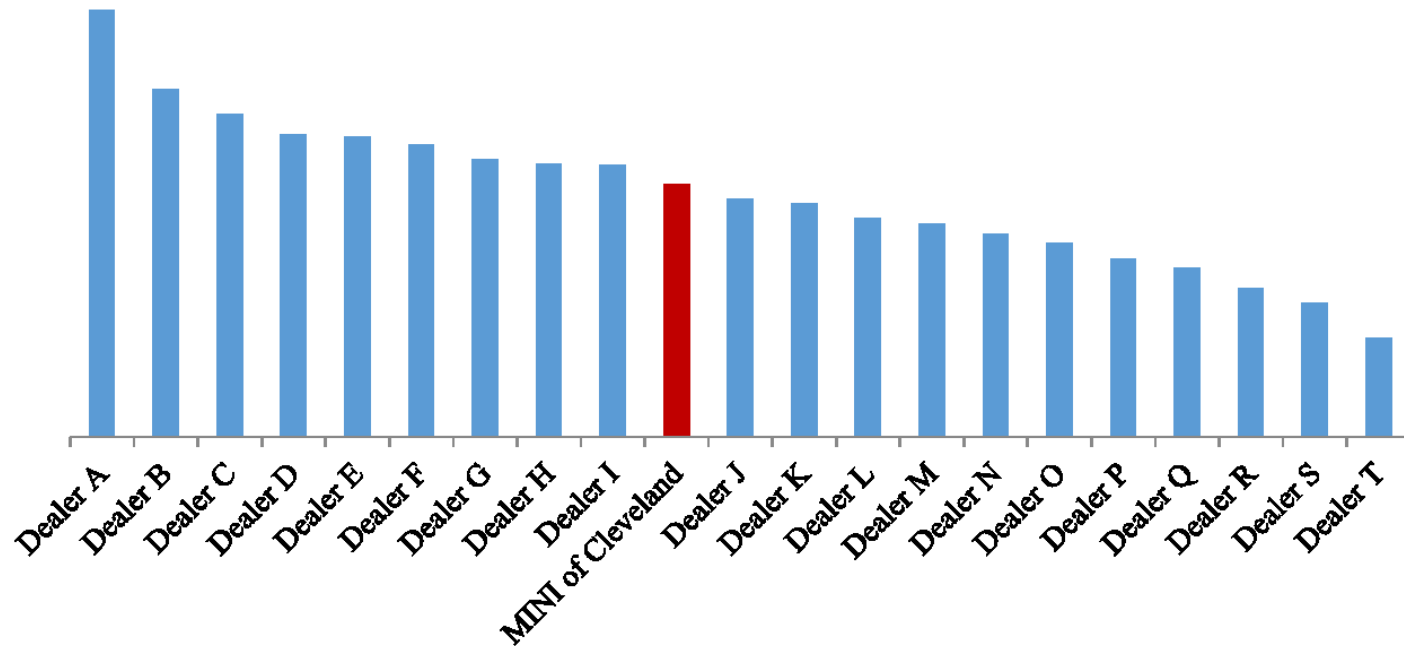
Note: Data obfuscated to comply with the protective order in this case.
Source: AEG illustration of sales figures.
Analysis: Anderson Economic Group

ranchisor shall evaluate the ~~~~

~~ust notify the franchisee and transferee within 30 days. Within 90 days of such disappr~~

~~e franchisee or transferee may file a protest. *See R.C. 4517.56.*

~~~~ notified BMW NA tha~~ ~~~~tended to transfer his

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(37) However, BMW NA's BSC summary, as applied to all 24 MINI dealers in the Midwest Region for the year 2017, resulted in the majority (88%) of the MINI dealers being unsatisfacto-ry, according to Anderson of Anderson Economic Group, testifying as an expert relative to new motor vehicle dealers. He explained that the BSC criteria used by BMW NA to assess a transfer request "fails to be an objective and reasonable standard [because a] metric that consistently fails the majority of the MINI dealerships is not a reasonable or objective metric" of dealer per-formance. Anderson saw no reasonable or objective metric that suggested that MINI of Cleve-land was not a typical, satisfactory example of a compliant MINI franchise, or that BMW NA of-fered any objective, reasonable excuse based on performance to refuse the transfer from Frye to MacLean. P-62.

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~~~~ecify the objective criteria it use~~

~~~~BMW NA satisfied this sta~~ ~~~~

Conclusions of Law

(1) BMW NA is a franchisor as defined in R.C. 4517.01(W)

Conclusions

How the Case Was Won: 3 Key Players

I. The Dealer

II. The Attorney

III. The Expert

IV. *plus:* Lessons outside this industry

I. **The Dealer**

A. Both dealers were present at the hearing.

B. Both dealers were able to demonstrate managerial competency.

II. The Attorney

A. The attorney exposed the manufacturer's secret plan to consolidate the market in discovery.

B. The attorney noted the manufacturer's failure to use statutory and contract factors to evaluate the dealer.

III. The Expert

A. The expert effectively demonstrated the "unreasonableness" of manufacturer's metrics,

- This required demonstrating the faults *in the entire method*—after going through the BSC category-by-category.

B. The expert demonstrated plausible alternate scenario using only credible data and metrics.

III. The Expert
(continued)

C. The expert withstood aggressive cross-examination.

- *Manufacturer is now defending the entire system, used across many dealers.*

- *Manufacturer has the presumption of reasonableness advantage.*

D. The expert grounded analysis in actual data, actual contract language, and actual industry practices.

Lessons outside of the auto industry

1. The BMW-MINI BSC metric was better documented than most "objective" metrics commonly seen in industry.
   - It was *much* better documented than typical machine-learning-based underwriting, screening, facial recognition, and targeting software used on consumers.
   - Rebuttable presumption of reasonableness not unusual.

2. Lessons apply to disputes involving automated data processing, "AI" and "machine learning" applications evaluating humans.

3. Attorneys need to start thinking about performance evaluation systems as a whole, rather than a collection of factors.

Questions?

1. See additional materials:

   a) **Case Decision** – Colin MacLean and CJM Automotive Group, Inc. and Kirtlund C. Frye and CMJ Automotive II, Inc., dba MINI of Cleveland v. BMW North America, LLC, MINI Division

   b) **Case Numbers:**

      18-01-MVDB-402-CM *and* 18-01-MVDB-403-CM

2. See presenter websites:

   a) **Patrick L. Anderson,** Anderson Economic Group: AndersonEconomicGroup.com

   b) **Christopher DeVito,** Morganstern, MacAdams, and DeVito: mmd-law.com

   Thank you!