

## Breaking Down the Myth of a Manufacturer's Demand

by : Richard N. Sox, Jr.

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On January 2, 2007, all Audi dealers received a letter entitled "The All-New 2008 Audi R8 – Dealer Participation Update." The R8 is a new product being manufactured by Audi, which is expected to be a hot seller. The letter begins by reminding dealers that, as was discussed at the regional meetings held in November, they have the choice of three levels of participation in the R8 program. Stop there! What do they mean "levels of participation?" If you are an Audi dealer, aren't you supposed to, as a matter of course, receive your fair share of the R8 allocation? Maybe – maybe not.

As we have discussed so many times in this column, the answer to this question of whether you are entitled to all new products comes down to a combination of what the dealer agreement says and what your state motor vehicle franchise laws provide. In the case of Audi, the dealer agreement is unusually generous in stating that Audi will sell and deliver "authorized products" to the dealer. The term "authorized products" is defined in the dealer agreement as motor vehicles supplied by Audi under the Audi linemake. So, logic would tell us that if the R8 is an Audi and is a vehicle being supplied to dealers by Audi, then the R8 falls within the definition of an authorized product to which every dealer is entitled.

If the dealer agreement is so clear, then why is Audi being so kind as to "offer" its dealers the opportunity to participate in the R8 Program? It all comes down to continuing efforts on the part of manufacturers to control more and more of your business operations. Audi wants to give the dealers the impression that they have to do something over and above the obligations under their dealer agreement in order to have the privilege of selling the R8.

Under this program, Audi is telling dealers that if they want to be a "certified R8 point" then they are required to do several things, the least of which is to (i) provide current model year Audi vehicles as service loaners for all Audi customers, regardless of where the vehicle was purchased; (ii) provide a minimum of 400 square feet of highlighted showroom space for R8 showroom display element; and (iii) pay \$100,000 for the R8 marketing package. If a dealer can't meet these requirements, he or she is left with the choice of being a mere service point for the R8 or not participating in selling or servicing the R8 at all.

Under most other manufacturer dealer agreements, the dealer is only guaranteed the vehicles that are expressly listed on the "product addendum," attached to the dealer agreement. For dealers operating under this more common type of dealer agreement, you are relying solely upon your motor vehicle franchise laws in order to have the right to sell and service every product distributed by your manufacturer.

The Audi dealer that brought the January 2nd letter to our attention happens to be located here in Florida. After reviewing the dealer agreement and despite determining that it seemed pretty clear to us that he had the right to receive the R8 with no strings attached, we took a look at Florida's motor vehicle franchise protections just to make sure we weren't left to argue with Audi over the interpretation of its own dealer agreement (no matter how clear it seemed to us). Florida's law provides that a manufacturer must fairly allocate all same linemake vehicles it produces to each of its dealers. Florida law goes on to say that a manufacturer cannot force a dealer to do any one of the following as a condition of receiving any such vehicle:

1. pay any extra fee;
2. execute a separate franchise agreement;
3. purchase unreasonable advertising displays;
4. remodel, renovate or recondition existing facilities; or

## 5. provide exclusive facilities.

Between the Audi dealer agreement and Florida franchise protections, we feel our Audi dealers in Florida are on solid ground in demanding they be allocated the R8 without having to comply with the requirements listed in Audi's R8 Certified Point Program. For dealers in many other states, however, you don't have a franchise law provision to fall back on. Many states' franchise laws are, unfortunately, silent on this issue. If you are in one of those states and have a dealer agreement different from Audi's, you will likely be at the mercy of the preconditions placed upon you by the manufacturer. That is not a position in which any of you want to find yourselves. Recent examples of this issue arising are the introduction of the BMW Mini, the Mercedes Benz Maybach and the Toyota Scion. In most cases, after some tense negotiations, the existing dealer body ended up being awarded the "franchise" for these new models, but not without first having to pay the price of admission!

Since you can't change your existing dealer agreement, the best way to protect yourself in this type of situation, which is sure to happen again and again, is to encourage your dealer association to pursue an amendment to your state franchise protections. Using Florida's law as a model for such a provision would be a very good start.

Now, before the manufacturer representatives reading this article (and we know you do!) have a coronary, let me say that we agree that there are certain items which are generally considered "reasonable" for the factory to demand of the dealers with a new product launch. First, it is perfectly reasonable to expect dealers to purchase special tools for use in servicing the vehicle, as well as undertaking sales and service personnel training on the new vehicle. Beyond special tools and training, however, any other precondition should be resisted as unreasonable.

## **Buying and selling dealerships are not exempt**

When it comes to a disagreement with your manufacturer, most dealers are wise enough to seek out lawyers with experience in the area of motor vehicle franchise disputes. Remember though, do not limit involvement of experienced automobile franchise counsel to a manufacturer dispute. We have seen time and again where a phone call from a dealer can put him or her on the right track to resolving the dispute with the manufacturer in a quick and efficient manner. This is because an experienced automobile franchise attorney has usually seen the situation before (or one similar to it) and can tell you whether you are barking up the wrong tree or whether you have a strong case.

Unfortunately, when it comes time to buy or sell a franchise, many of you don't seek experienced automobile franchise counsel. Instead, you call your local corporate attorney to assist you with the transaction. Nothing against your local corporate attorney (we work with them all the time on behalf of dealers' interests) but they have usually either never been involved in an automobile buy-sell transaction or have only had the occasion to complete one every few years. The manufacturer's representatives, let alone experienced counsel on the other side of the transaction, who are regularly involved in these transactions will run circles around a lawyer with little to no experience with the buying and selling of automobile franchises.

We continue to see the fallout from dealers failing to seek experienced automobile franchise counsel in the arena of buy-sells. In addition to the costly missteps commonly found within the asset or stock purchase agreement (that is a story for another day), the fallout resulting from negotiations with the manufacturer can be severe. The most recent example of such a situation that has come our way involves a dealer acquiring a franchise who was told by the manufacturer that the manufacturer would not approve the buy-sell unless he agreed to relocate and construct a new facility. Of course, without knowing that most states have very specific laws governing a manufacturer's approval or disapproval of a proposed transfer, the dealer's transactional lawyer advised him that if he wanted the franchise he

would have to capitulate. The dealer's local lawyer did not know to tell the dealer to inform the manufacturer that he had specific rights under the state franchise protections and to insist that any conditions placed on the transaction be limited to those found in the transfer law. As a result, the dealer committed to an agreement to relocate and construct a new facility in order to obtain approval to acquire the franchise. Now we are left to clean up the mess!

It is very difficult to unwind these types of commitments on the part of the dealer because a judge only sees that the dealer, as an "experienced" businessman or businesswoman, signed a written agreement to do whatever it is that the manufacturer was insisting upon. As you know, ignorance of the law, especially your own state motor vehicle franchise law, is no defense!

Having an attorney on board that knows the manufacturer's tricks and how far a manufacturer can push in seeking terms outside of the buy-sell agreement is critical to protecting any dealer acquiring a new franchise. Don't make the mistake so many dealers have made in the past – it can turn a good investment into a devastating loss!

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