



Lessons Learned from the GM and Chrysler Arbitrations

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Bass Sox Mercer (our law firm) handled arbitration filings for 74 GM and Chrysler dealers seeking reinstatement of their franchises. Almost one half of those dealers were reinstated very early in the process, primarily by GM. The remainder of those matters were ultimately settled or went on to a final hearing. BSM attorneys won reinstatement at final hearing for four out of five of our dealers.

There are lessons to be learned for all dealers, not just those holding GM and Chrysler franchises, through this incredibly unique process which included many hours of settlement discussions with GM and Chrysler representatives, document review, and hearing testimony.

Monitor your Dealership Performance under Manufacturer Formula

Many GM and Chrysler dealers were caught asleep at the wheel when it came to how their manufacturer viewed their performance. GM and Chrysler made performance, in particular sales performance, one of the primary criteria for determining the dealers that would be terminated through the bankruptcy process.

In addition to the standard Retail Sales Effectiveness calculation GM has utilized for years, GM instituted the Dealership Performance Summary a few years ago. The DPS score was calculated utilizing a combination of sales performance, customer satisfaction scoring, working capital standard, and dealership profitability. Dealers were sent notice of their DPS score on a regular basis and provided the ability to access the DPS calculations through the dealer web portal.

Unfortunately, many dealers ignored the DPS scoring provided to them by GM. In the arbitrations, GM presented web logs which demonstrated that the dealership had not accessed its DPS score in many months and, in some cases, had never accessed the scorecard. GM made lots of hay with these reports by arguing that the dealer didn't care enough about his or her franchise to spend a few minutes reviewing the DPS scorecard.

Chrysler, on the other hand, has used the same performance calculations for many years. Chrysler, like most manufacturers, requires a certain working capital amount, adequate CSI scores, and sales performance based upon a comparison to the "average" Chrysler dealer in the state. The sales performance criteria is known as Minimum Sales Responsibility or "MSR." Although Chrysler regularly provided dealers with the same performance standards for many years, like GM, it attempted to make the argument that dealers had ignored one or more of these fundamental requirements. Ultimately,

both GM and Chrysler contended that dealers clearly did not care about their franchises because they continued to allow their dealership to fall short in one or more of the performance criteria.

The lesson to be learned here is that if a dealer is falling short in any particular performance category, the dealer must document his or her file with a communication to the manufacturer either explaining the deficiency and the means by which the dealer will correct it, or outlining the reasons why the dealer believes the standard is unreasonable as applied to the dealership.

As I have repeated many times already in this column, it is critical that dealers not ignore any performance deficiency claimed by the manufacturer. The manufacturer will create a paper trail a mile long to include every communication to the dealer warning of the deficiency. The dealer must do the same in order to make clear to any independent decision-maker (arbitrator or judge) who might hear a future dispute that the dealer does indeed care about his or her franchise and actively addressed the manufacturer's concern. Responding to the alleged deficiency will create a consistent argument against the performance standard and serve the purpose of making the argument against the performance standard more credible in the eyes of the decision-maker.

Pay Attention to the Market Territory Assigned to the Dealership

As part of every dealer's performance criteria is a component involving the dealership's assigned market territory. This territory is the geographic area within which a dealer's sales performance is judged.

A number of our GM and Chrysler dealers found themselves in the position of arguing that their market territory was improperly drawn which, in turn, resulted in the false appearance of poor sales performance. However, the fact that the dealer's territory was not properly drawn was never brought to GM or Chrysler's attention. Once the dealer was terminated by GM or Chrysler, as expected GM and Chrysler dug their proverbial heels in the ground and refused to take another look at the dealer's territory. This left the dealer, and our lawyers, in the position of explaining to the arbitrator that our concern with the way the dealer's territory was drawn was not something we had pulled out of thin air in order to avoid be labeled as a poor performer. It was an uphill battle convincing the arbitrator that the territory assigned to the dealer had always been fundamentally flawed and was the real reason for the poor sales performance numbers.

The lesson to be learned is that dealers must pay attention to the market territory assigned by the manufacturer. The market territories are amended from time to time based upon changes to the dealer network and upon the latest US census data. A dealer's territory is drawn by a computer using distances measured by air miles. There is little human interaction in this process. As a result, the manufacturer's assignment of territory does not generally take into account geographic obstacles such as rivers and mountains and does not take into account the road system running through a dealer's community. There are countless examples of dealer's being assigned a geographic areas that are much closer to another same linemake dealer when one considers the customer's drive distance. We have also seen on more than one occasion

where the manufacturer has added dealerships to the community without adjusting the existing dealers' market territory.

Dealers must keep a close eye on their assigned market territory at all times. We continue to be amazed at the errors made by manufacturers in drawing those territories. It is very important to document those errors well in advance of any formal dispute which may arise over the dealership's sales performance.

Engage the Manufacturer in Discussions related to Dealer Network Plans

For many years, GM and Chrysler analyzed, discussed and published ever-changing plans for their respective dealer networks. At any given time, GM and Chrysler had some plan for both the image of dealership facilities and the franchises they wanted to see joined together under one roof. As we all know, those plans (in particular, GM's) changed every couple of years. As a result, many dealers checked-out of the discussions. These dealers didn't want to waste their time or money attempting to comply with the latest plans only to have the plans change, or worse, have a linemake discontinued altogether.

Of course, within the reinstatement arbitrations, GM and Chrysler used the dealers' apparent lack of interest against them. GM and Chrysler argued that dealers who did not attempt to comply with network plans were not a "team players" and didn't truly care about the best interest of their manufacturer or the residents of their community.

Not understanding the ins and outs of the manufacturer-dealer relationship and the fact that the interests of the two parties in that relationship are fundamentally different, arbitrators seemed to buy into GM and Chrysler's argument.

Although dealers had, and continue to have, good reason not to trust the manufacturer or to look out for their manufacturer's best interest, **the lesson learned is that dealers must at least give lip service on the issue of dealership image and network plans.** The best way to do this is to communicate in writing with the manufacturer. When the dealer learns of a new image program or network plan ask questions about what the recommendations are for your specific dealership and specific market. If those plans suggest that the dealer should take some action (upgrade facility, acquire another franchise, dispose of a franchise, etc.), then the dealer should analyze that recommendation from the standpoint of the dealership's best interest and then provide a detailed response which explains what the dealership would require in order to be able to proceed with those plans or, alternatively, why the recommendation is not feasible.

Implement a Succession Plan

Interestingly, although GM and Chrysler did not argue the point very forcefully, arbitrators in the reinstatement hearings were extremely interested in whether the dealer had a successor lined-up to take over operations of the dealership. Arbitrators were clearly judging the level of interest the dealer had in his or her franchise based, in part, upon whether the dealer had gone to the trouble to create a succession plan. If the dealer could not point to a family member or manager that was working their way up through the dealership and had been approved by the manufacturer as a successor

dealer operator, it was more difficult to convince the arbitrator that this was a dealership that should not be terminated.

The obvious lesson to be learned on this point is to insure that the dealership has a written succession plan in place. A proper succession plan involves identifying a successor, obtaining manufacturer approval of that individual, employing that individual in the dealership such that they are obtaining real experience in every department and, of course, sitting down with your attorney and accountant to create the best plan for the eventual transfer of ownership.

I could go on and on with the lessons learned from the GM and Chrysler arbitrations but space is limited. Nonetheless, these lessons are ones that every franchised automobile dealer should take to heart. As you can see, the common thread in these lessons learned is that written communication with your manufacturer is of the utmost importance. When determining what dealerships to harass, push out of business or ultimately terminate, the manufacturers undoubtedly first select those dealers for which the paper trail is one-sided in the manufacturer's favor.

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