GM's Dealer Strategy Off the Mark

by : Richard N. Sox, Jr., Esq.

The relationship that the new General Motors intends to have with its going-forward dealers has now come into full focus. First, GM started with the onerous, take-it or leave-it participation agreements and then followed up with its potentially harmful Essential Brand Elements incentive program. Now, GM has issued a new dealer agreement for those dealers hoping to receive one or more additional brands to round out their product offering (franchises taken by GM from other dealers). This new dealer agreement combines two documents – a "Summary Agreement" and an "Exclusive Use Agreement."

The terms of the new dealer agreement are extremely onerous and, like my analysis in last month's column on the Essential Brand Elements incentive program, a violation of many state franchise laws. Dealers who are being asked to sign this new dealer agreement should first seek out the assistance of an experienced motor vehicle franchise lawyer to determine if any of its provisions are a violation of your state's franchise protections. In particular, we have found that the following provisions violate a number of state franchise laws:

Arbitration – This provision requires the dealer to agree to submit any dispute related to your franchise and the dealer agreement to binding arbitration. Most states, along with federal law, strictly prohibit a requirement that a dealer be forced to submit a dispute to binding arbitration. Instead, the venue for any such dispute is dictated by state franchise law.

Dualing – This provision requires a dealer to provide GM with an exclusive facility whether or not you were previously approved to have a non-GM dual and regardless of whether your facility is viable containing just GM linemakes. Many states have recently moved to prohibit or limit a manufacturer's ability to require exclusive facilities.

Facility renovation/expansion/separation – This provision has the dealer committing to a facility upgrade to meet GM's latest image requirements. Interestingly, this dealer agreement provision doesn't provide much detail as to the extent of the upgrade but instead seeks to have the dealer agree to rely upon the judgment of GM's exclusive architectural firm over the next few months for that information. GM is asking dealers to agree to something that is unknown and could be tremendously costly. Again, many state franchise laws protect dealers from unreasonable facility upgrades that cannot be justified by reasonable market and economic expectations.

After determining whether any of the dealer agreement provisions violate your state franchise law, a dealer being asked to sign the dealer agreement in exchange for a new franchise should inform GM, in writing, that the particular provision(s) violates state franchise laws and should be removed from the dealer agreement. Whether or not the dualing and facility upgrade provisions violate your franchise law, a dealer should at a minimum ask GM, in writing, to provide you with details as to the basis upon which GM has determined that your market will support your facility in its upgraded and undualed capacity.

To sign or not to sign the new dealer agreement

If you are unable to obtain any relief from the dealer agreement, whether through citing franchise laws or pleading rationale economics, then in order to receive the much-needed additional franchise, a dealer is going to have to decide whether to sign or not sign the dealer agreement. A question we receive frequently at the firm is whether franchise laws will protect dealers subsequent to signing a manufacturer agreement when the dealer knows at the time of signing that the agreement contains a provision contrary to state franchise law. The answer to this question will, to a great degree, come down to how exactly your franchise protections are written.

It will be critical for the dealer inclined to sign the dealer agreement despite franchise law protections to have an experienced motor vehicle franchise lawyer determine if the state franchise law is written such that the prohibitions are enforceable "notwithstanding the terms of the dealer agreement." If you are fortunate enough to have had your franchise laws written in this fashion, then you stand a better chance of being able to seek the protection of the law even after signing the agreement. However, a word of caution – judges generally do not like the idea of a party to a contract taking something of value from the other party (in this case, a new franchise) and then not following through with their part of the deal. Regardless of how your state franchise laws are written, this is a serious risk in signing the dealer agreement and hoping to later extract yourself from the most onerous terms within the agreement.

Nonetheless, if a dealer has documented their objection to the dealer agreement provision as violative of franchise laws and GM still ignores the request to remove the offending provision (s), then the dealer has a strong argument that GM took the risk of relying on the dealer's promise to comply despite it being pointed out that the provision was contrary to franchise laws. With all of this said, we certainly prefer the dealer do all he or she can to negotiate the onerous terms of the agreement before even considering whether to risk the potential consequence of being required to perform under the agreement.

A misunderstanding regarding Chrysler and GM's ability to instigate another round of dealer cuts

We have been told by several dealers that floorplan and capital lenders are informing some Chrysler and GM dealers that they will not continue, or plan to severely limit, additional lending because it is their understanding that Chrysler and GM are planning another round of dealer cuts. Do not let this misunderstanding go unanswered!

As awful as the bankruptcy process was for old Chrysler and old GM dealers, the ability of new Chrysler and new GM to cut additional dealers is restricted by state franchise laws. Through the bankruptcy process, the old Chrysler and GM entities have assigned, with the approval of their respective bankruptcy judges, all going-forward dealer agreements to the new companies. The new companies are not in bankruptcy and, thus, cannot simply "reject" dealer agreements as old Chrysler and old GM did. Beyond the terms of the GM wind-down agreements, neither Chrysler nor GM can unilaterally terminate any of its dealers. Just as before the bankruptcy proceedings, state franchise law protections govern both the Chrysler

dealers and GM dealers who were lucky enough to avoid rejection.

To reiterate, there is absolutely no legal basis for the rumor that new Chrysler or new GM are planning to make further systemic cuts to the dealer network. That nightmare is fortunately over, at least for now.

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