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CLIENT ALERT

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HOW TO LOSE YOUR FRANCHISE LAW PROTECTIONS

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Most dealers are focused on servicing existing customers, selling cars, parts and service - and usually don't have time to pay attention to the countless letters, reports and agreements manufacturers bombard them with . . . until a dispute is right around the corner. This typically occurs years after signing numerous documents that, at the time, seemed harmless or that were signed when the dealer did not have the luxury of sitting down and reviewing the details. Many dealers are exasperated by countless attempts at negotiating with their manufacturers for different terms, particularly when they are told, "This is the same agreement/terms every dealer is signing," and don't make any efforts to read or understand the agreements. Other dealers believe that if a dispute does arise, any court will understand the substantive issues and the "true" relationship between dealers and their manufacturers well enough to appreciate they had been "coerced" into signing. Overcoming this aspect of human nature is not easy - and strategically managing the manufacturer relationship often defies common sense or logic.

Along these lines, it is important to remember that courts or arbitrators rarely have any sympathy for commercial parties that have even a tiny window of opportunity to review documents with counsel. While the disparity in bargaining power between a dealer and a manufacturer may exceed the disparity between a dealer and a consumer, the financial helplessness that causes a dealer to sign documents (that are non-negotiable) almost never serves to excuse a dealer from its obligations.

Manufacturers have much more experience with disputes than individual

dealers do. Comparatively, they are "experts" in handling disputes. The manufacturers squeeze and attack only the "low-hanging fruit" - those dealers that they have targeted for failure. Often, they use tactics based on the circumstances described above to have dealers sign documents that lay the foundation for a winning strategy or, worse, have dealers sign documents waiving the protection of the local franchise laws, thereby making them easy prey.

These documents come in the form of Letters of Intent and other "side" agreements where dealers agree that the terms of their facility upgrade requirements, financial assistance or commitments to sales performance figures (among other types of agreements) are "not a franchise agreement and cannot be challenged under the local franchise law as a franchise agreement." This usually leaves dealers that desperately need franchise law protection without any legal recourse to protect themselves.

Currently, some states are evaluating laws that would prevent such agreements that mask the fact that they are simply signing a waiver. The most basic strategy to implement: any time your manufacturer asks you to sign or initial a document, just imagine the title of the document is "WAIVER OF RIGHTS" and proceed accordingly.

In an effort to address issues that often arise, McCarter will start publishing a series of Automotive Franchise Law FAQs on a bimonthly basis. If these FAQs don’t hit your particular problems - just pick up the phone!

1. When I invest in a new facility or relocate my operations, how much extra protection is there against geographic moves by same-line make competitors?

Whether you are in a new, image-compliant facility or an old, dilapidated warehouse, your protest rights are limited to those provided in G.L. c. 93B - unless you negotiate additional rights in exchange for making a new investment.

This is particularly important for luxury brand dealers that expect larger territories and that are surprised, after building state-of-the-art facilities, when their manufacturer relocates or appoints a competitor much closer than they ever would have imagined (and they never would have made the investment had they known). When presented with the Letter of Intent that

spells out your construction timeline for a build-out, that is when you need to request an exclusive territory (at least for a window of time).

2. If I invest millions in a new facility, how much can I recoup from my factory if they suddenly reduce my assigned AOR/PMA, reduce my planning volume or relocate a dealer into my AOR/PMA?

Typically, you have no such right of "recoupment." Every manufacturer will demand investment - only to insist that you sign documents that say (1) you cannot rely on their demands, (2) you cannot trust their predictions when making investment, and (3) the decision was all yours.

3. Can my manufacturer appoint a same-line make dealer in my AOR/PMA/APR?

Absolutely. AOR/PMA/APR gives you no exclusivity to your market. Rather, your AOR/PMA/APR is the territory your manufacturer assigns to you for purposes of measuring your performance. Your RMA (Relevant Market Area) is the geographic circle around your dealership assigned by state law. If your manufacturer proposes an appointment of a dealer within that circle, you probably have protest rights (subject to a few exceptions).