December 2019

Buyers Beware: Signing Your Dealer Agreement Without Reading It Could Be Costly

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SIGNING YOUR DEALER AGREEMENT WITHOUT READING IT COULD BE COSTLY. If you are not in the habit of reading documents the Manufacturer puts in front of you to sign, it is time you started. Whether you are signing new documents because you are buying a dealership, or renewing your Dealer Sales and Service Agreement, what you find if you read it carefully may surprise you. Manufacturers have been making more revisions to their Dealer Sales and Service Agreements that erode dealer rights in the last five years than in the prior 25 years combined.

HERE'S WHY: Dealers are unwittingly agreeing to things like allowing the manufacturer to charge their account for money owed to the manufacturer by the selling dealer. This can cost a dealer hundreds of thousands of dollars. Make sure you give any documents a manufacturer asks you to sign to your attorney to review before you sign if you don't want to read it or don't understand it. A manufacturer cannot, in many states, refuse to approve a buyer because the buyer will not agree to unreasonable agreements or unreasonable provisions contained in a Dealer Sales and Service Agreement.

PROTECTIVE STATUTES. California makes it unlawful for manufacturers to terminate a franchise without good cause or to fail to approve a buyer without good cause. Poor sales performance or failure to sign a new dealer agreement are **NOT** typically good cause for termination. In addition, refusal to agree to unreasonable terms in a dealer sales and service agreement is not good cause for refusing to approve a buyer.

MORE EXAMPLES OF PROBLEM PROVISIONS. Here is a sampling of some of the provisions I have seen manufacturers attempt to put into Dealer Sales and Service Agreements for the first time in the last five years:

1. A provision stating the dealer agrees to include in their purchase and sale agreement, if they sell, that the buyer will agree to all of the manufacturer's current dealer agreement provisions **as a condition of the manufacturer's obligation to approve the buyer** to

whom a seller has agreed to sell their dealership. This provision is prohibited by California and many other state's laws that provide that a manufacturer cannot unreasonably withhold consent to a buyer. If a seller agrees to a provision like this one, the seller will have given the manufacturer leverage against a buyer. Why? Because the seller, not the buyer, has the right to object when a manufacturer unreasonably withholds consent to the transfer of the dealership assets to a buyer. If the seller has agreed it will not object, the buyer has no leverage to negotiate terms it can live with. This makes the dealership less valuable because it narrows the pool of buyers to those who will agree to unreasonable terms and because the unreasonable terms could affect profitability.

2. A provision stating that the manufacturer's sales performance standards are reasonable. They often are not reasonable and agreeing they are without being able to understand how to meet them is a huge mistake. This is the manufacturer's attempt to circumvent recent case law protecting dealers from incomprehensible and unreasonable performance standards.
3. A provision giving the manufacturer or its assignee the right to perform an environmental inspection for purposes of determining whether it will exercise its right of first refusal. This provision gives the manufacturer the right to exercise their right of first refusal and then walk away leaving the seller without a buyer unless the original buyer wants to step back in after the manufacturer has essentially queered the deal. If the manufacturer's candidate didn't like something they saw, even a buyer who already approved everything is likely to take a second look if they haven't already moved on to other things. Can they still be bound to perform after the manufacturer conducts due diligence and finds something the buyer didn't find? That will depend on the terms of the contract. Most asset purchase agreements do not protect a seller by requiring the buyer to perform if the entire contract cannot be performed. A buyer may not even agree to including such a provision, but if the dealer agreement allows it, then the seller will have to insist on the provision or let the balance of the deal go if the manufacturer does exercise its rights with respect to less than all of the dealerships being sold.
4. A provision allowing the manufacturer to exercise their right of first refusal with respect to only one franchise, and not all if more than one is included in the purchase agreement – or requiring a separate purchase agreement for each franchise. Under California law, and in some other states, if the manufacturer exercises the right of first refusal, it must perform all the obligations of the original buyer under the purchase agreement so that the seller does not lose the benefit of their bargain with the original buyer.

HOW DO YOU GET A MANUFACTURER TO DO WHAT YOU WANT THEM TO DO?
It's easy. California, like many other states, has laws that protect dealers. An attorney can write a kind, but firm, letter to the manufacturer educating them. Manufacturers are dealing with 50 states' laws. It is easy to think they know the laws of all states, but they generally don't. They

need to be educated. When they get such a letter, they go to their legal department, which checks the letter for accuracy. If it is accurate, they will typically back off.

WHY THIS WORKS. California law protects dealers from termination of their franchise by a manufacturer when the dealer agreement expires. If a new agreement is not signed, the old agreement just continues. It cannot be terminated without giving the dealer the opportunity to be heard before the state Administrative Agency, the New Motor Vehicle Board. The New Motor Vehicle Board determines, in California, what is reasonable grounds for termination, not the manufacturer. Dealers win before the New Motor Vehicle Board more often than not. Refusal to sign a new dealer agreement is not reasonable grounds for termination in California. The dealers who are in the best position to fight the manufacturer when their dealer agreement becomes a topic of dispute are the dealers who have not agreed to the new terms when they hurt the dealer. Your franchise is a valuable asset. Protect it.

OTHER ADVERSE CONSEQUENCES OF JUST AGREEING: Many of these provisions could adversely affect you if you try to sell your dealership. In addition to the example above, manufacturers are notorious for asking dealers to sign agreements to expand their facilities. Many states, including California, have laws that limit the frequency with which manufacturers can require expansion or remodeling of a facility. If you are going to agree in writing to remodel or expand but you don't really want to, check into your legal rights. You may be surprised. If you are going to sign the agreement, make sure the agreement is specific and gives you plenty of time to complete the expansion. Once you have agreed to it in writing you are likely going to be bound to complete it. Manufacturers often give extensions if good cause for delays or reasonable efforts to move forward can be shown, but it gives the manufacturer leverage and takes leverage from the dealer to be in this position. The manufacturer will also ask any buyer to complete the construction you agreed to complete and didn't complete.

Here's another tip: Getting the manufacturer to sign the building plans once they have agreed to them may save you a lot of money. Manufacturers are notorious for changing their minds and revoking approval after the dealer has spent thousands of dollars and many hours getting approvals and pulling permits. If you have a written approval of your plans and a letter went out to the manufacturer telling them you are moving forward in reliance on their approval, you have the ammunition to shift the leverage in your favor so you don't have to agree to unreasonable demands.

Getting your attorney involved can save you hundreds of thousands of dollars. This article is not intended as legal advice. Contact your attorney for more information. For questions, you can reach Erin Tenner at 818-907-4071.

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