*October 2019*

# Buyers Beware: Signing Dealer Agreements Without Reading Can Get Costly

Published: *Digital Dealer*
By: Erin K. Tenner, Esq.

Many issues are arising from what's becoming standard terms in dealer agreements, so if you're not in the habit of thoroughly reviewing what the manufacturer puts in front of you to sign, it's time to put down the pen and start reading. Whether you're buying a dealership or renewing your Dealer Sales and Service Agreement, what the documents say may surprise you.

Manufacturers made 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.

**Don't Get Caught Off-Guard**

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. If your manufacturer asks you to sign a document, have your attorney review it first, particularly if you don't have time to read it or don't understand something. In many states, a manufacturer cannot refuse to approve a buyer because the buyer will not agree to unreasonable provisions contained in a Dealer Sales and Service Agreement.

**Protective Statutes**

Consult with your attorney to find out if any of the agreement's provisions violate your state's laws. For example, it is unlawful in many states 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 is not typically a good cause for termination. Refusal to agree to unreasonable terms in a Dealer Sales and Service Agreement is not good cause for refusing to approve a buyer.

Also, some states like California, protect dealers from termination of their franchise, even if the franchise agreement has expired, if the dealer does not sign a new dealer agreement.

**More Examples of Problem Provisions**

Here is a sampling of what some manufacturers have recently included as "standard" provisions:

**1.** *A provision stating the dealer agrees to include in their purchase and sale agreement that if they sell, 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 transfer ownership of the dealership to.* This provision is prohibited by many state laws that provide that a manufacturer cannot unreasonably withhold consent to a buyer.

If a seller agrees to a provision such as this, the seller gives the manufacturer leverage against a buyer. Why? Because by agreeing to that provision, the seller allows for the manufacturer to disapprove of the buyer as the new dealer if they do not agree to the unreasonable terms in their dealer agreement.

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. The dealership then becomes less valuable because it narrows the pool of buyers to those who will agree to unreasonable terms, and also because unreasonable terms could affect profitability.

**2.** *A provision stating that the manufacturer's sales performance standards are reasonable.* They often aren't reasonable, and agreeing they are, without understanding 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.* In some states, if the manufacturer exercises the right of first refusal, it must perform all of the obligations of the original buyer so that the seller does not lose the benefit of their bargain with the original buyer.

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 doesn't like something they see, 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. Even if the deal can still be enforced against the buyer, the buyer may not decide to fight rather than proceed to closing.

**How Do You Get a Manufacturer To Do What You Want Them To Do?**

It's easy. Many states have laws that protect dealers. An attorney can write a kind, but firm, letter to the manufacturer educating them. Manufacturers are dealing with laws from 50 different states; it is easy to assume they're familiar with all laws, but they generally are not. They need to be educated. When they get a letter that does just that, they go to their legal department, who then reviews the letter for accuracy. If it is accurate, they will typically back off.

**Why This Works**

California law, for example, protects dealers from termination of their franchise by a manufacturer when the dealer agreement expires. If a new agreement is not signed, then the old agreement just continues.

It cannot be terminated without allowing the dealer an opportunity to be heard before the state Administrative Agency, the New Motor Vehicle Board. In California, the New Motor Vehicle Board determines what is considered reasonable grounds for termination, not the manufacturer. Refusal to sign a new dealer agreement is not reasonable grounds for termination.

The dealers who are in the best position to fight the manufacturer when their dealer agreement becomes a topic of a 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. For example, manufacturers are notorious for asking dealers to sign agreements to expand their facilities. Many states 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 it 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 there's good cause for delays or reasonable efforts shown to move forward, but the manufacturer takes leverage from the dealer to be in this position. The manufacturer will also ask any buyer to complete the construction that you agreed to but didn't complete.

**A Final Tip**

Getting the manufacturer to sign the building plans once they 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 written approval of your plans, and a letter was sent to the manufacturer telling them you're moving forward in reliance on their approval, you have 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.

---

*Erin Tenner has represented auto dealers in buy/sell agreements for over 30 years and is a partner at Gray•Duffy, LLP in California. She can be reached at etenner@grayduffylaw.com or 818-907-4071.*

*This article is not intended as legal advice.*