



Overcoming OEM Objections to Dealer-Initiated Changes

PAUL NORMAN

(608) 283-1766

PNORMAN@BOARDMANCLARK.COM

ERIC BAKER

(608) 283-1783

EBAKER@BOARDMANCLARK.COM

BoardmanClark 

Introduction

- During the lifetime of virtually every dealership (“Dealer”), its owners will need or want to make dealer agreement changes that require its manufacturer(s)’ or distributor(s)’ (“OEM”) approval
- Whether the OEM’s approval is required is controlled by the parties’ **Dealer Agreement**

Introduction (cont.)

- Whether the OEM is willing to give its approval is controlled by the OEM's Policies and the particular circumstances of the Dealer and the proposed change
- Whether the Dealer has legal options if the OEM refuses to approve the change depends largely on the Governing Law: statutes of the state where the Dealer is located and, in some circumstances, common law remedies

Typical Dealer-initiated Changes Requiring OEM Approval

- **Ownership Changes**
- **Management Changes**
- **Dealership Assets/Franchise Transfers**
- **Succession of Deceased or Disabled Dealer Principal**
- **Location Changes**
- **Dualing (Adding an Additional Franchise)**

Ownership/Management Changes and Dealership Assets/Franchise Transfers

Sample Dealer Agreement Provisions

Fiat/Chrysler Agreement Provisions

- Dealer shall not change the personnel designated as having active, substantial and continuing personal participation in the Dealer's management without FCA's prior written approval (Paragraph 2)

FCA Provisions (cont.)

- Dealer warrants that there will be no change in the dealership's ownership affecting more than fifty (50%) percent of the ownership interest of Dealer, nor will there be any other change in the ownership interest of Dealer which may affect the managerial control of Dealer without FCA's prior written approval" (Paragraph 3)

FCA Provisions (cont.)

- FCA may terminate the dealer agreement on 60 days notice in the event of any change, whether voluntary or by operation of law, in the ownership of the Dealer as listed in Paragraph 3 “resulting in a transfer of control or majority interest in in” the Dealer, unless FCA has given prior written approval to such change (Paragraph 28(b)(iv))

FCA Provisions (cont.)

- Even if proposed buyer meets FCA's qualifications, FCA retains a right of first refusal to offer to purchase the dealer's assets "on the same terms as said qualified prospective purchaser." FCA must make such offer within 15 days after receipt of the dealer's application to sell and all necessary information. Within 15 days after FCA has made such offer, dealer may withdraw its proposal to sell. Dealer may also request that FCA predetermine whether a proposed purchaser would be acceptable. (Paragraph 34)

FCA Provisions (cont.)

- The dealer agreement will terminate automatically without notice from either party in the event of any attempted or actual transfer of a substantial portion of dealership assets by Dealer without the prior written consent of FCA (Paragraph 28(c)(ii))

Ford Agreement Provisions

- Agreement is entered into with Dealer in reliance that only the persons named in paragraph F(i), (ii) and (iii) will be the principal owners, managers and remaining owners, respectively, of the Dealer (Paragraph F)

Ford Provisions (cont.)

- Dealer shall give Ford prior notice of any proposed change in the ownership or managerial authority of Dealer and no such change will be effective against Ford unless and until embodied in an amendment to the dealer agreement (Paragraph F)

Ford Provisions (cont.)

- Ford shall not unreasonably withhold its consent to a change in the ownership or management of the Dealer (Paragraph F)
- Any transfer or attempted transfer by Dealer of any interest under the dealer agreement or Dealer's principal assets without Ford's prior written consent is grounds for termination of the Agreement (Paragraph 17(b)(1))

Ford Provisions (cont.)

- Any change in the direct or indirect ownership or operating management of Dealer as set forth in paragraph F without Ford's prior written consent, which consent shall not be unreasonably withheld, is grounds for termination of the dealer agreement.
(Paragraph 17(b)(1))

Ford Provisions (cont.)

- Ford standard dealer agreement does not have a ROFR provision; some, but not necessarily all, Ford dealers have received amendments purporting to give Ford a ROFR

General Motors Agreement Provisions

- Change in Dealer Operator without GM's prior written consent is grounds for termination of the dealer agreement (Article 13.1.1)
- Any attempted or actual sale, transfer or assignment of the dealer agreement is grounds for termination (Article 13.1.2)

GM Provisions (cont.)

- If Dealer proposes a change in Dealer Operator or a change in ownership or a transfer of the dealership business or its principal assets, GM will consider the proposal and not unreasonably refuse to approve it, subject to the following:

GM Provisions (cont.)

- Dealer must give GM notice of the proposed change before it is made;
- GM will consider the proposal taking into account factors such as (a) the personal, business, and financial qualifications of the proposed dealer operator and investors; (b) whether the proposed change is likely to result in a successful dealership operation which will provide satisfactory sales, service, and facilities at an approved location, while promoting and preserving competition and customer satisfaction.

GM Provisions (cont.)

- GM will notify Dealer in writing of GM's decision within 60 days of GM's receipt of all applications and information reasonably requested by GM (Article 12.2)

GM Provisions (cont.)

- Even if a proposed buyer is qualified to be a dealer, GM may exercise a right of first refusal (ROFR) to purchase the dealership assets or stock and such other rights proposed to be transferred for the purchase price and other terms of sale set forth in the Dealer's agreement with the proposed buyer (Article 12.3)

GM Provisions (cont.)

- If agreement between Dealer and the proposed buyer is not “a bona fide written buy/sell agreement”, the purchase price and other terms of sale will be determined by good faith negotiations between Dealer and GM or, if an agreement is not reached within a reasonable time, by arbitration (Article 12.3.2(b))

Toyota Agreement Provisions

- No change in ownership or in the General Manager of the dealership shall be made without Toyota's prior written consent, which Toyota shall not unreasonably withhold (Section VI)
- If Dealer submits a proposal to sell the dealership's assets or transfer its ownership, or in the event of the death of the Dealer's majority owner, Toyota has a right of first refusal or option to purchase the dealership assets or stock, including any leasehold interests or realty (Section XXI.A)



***Common OEM Conditions for Approving
Ownership/Management Changes or
Dealership Assets Transfers***

Common OEM Conditions for Approving Ownership/Management Changes or Dealership Assets Transfers

- Facility Upgrade
- De-Dualing
- Execution of new dealer agreement (limited terms/different standards for renewal)
- Site Control
- Meeting/Exceeding performances metrics
- Other

***Statutes –
A Variety of Substantive
Standards***

Statutes: Substantive Standards

- Successor Only Needs to Be Eligible for a Dealer License (Iowa Code §§ 322A.12)

Statutes: Standards (cont.)

- Qualifications of Successor - OEM may not prevent changes in Dealer's ownership or management or transfer of franchise from occurring, (a) if successors are of good moral character and meet the OEM's "written, reasonable, and uniformly applied standards or qualifications . . . relating to financial qualifications . . . and business experience" (Fla. Stat. §§ 320.643-320.644); successor meets "the criteria generally applied" by OEM in approving new dealers (Ark. Code § 23-112-403(a)(1)(I)(i)(a)); OEM must be able to prove successor is not of good moral character or does not meet the OEM's existing and reasonable capital standards and uniformly applied minimum business experience standards (810 Ill. Comp. Stat. 710/4(e)(6))

Statutes: Standards (cont.)

- Balancing Test - If challenged by the Dealer, OEM must show “good cause” for its disapproval by proving that the prospective benefits to the OEM, the Dealer, the public and other dealers if the proposed action is not undertaken outweigh the prospective harms to the Dealer, OEM, the public and other dealers if the proposed action is not undertaken (Wis. Stat. § 218.0134(3)(am))

Statutes: Standards (cont.)

- Performance Standards – OEM may not disapprove a proposed change of ownership or management or a franchise/dealership assets transfer based on the proposed successor's sales or other performance if the performance standard used to evaluate that performance is not fair, reasonable and equitable (Wis. Stat. § 218.0124; Tex. OCC § 2301.467)

Statutes: Standards (cont.)

- Detrimental to the Public or OEM – OEM may disapprove a proposed change or transfer if it can show that the change or transfer will be detrimental to the public (Ark. Code § 23 – 112-403(a)(1)(I)(i)(b))

Statutes: Standards (cont.)

- Unreasonable Withholding Consent – OEM may not “unreasonably” withhold consent to the proposed change or transfer (Cal. Veh. Code § 11713.3(d)(1),(3) (“whether the withholding of consent was unreasonable is a question of fact requiring consideration of all the existing circumstances”); Haw. Rev. Stat. § 437-53; Tex. OCC § 2301.359(e),(g)-(h) (OEM may consider successor’s financial and operational performance as a franchised dealer, moral character, and satisfaction of reasonable and uniformly applied written criteria))

Statutes: Standards (cont.)

- Arbitrary Decision – OEM may not arbitrarily refuse to agree to a change in ownership or management or transfer of the Dealer’s assets (Ga. Code § 10-1-653)
- Successor Unfit – OEM has burden of showing that proposed successor is unfit or unqualified based on the OEM’s prior written, reasonable, objective, and uniformly applied standards (Ga. Code § 10-1-653)

Statutes: Standards (cont.)

- Factors Not Constituting Good Cause for Disapproval – Factors that do not constitute sufficient good cause, alone, for failing to approve a proposed sale or transfer include (1) where the successor resides; (2) successor does not intend to be employed full time in Dealer’s operation; (3) successor owns interest in competing or same brand dealerships; (4) the OEM has previously determined to discontinue the franchise of the current Dealer; and (5) successor proposes to relocate dealership as long as the relocation facility meets the OEM’s facility standards (Ohio Rev. Code § 4517.56)

Statutes: Standards (cont.)

- Transfers to Trusts or Other Entities Established by Owner – OEM may not reject a proposed transfer to a trust or other entity established by dealer owner for purposes of estate planning if the controlling person or beneficiary is of good moral character (Fla. Stat. § 320.643(2)(b))

***Statutes –
Setting Limitations on OEM
Conditions***

Statutes: Limits on OEM Conditions

- Prohibits OEM from conditioning proposed transfer upon relocation of the dealer, construction or modification of facility, or upon modification of existing dealership agreement (Fla. Stat. § 320.643(3))
- Prohibits OEM from requiring a facility improvement as a condition for entering into an agreement with a successor dealer unless OEM can prove the technological necessity or business justification for the improvement (Wis. Stat. § 218.0116(1)(vm))

Statutes: Limits on OEM Conditions

- Prohibits OEM from requiring exclusive facilities as a condition for entering into an agreement with a successor dealer (Wis. Stat. 218.0116(1)(wm))
- Prohibits OEM from conditioning approval of the sale or transfer of the Dealer's assets on the proposed successor's willingness to enter into a site control agreement (Ga. Code § 10-1-662(a)(18))

***Statutes –
Establishing Procedures
for OEM Consideration or
Denials***

Statutes: Establishing Procedures

- OEM notified of Proposed Action
 - Information to be provided with notice
 - i. Prospective successor's name, address, financial qualifications, and business experience during the previous 5 years (Fla. Stat. § 320.643(1)(a))
 - ii. Copy of all agreements relating to the proposed change and Proposed successor's dealer application (Cal. Veh. Code § 11713.3(d)(2)(ii), (iii); Tex. OCC § 2301.359(c))

Statutes: Procedures (cont.)

- OEM notified of Proposed Action
 - Information to be provided with notice
 - iii. Successor's written agreement to comply with franchise to extent it does not conflict with applicable law (Tex. OCC § 2301.359(c)(3))
 - iv. None, but OEM may timely request information “reasonably necessary” to determine whether to approve the Proposed Action after receiving notice (Wis. Stat. § 218.0134 (2)(a))

Statutes: Procedures (cont.)

- Failure of OEM to act in a timely manner
- If OEM does not disapprove in writing within specified time period, it is deemed by statute to have approved the Proposed Action (Cal. Veh. Code § 11713.3(d)(2)(B); Fla. Stat. § 320.643(1)(a); Wis. Stat. § 218.0134(2)(b))

Statutes: Procedures (cont.)

- Dealer's remedies in event of a timely OEM disapproval
 - i. Complaint to an administrative agency (Fla. Stat. § 320.643(1)(b); Wis. Stat. § 218.0134(2)(c); Tex. OCC § 2301.360)
 - ii. Court action for damages or injunction (Alabama § 8-20-11)
 - iii. Court action for damages if administrative agency determines there is no good cause for the disapproval (Wis. Stat. § 218.0163(1)(c))
- Mediation—Required before dispute is adjudicated (Wis. Stat. § 218.0136)

***Statutes –
Restricting or
Establishing OEM
Right of First Refusal***

Statutes: Right of First Refusal

- Exercise of ROFR by OEM is prohibited (Iowa Code § 322A.12)
- OEM shall have the right to assume the Dealer's lease or acquire the real property on the same terms as those on which the real property or lease was to be sold or transferred to the proposed successor (63 Pa. Stat. § 818.16(2)(i))

Statutes: ROFR (cont.)

- OEM exercise of ROFR expressly allowed with exceptions:
 - i. Family members (Cal. Veh. Code § 11713.3(t)(4); 63 Pa. Stat. § 818.16(3))
 - ii. Qualified managers (Cal. Veh. Code § 11713.3(t)(4); 63 Pa. Stat. § 818.16(3))
 - iii. Only if more than 50% of the Dealer's ownership or assets are being transferred, and does not involve transfer to family or qualified manager (Ga. Code § 10-1-663.1)

Common Law and Other Legal Theories

Common Law and Other Legal Theories

- Breach of Implied Duty of Good Faith and Fair Dealing
- Tortious Interference with Contract
- Automobile Dealers Day in Court Act (ADDICA) (15 U.S.C. §§ 1221-1226)

Representative Case Law

Representative Case Law

- Bob Zimmerman Ford, Inc. v. Midwest Automotive I, LLC, 679 N.W. 2d 606 (Iowa 2004) (statute requiring OEM to approve dealership transfer to any transferee qualifying for dealer license precludes exercise of OEM's ROFR)
- Chrysler Corporation v. Bowshier, 2002 WL 465118 (Ohio Ct. App. 2002) (OEM's failure to timely disapprove proposed transfer not dispositive)

Representative Case Law (cont.)

- General Motors Corporation v. Brett Bay, 243 S.W.2d 678 (Tex. App. 2007) (affirming in part and reversing and remanding in part Texas DOT order compelling GM to approve dealership transfer)

Representative Case Law (cont.)

- In re Van Ness Auto Plaza, Inc., 120 B.R. 545 (Bankr. N.D. Cal. 1990) (OEM's refusal to consent to assignment of dealer's franchise was reasonable when based upon relevant criteria supported by substantial evidence, including unacceptable location of assignee's dealership, below average customer satisfaction ranking, and lack of working capital)

Representative Case Law (cont.)

- Jim Carter Ford v. Ford Motor Company, Wis. Div. Hearings and Appeals, Final Decision (May 1, 2003) (OEM lacked good cause for not permitting ownership change proposed by dealer)
- Pacesetter Motors, Inc. v. Nissan Motor Corporation in U.S.A., 913 F. Supp. 174 (W.D.N.Y. 1996) (OEM acted reasonably in denying proposed sale of dealership based on buyer's proximity to existing same brand dealership)

Representative Case Law (cont.)

- Volvo Group North America, LLC v. Truck Enterprises, Inc., 2018 WL 1483431 (W.D. Va. Mar 31, 2017) (OEM had ROFR as to dealer's business related to OEM; dealer required to provide information regarding purchase price allocated to that business)
- Wilde Pontiac, Inc. v. General Motors Corporation, Wis. Div. Hearings and Appeals, Final Decision (Nov. 8, 2005) (good cause did not exist to permit proposed transfer of franchise to another dealer operating at different location without the OEM's approval)

Typical Dealer-initiated Changes Requiring OEM Approval

- Ownership Changes
- Management Changes
- Dealership Assets/Franchise Transfers
- **Succession of Deceased or Disabled Dealer Principal**
- Location Changes
- Dualing (Adding an Additional Franchise)

Succession of Deceased or Disabled Dealer Principal

Sample Dealer Agreement Provisions

FCA Provisions

- FCA may terminate the dealer agreement on not less than 60 days written notice upon the death of any person listed in Paragraph 2 as having managerial responsibility for the Dealership Operations (Paragraph 28(b)(iii))
- Dealer may request in writing (prior to death of the decedent) that FCA offer a two year term agreement to any “qualified” person nominated by Dealer upon the death of any person named in Paragraph 2) (Paragraph 32(a))

FCA Provisions (cont.)

- FCA shall offer such agreement to the nominated person, provided that such person has demonstrated operating qualifications in the management of the Dealer's organization and possesses acceptable capital and facilities (Paragraph 32(a))
- If Dealer has not nominated a successor, FCA will review the qualifications of any remaining person named in Paragraph 2 and offer a Sales and Service Agreement or term agreement, if such person is qualified, as FCA deems appropriate, with the successor to be selected by FCA if more than one person qualifies (Paragraph 32(b)).

FCA Provisions (cont.)

- The surviving spouse of a person named in Paragraph 2 may hold a financial interest in any successor dealership under circumstances specified in Paragraph 33.

Ford Provisions

- Ford may terminate the dealer agreement upon 15 days prior written notice in the event of the death or physical or mental incapacity of any principal owner named in subparagraph F(i); however, Ford shall defer the termination for a period of 3 to 12 months, as Ford may determine, if the deceased or incapacitated owner's executor or representative requests and demonstrates the ability to carry out the terms and conditions of the dealer agreement (Paragraph 17(d))

Ford Provisions (cont.)

- In the event of termination pursuant to Paragraph 17(d), Ford shall offer an Interim Ford Sales and Service Agreement to a successor dealership composed of the last person nominated by the deceased or incapacitated principal owner as his (her) successor, together with any other principal and remaining owners named in subparagraphs F(i) and F(iii), provided that:

Ford Provisions (cont.)

- i. The nomination of a successor must be submitted to Ford in writing on the form supplied by Ford (prior to such death or incapacity) and consented to by the other owners named in subparagraphs F(i) and F(iii);
- ii. The nominated successor must be approved by Ford as qualified (or capable of becoming qualified in 5 years) to assume full managerial authority for the dealership operations, which approval shall not be unreasonably withheld;
- iii. The nominated successor must be a manager of the Dealer or another “satisfactorily performing” retail business for a reasonable period of time prior to the notice of termination. (Paragraph 20(a)(1)).

Ford Provisions (cont.)

- Paragraph 20(a)(2) provides an alternative procedures for considering a successor dealership in the event the principal owner notifies Ford in writing that a spouse, other relative, or heir shall retain or acquire a financial interest in the successor, and Ford has approved such ownership.
- Paragraph 20(a)(3) provides yet another alternative procedure in the event that no successor has been nominated, nor the principal owner given prior notice of a retained or acquired interest pursuant to paragraph 20(a)(2).

Ford Provisions (cont.)

- One or more of the persons named in paragraph F(ii) of the interim dealer agreement must have the right to acquire at least a 20% ownership interest in the successor dealership and, if the successor dealership is ultimately offered a standard dealer agreement, such person(s) must have the right to acquire the entire ownership interest in the dealership (Paragraph 20(b)).

GM Provisions

- GM may terminate agreement by written notice to Dealer upon the death or incapacity of the Dealer Operator, but will first provide Dealer with 60 days to submit a proposal for a replacement dealer (Article 14.4)

GM Provisions (cont.)

- Dealer may apply for a Successor Addendum designating a proposed Dealer Operator to be established in the event of the death or incapacity of the current Dealer Operator (Article 12.1.1)
 - i. GM will execute Addendum if (a) Dealer is meeting its obligations under the Agreement and the proposed successor is employed by Dealer or a comparable automotive dealership and is already qualified or is being trained to qualify as a Dealer Operator
 - ii. New Successor Addendum is required whenever the GM dealer agreement is renewed

GM Provisions (cont.)

- Upon death or incapacity of the current Dealer Operator, Dealer may propose a successor Dealer Operator, whether or not it has an executed Successor Addendum in place, and GM will accept the proposal if:
 - i. The proposed successor Dealer Operator is qualified and ready to meet the requirements of the Dealer Agreement (including having a minimum 15% ownership interest in Dealer); and
 - ii. GM approves all proposed investors not previously approved by it (Articles 12.1.2 & 12.1.3)

Toyota Provisions (cont.)

- In event of the death of the Dealer's majority owner without a nominated successor, Toyota has an option to purchase the Dealer's principal assets, including real estate and leasehold interests, on terms and conditions agreed upon between the parties or, if no agreement can be reached, terms and conditions determined by arbitration. (Section XXI.D)
- Nomination of successor prior to death or incapacity of Dealer's majority owner will supersede Toyota's option to purchase. (Section XXI.F/Section XXII.C)

*Statutes –
Substantive Standards*

Statutes: Substantive Standards

- Prohibit OEM from refusing to give effect to the succession to the ownership or management of a qualified legatee or devisee under the will of a dealer or an heir under the laws of intestate succession (Ark. Code § 23-112-402(a)(1)(J))

Statutes: Standards (cont.)

- Unless there is good cause for refusal to honor succession, a designated successor of a deceased or incapacitated owner may succeed to the ownership interest of the owner under the existing franchise if the designated successor (a) gives the franchisor written notice of intent to succeed within a specified time of the owner's death or incapacity and (b) agrees to be bound the franchise agreement (Ga. Code § 10-1-652; Haw. Rev. Stat. § 437-54; Wis. Stat. § 218.0131)
- Succession rights apply to a qualified manager who has been employed at the dealership for at least two years (63 Pa. Stat. § 818.15(a))

Statutes – Establishing Procedures

Statutes: Establishing Procedures

- Designated successor must serve written notice of intent to succeed within specified time period of dealer owner's death or incapacity (Ga. Code § 10-1-652; Wis. Stat. § 218.0131)
- OEM has a limited time to request personal or financial data from the designated successor (Ga. Code § 10-1-652; Wis. Stat. § 218.0131)
- OEM has a limited amount of time from receiving the written notice or requested information a notice of its refusal to honor the proposed succession (Ga. Code § 10-1-652; Wis. Stat. § 218.0131)

Statutes: Procedures (cont.)

- If OEM enters into “interim or trial agreement” with designated successor, OEM has a limited amount of time in relation to the expiration of that agreement to notify designated successor that OEM is not honoring the succession (Ga. Code § 10-1-652)
- If OEM timely refuses to honor the succession, designated successor may request an administrative or judicial hearing at which the OEM will have the burden of showing good cause for the refusal (Ga. Code § 10-1-652; Wis. Stat. § 218.0131)

Statutes: Procedures (cont.)

- If board or agency finds that OEM has good cause to not honor the succession, it shall include in its order conditions as are reasonable and adequate to afford the successor an opportunity to receive fair and reasonable compensation for the value of the dealership (Wis. Stat. 218.0131(3)(c))

Typical Dealer-initiated Changes Requiring OEM Approval

- Ownership Changes
- Management Changes
- Dealership Assets/Franchise Transfers
- Succession of Deceased or Disabled Dealer Principal
- **Location Changes**
- Dualing (Adding an Additional Franchise)

Location Changes



Sample Dealer Agreement Provisions

FCA Provisions

- Dealer shall conduct its Dealership Operations only from the dealership location and facilities described in the dealer agreement (Section 11(d)(i))
- Dealer shall not make any changes in the location of Dealership Operations without the prior written approval of FCA (Section 11(d)(ii))

Ford Provisions

- Dealer shall not move the Dealership Location or Facilities without the prior written consent of Ford (Paragraph 5(c))
- Dealer's failure to fulfill its responsibilities with regard to Dealership Location and Facilities under paragraph 5 is grounds for termination unless Dealer cures the failure within a reasonable time after being notified of the failure. (Paragraph 17(c)(4))

GM Provisions

- Dealer agrees to conduct Dealership Operations only from the approved location(s) within its Area of Primary Responsibility, as identified in the Location and Premises Addendum (Article 4.4.1)
- If Dealer wants make any change in its location, Dealer must give GM written notice of the proposed change, together with the reasons for the change, for GM's evaluation and final decision in light of dealer network planning considerations (Article 4.4.2)

GM Provisions (cont.)

- **Note on GM Dealer Network Planning** – GM “agrees to monitor marketing conditions and strive, to the extent practicable, to have dealers appropriate in number, size and location to achieve” stated objectives that include giving each dealer “the opportunity to achieve a reasonable return on investment” (Article 4.1)

GM Provisions (cont.)

- No change in Dealer's location will be made without GM prior written authorization pursuant to its business judgment (Article 4.4.2)
- Any undertaking by Dealer to conduct any of the Dealership Operations at any un-approved location is grounds for termination (Article 13.1.4)

Toyota Provisions

- Dealer may not conduct dealership operations at any location other than that approved in the dealer agreement without Toyota's prior written consent (Section VII)

OEM Conditions for Approval

- Facility upgrade
- Site Control
- Other

OEM Conditions for Approval

*Statutes –
Substantive Standards*

Statutes: Substantive Standards

- Dealer may only sell new vehicles from location expressly authorized by OEM (Tex. OCC § 2301.355(a))
- Unreasonable Withholding of Consent - Prohibits OEM from unreasonably refusing to allow a dealer to change its location (63 Pa. Stat. § 818.12(b)(4); Tex. OCC § 2301.464(a) (if Dealer files protest, board must determine whether the OEM has reasonable grounds for withholding its approval))

Statutes: Standards (cont.)

- Balancing Test - If challenged by the Dealer, OEM must show “good cause” for its disapproval by proving that the prospective benefits to the OEM, the Dealer, the public and other dealers if the proposed action is not undertaken outweighs the prospective harms to the Dealer, OEM, the public and other dealers if the proposed action is not undertaken (Wis. Stat. § 218.0134(3)(am))

Statutes – setting limits on OEM Conditions

Statutes: Setting limits on OEM Conditions

- OEM may not condition sale, transfer or relocation of a dealership upon site control or facility upgrade

Common Law and Other Legal Theories

Common Law and Other Legal Theories

- Automobile Dealer Day in Court Act (15 USC §§ 1221-1226)
- Breach of Implied Duty of Good Faith and Fair Dealing
- Constructive Termination
- Breach of Fiduciary Duty

Representative Case Law

Representative Case Law

- First United, Inc. v. General Motors LLC, 2013 WL 1411253 (Cal. Ct. App. Apr. 9, 2013) (unpublished opinion affirming trial court's dismissal of dealer's claims based on OEM's rejection of its proposed purchase and relocation of another dealer's franchise)
- Bowser Cadillac, LLC v. General Motors, LLC, Pa. Bd. Veh. Mfg's, Dealers and Salespersons, Final Adjudication and Order (Dec. 5, 2012) (finding OEM's denial of dealer's relocation request unreasonable and allowing relocation)

Representative Case Law (cont.)

- Hubbard Chevrolet Company v. General Motors Corporation, 873 F. 2d 873 (5th Cir. 1989) (OEM's alleged arbitrary denial of dealer's relocation request did not rise to level of coercion and intimidation required to establish violation of Mississippi Motor Vehicle Commission Law and the implied covenant of good faith and fair dealing under Michigan law did not apply to the relocation denial)

Representative Case Law (cont.)

- General Motors Corporation v. Dealmaker, LLC, 2007 WL 2454208 (N.D.N.Y. 2007) (dealer's complaint against OEM for rejecting dealer's relocation request was not sufficient to state claims for (a) violation of ADDICA (15 U.S.C. §§ 1221-1226); (b) termination provisions of New York Franchised Motor Vehicle Dealer Act ("FMVDA"); and (c) tortious interference with actual or prospective business relations, but did sufficiently allege claims for (1) violation of FMVDA's prohibition against imposing unreasonable restrictions on dealer relative to site-control and (2) breach of implied duty of good faith and fair dealing under Michigan law.)

Representative Case Law (cont.)

- Golden Gate Acceptance Corp. v. General Motors Corp., 597 F.2d 676 (9th Cir. 1979) (OEM's refusal to allow dealer to relocate did not violate the ADDICA)
- Mathew Enterprise, Inc. v. FCA US, LLC, 2016 WL 6778534 (N.D. Cal. 2016) (dealer's complaint against OEM for rejecting dealer's relocation request was not sufficient to state claims for violation of ADDICA, breach of implied duty of good faith and fair dealing or construction termination in violation of the California dealer law)

Typical Dealer-initiated Changes Requiring OEM Approval

- Ownership Changes
- Management Changes
- Dealership Assets/Franchise Transfers
- Succession of Deceased or Disabled Dealer Principal
- Location Changes
- **Dualing (Adding an Additional Franchise)**

Dualing - Adding an Additional Franchise

Sample Dealer Agreement Provisions

FCA Provisions

- Dealer shall not make any changes in the use of the Dealership Facilities without the prior written approval of FCA (Section 11(d)(ii))

Ford Provisions

- Dealer shall not change the usage of any Dealership Facilities without the prior written consent of Ford (Paragraph 5(c))
- Dealer's failure to fulfill its responsibilities with regard to Dealership Location and Facilities under paragraph 5 is grounds for termination unless Dealer cures the failure within a reasonable time after being notified of the failure. (Paragraph 17(c)(4))

GM Provisions

- No change in the use of the Dealer's Premises, including addition of any other vehicle lines, will be made without GM's prior written authorization pursuant to its business judgment (Article 4.4.2)

GM Provisions (cont.)

- If Dealer wants to make a change in the use of the Dealer's Premises, it will give GM written notice of the proposed change, together with the reasons for the change, for GM's evaluation and final decision in light of dealer network planning considerations (Article 4.4.2)
 - **Note on GM Dealer Network Planning** – GM “agrees to monitor marketing conditions and strive, to the extent practicable, to have dealers appropriate in number, size and location to achieve” stated objectives that include giving each dealer “the opportunity to achieve a reasonable return on investment” (Article 4.1)

GM Provisions (cont.)

- Any change in the use of the Dealer's use of the Premises without GM's prior written approval is grounds for termination of the dealer agreement (Article 13.1.5)

Toyota Provisions

- Dealer may not change the usage of the approved location and facilities or utilize such location and facilities for any functions other than those approved in the dealer agreement without Toyota's prior written consent (Section VII)

*Statutes –
Substantive Standards*

Statutes: Substantive Standards

- Prohibit Coercion - OEM prohibited from coercing Dealer to refrain from acquiring another franchise or to maintain an exclusive sales facility provided that the OEM's other reasonable facility requirements are met (63 Pa. Stat. § 818.12(a)(6))
- Balancing Test - If challenged by the Dealer, OEM must show “good cause” for its disapproval by proving that the prospective benefits to the OEM, the Dealer, the public and other dealers if the proposed action is not undertaken outweighs the prospective harms to the Dealer, OEM, the public and other dealers if the proposed action is not undertaken (example, Wis. Stat. § 218.0134(3)(am))

Statutes: Standards (cont.)

- Impairment of OEM Representation – OEM who refuses to approve Dealer adding another franchise has burden of proving that addition will substantially impair the dealer’s ability to adequately sell or service the OEM’s vehicles (Ga. Code § 10-1-662(a)(17))
- Unreasonable Impairment – OEM may not unreasonably limit or impair Dealer’s ability to use its dealership property as the Dealer considers appropriate, including withholding approval of a Dealer’s request to add another line-make to the property (Tex. OCC § 2301.4671(1), 2301.472)
- Enumerates factors to be considered in determining whether denial of dualing request was reasonable (See Tex. OCC § 2301.472(d))

Statutes – Establishing Procedures

Statutes: Procedures

- Dealer may appeal OEM disapproval of a dualing proposal to administrative agency (Wis. Stat. 218.0134)
- Dealer may appeal OEM disapproval of a dualing proposal to board or bring a court action (63 Pa. Stat. § 818.12(a)(6)(iii))

Representative Case Law

Representative Case Law

- Don Jacobs Buick, Inc. v. General Motors Corporation, Wis. Div. Hearings and Appeals, Proposed Ruling on Motion for Declaratory Ruling (Sept. 6, 1996) (OEM failure to timely notify dealer and WisDOT of disapproval of dealer's proposal to add another franchise to its facility constitutes approval)

Representative Case Law (cont.)

- General Motors Corporation v. Harry Brown's, LLC, 563 F. 3d 312 (D. Minn. 2009) (OEM request for preliminary injunction prohibiting dealer from adding additional franchises to facility denied on grounds OEM would not be irreparably harmed)
- General Motors Corporation v. The New A.C. Chevrolet, Inc., 263 F.3d 296 (3rd Cir. 2001) (OEM termination of dealer's franchise for adding another franchise to its facility over OEM objections did not violate ADDICA, New Jersey Franchise Practices Act or constitute breach of dealer agreement)

Representative Case Law (cont.)

- Saturn of Denville New Jersey, LP v. General Motors Corp., 2009 WL 953012 (D. N.J. April 7, 2009) (finding dealer had reasonable probability of success on merits to enjoin OEM from enforcing exclusivity provision in dealer agreement as violation of NJFPA, but denying injunction because dealer failed to show irreparable harm).

Representative Case Law (cont.)

- Saturn of Denville New Jersey, LP v. General Motors Corp., 2009 WL 1545559 (D. N.J. May 29, 2009) (granting injunction enjoining OEM from enforcing exclusivity provision in dealer agreement, following rehearing, finding irreparable harm to dealer based on changed circumstances of GM issuing “Updated Plan” to terminate Saturn brand by end of 2009, instead of previously planned termination in 2011, if GM was not able to find purchaser for Saturn).