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COMMENTARY

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COLUMNIST



Dealer agreement renewals: ask not for whom the bell tolls...

The scenario is an ominous one, and all too frequent. You are the dealer under a dealer agreement with the manufacturer that goes back a number of years. Over that time, relations have been good although in the last few years, they have hit a few bumps.

Renewal time is approaching. For you, it is business as usual. But sales are slow, and you have an uneasy feeling because you heard of a few experienced operators sniffing around looking for an opportunity to open a competing location uncomfortably close to your territory.

The manufacturer notifies you, out of the blue, that it does not plan to renew your dealer agreement. You quickly realize that the rumors are true: another dealer has pulled enough strings to put himself in a position to replace you in your territory, presumably in that empty building down the road, where they used to carry on business with a competing brand.

As far as you are concerned, you have done nothing wrong. Nevertheless, you are about to be put out of business.

You seek advice from your lawyer who has been acting for you for years, having incorporated your business and kept your books up to date annually.

Maybe they have looked after some filings for you, and written the occasional letter to an irate consumer.

They look at your dealer agreement and point out to you that nothing in the agreement makes it mandatory for a manufacturer to renew, and suggests that you start looking for a sub-tenant for your building.

Is that good advice? Don't you have any options at all? Well, yes you do.

The main route to consider is NADAP, the National Automobile Dealer Arbitration Program.

It was created to resolve disputes between dealers and manufacturers.

The program sets out a series of rules which bind both the manufacturer and the dealer once they adopt them by signing an implementation agreement.

That was probably something you did at the same time that you signed your dealer agreement.

In essence, it sets out a scheme for mediating and arbitrating disputes. Importantly, it takes precedence over anything set out in a dealer agreement, especially where dealer agreement provisions conflict with those in NADAP.

In fact, the program not only sets out rules of a procedural nature, it also includes provisions that may provide dealers with substantive rights that their dealer agreements do not include.

The program includes a long list of disputes that are covered. One of the items on the list is a dispute over a manufacturer's refusal to renew a dealer agreement without cause.

This suggests that notwithstanding anything to the contrary in the dealer agreement, manufacturers have an obligation to renew their dealer agreements unless there is cause to refuse to do so.

What constitutes cause, of course, is the key question. The availability of another experienced dealer to take over in the territory, obviously, is not cause. Cause has to relate to the dealer's performance in some way.

In employment situations, where employers seek to justify the firing of an employee without notice or pay in lieu thereof because they had "just cause" for the termination, the courts require the employer to meet an extremely high threshold.

Most employers walk away from employment litigation scratching their heads and wondering if anything short of catching the employee with their hand in the till will suffice.

In the case of car dealers, the threshold might not be quite so high. However, given the investment that car dealers invariably make in their businesses and the goodwill that they typically generate over years of operations, the manufacturer is going to have to come up with a very solid basis for its decision not to renew in order to succeed. And that is the key point: manufacturers have to show cause for their decision not to renew. That is not generally true under common law.

The dispute will be played out under the program with the parties first mediating and then arbitrating it. The program rules provide for a relatively speedy process – certainly much faster than any lawsuit.

The process is also private, unlike a lawsuit. Documents are filed with the office of the arbitrator, but they are not available to the public.

The arbitration hearing itself is private. Even the decision is not generally circulated although access to NADAP's decisions is available to people in the industry and their lawyers.

If the termination date is approaching quickly, and it becomes impossible to arrange for an arbitration hearing before that date, it is open to a dealer to at least ask for an order from the arbitrator requiring the manufacturer to allow the dealer to remain in business for an additional period of time in order to accommodate the date of the arbitration hearing.

The NADAP rules also contemplate that the manufacturer's termination right is to be exercised in good faith. If the manufacturer's position on cause is not particularly strong, evidence of the existence of a competing dealer who has been lobbying for the territory may be sufficient to tip the balance in the dealer's favour.

This may require some detective work, but it would be well worth undertaking.

NADAP proceedings are somewhat technical and somewhat specialized, so be sure to get proper legal advice before undertaking a NADAP application.

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