McNees Wallace & Nurick LLC

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AUTO NOTES

FACILITY UPGRADES, WHERE DOES IT END?

By Peter K. Bauer

Manufacturer demands for facility upgrades continue to cause dealers headaches and expense. Dealers are being required to "voluntarily" commit to facility upgrades, relocations, and/or construction of new or stand alone facilities. If a dealer believes the demands are unreasonable, there are protections under the Pennsylvania Board of Vehicles Act ("Act"), which limit the facility demands a manufacturer can place on a dealer. There are several provisions in the Act that a dealer can utilize in an effort to slow down or reduce a manufacturer's demands for a renovated, new or relocated facility. This can be accomplished by using the Act's protections and presenting a business case to the manufacturer, or by filing a protest under the Act with the Dealer Board.

The Act limits the ability of a manufacturer to require a dealer to unreasonably construct, expand, or modify a facility, where the market and economic conditions do not justify such activity. Additionally, the manufacturer cannot require such facility improvements, unless there is sufficient vehicle allocation available to justify the new or revised facility activity. A dealer also has protections from being forced to establish or maintain exclusive facilities, display space or personnel where such activities would be unreasonable in light of economic conditions, or otherwise are not justified by reasonable business considerations. (There is even proposed legislation to be reintroduced in 2013 that would permit a dealer to use comparable products and services versus those being required by a manufacturer in completing facility construction or renovations.) Dealers should point out the Act's protections to a manufacturer to try to relieve some of a manufacturer's micro management of facility activities.

Recently, we have assisted numerous dealers in addressing demands to revise current facilities, and to build new, stand alone facilities. Dealers have been approached by manufacturers and told that their existing facilities are non-compliant based on manufacturer standards from not having the correct brand look, to not having enough sales or service space to handle current, or anticipated future growth in market share, to not being in the right location in town. Dealers were assisted in reaching an agreement with manufacturers that their facilities would be upgraded to meet brand standards, but would be permitted to do renovations over a longer period of time, or that there could be a middle ground for the size of sales or service areas between what the dealer currently had, and what the manufacturer thought was necessary. We also assisted dealers to remain at their existing locations with facility upgrades versus the dealers moving to the middle of a congested, commercial retail strip, or to a remote exit off a highway that would be more inconvenient for customers and the dealer's operations. ■

CHANGES IN AREAS OF RESPONSIBILITY

By Stephen A. Moore and Peter K. Bauer

The results of the 2010 census have been trickling down and affecting dealers. In the last two years, a number of manufacturers have re-examined their dealers' area of responsibility (also referred to as area of primary responsibility, area of primary influence, etc.) ("AOR") and have been adjusting dealers' territories. In a number of instances, dealers believe that these adjustments are adverse to them. Dealers should remember that the Act requires a manufacturer to provide sixty days' advance notice of any change in a dealer's AOR and an explanation as to why the changes were made. The dealer then has the opportunity to challenge the AOR through any manufacturer dispute resolution program and/or a protest under the Act.

Even if the dealer does not successfully challenge the change in the AOR, the manufacturer may not take any adverse action against the dealer for a period of eighteen months after the AOR change is effective. This time period provides the dealer an opportunity to improve its sales and service performance. Regardless of whether a dealer ultimately chooses to challenge a change in its AOR, it should go on record with the manufacturer if it believes the change may adversely affect the dealer's performance in its AOR.

Recently, we have been working with several dealers to address the impact that a revised AOR will have on a dealer, how and when a

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dealer can utilize these protections, and if an AOR is revised and not challenged initially, how a revised AOR could impact a dealer where sales performance is later alleged to be sub-standard based on an analysis of the dealer's performance of sales and service activities within the revised AOR. This assistance has ranged from helping a dealer to write a letter formally objecting to a revised AOR, to assessing the revised AOR and the potential impact going forward, to filing a protest against a manufacturer for a revised AOR that the dealer believed was unreasonable and would impact the dealer's sales effectiveness scores, if the manufacturer implemented the AOR change. We recently were successful in assisting a dealership to get its AOR revised, which was going to negatively impact the dealer's sale performance.

Additionally, we are seeing a number of dealers being threatened, challenged and even served termination notices based on their existing, or recently revised AOR that their sales numbers when measured as sales effectiveness in their AORs are not meeting manufacturer expectations. With this upturn in termination notices based on poor sales performance in their AOR, some dealers have been forced to fight a termination notice of a franchise agreement before the Board and under the protections of the Act. Others recognize the notice reflects that there are true poor sales performance issues that cannot be easily rectified, and in lieu of termination pursue manufacturer approval of a buyer to purchase the franchise. In addition to a notice of a revised AOR, a dealer's receipt of a termination notice is something that must be acted on in prompt fashion. Dealers are reminded that if there is no immediate and appropriate response, and protective action is not taken under the Act to slow the termination process down, a dealer could lose important protections and benefits under the Act. ■

McNees Wallace & Nurick assists dealers with the host of legal challenges found in today's highly regulated business environment. From buy/sells to franchise terminations; from environmental to employee relations; from consumer complaints to problems with PennDOT; from formation of a new dealership to successor planning; from taxes to tags. For almost 25 years McNees has provided effective representation and assistance to Pennsylvania dealerships. Call (717) 232-8000 or visit www.mwn.com.

SAD THINGS CAN HAPPEN TO A DEALERSHIP'S WORK "FAMILY" MEMBER, TOO

The time after an outside of work accident is often one of the most challenging and frightening that an individual or family member, including a dealership's work family, will ever experience. Navigating the maze of problems confronted is made infinitely easier with the guidance of the experienced and trusted attorneys at McNees. Our attorneys can help when:

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- You have property damaged by another's negligence
- You have been injured by a defective product
- You have been injured by an underinsured or uninsured driver
- You have been improperly denied insurance coverage after an accident
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