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DRIVING YOUR SUCCESS

The Curse of the Cat People and Other Franchisor Folderol

Has your dealership ever had the curse of the cat people put on it by your franchisor? You have if you have ever made this phone call to your lawyer: "Help! The manufacturer has only given me a one year term franchise agreement. What have I done to deserve this? I can't let them put me out of business in a year!" So, you may ask, how is a term franchise agreement like the curse of the cat people? Because fearing the curse, which is a silly superstition, makes about as much sense as fearing a term franchise agreement.

Every state has a law providing that a manufacturer may not terminate or fail to renew a dealer without good cause. Of course, a dealer would prefer to have a permanent or long term agreement. However, if the franchise agreement is for one year or one month, what is the difference? A manufacturer is required to renew the dealer agreement regardless of the time period unless the manufacturer wishes to go through a state termination process and show that it has a legitimate basis for failing to renew. Therefore, the fact that you receive a term agreement in a renewal is no cause for panic or concern.

Having said that, however, if you are the recipient of a term agreement during renewal, you do have to pay attention and be careful about the requirements it contains. Term franchise agreements are done to identify certain standards or performance requirements for the dealer. That in itself is not objectionable. What may be objectionable, however, is if the manufacturer tries to slip in language or provisions designed to prejudice the dealer's position in any future

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BOYCOTT GROUP BOYCOTTS

Have you ever had a call from another dealer or attended a meeting where it was suggested that all dealers get together to stop advertising in a newspaper because of its editorial policy about dealers? Or to stop dealing with a marketing company because of unhappiness about its policies and the effect on dealers' businesses? Or to stop dealing with a supplier because of something the supplier has done?

What did you do? If you did not immediately terminate the conversation or leave the meeting, read on!

An individual decision to stop doing business with someone is legal. When that decision is the result of an agreement by or among competitors to cease or limit doing business with a third party, however, that decision can be very costly. Group boycott agreements among competitors are a restraint of trade. They are a violation of the anti-trust laws

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proceeding over the termination or the non-renewal of the dealer. Here are questions and answers about common provisions in term franchise agreements.

- Why agree in the first place? Simply because your franchisor will wear you out if you don't. A franchisor can put incredible pressure on a dealer to sign a term agreement after the previous franchise agreement's expiration date. Its representatives will use a variety of tactics from gentle urging to outright threats. Throughout the process, keep in mind that you have a right to renewal under your state franchise statute. A manufacturer cannot withhold that and say that it will only renew if you agree to radically restructure the deal with the franchisor. Going along with the term agreement to end the process is understandable. However, don't go along at all costs. Don't agree to goals or standards that are improper or that you can't meet, don't make admissions that you are in violation of the terms of your franchisor agreement, and don't agree to provisions that might someday give the manufacturer grounds to terminate you.
- Are the goals your dealership is supposed to reach appropriate? Manufacturers regularly set goals and objectives for your dealership. Sometimes they are fair and based on proper assumptions and methodology. Often, they are not. For example, a common goal of term agreements is reaching and maintaining a specified level of sales efficiency. However, are

the sales efficiency targets valid? Or is the manufacturer's measurement of sales efficiency improper because it is using the wrong primary market area for your dealership, or because it fails to take into account special circumstances that should lead to an adjustment of the sales objective, or for any of a variety of other reasons? Don't agree to meet or exceed goals that you think are unfair and improper.

- Can you reach the goals? Even if the measuring methods are appropriate, can you meet the levels of performance set? Or are they too lofty? Negotiate levels that you can meet.
- Shouldn't you simply agree that you will use best efforts to reach goals? Actually agreeing that you will meet and maintain performance at the level set is a serious commitment. Even when you meet goals over several months, you may fail by dipping below the target in one month and wind up in breach. Agreeing to provide improvement plans for meeting goals and using your best efforts to undertake those plans is a better sales improvement provision.
- Are timetables for compliance realistic? Manufacturers love establishing unrealistically brief time periods for compliance, especially where construction is involved. They fully understand the delays that can be caused by zoning and planning offices or bad weather, yet they act as if no other dealer in the country has ever experienced such a problem and that any delays are fully your fault. Your failure to meet a timetable gives the manufacturer great leverage, and that's exactly the position in which it wants to find itself to bargain for more concessions from you. Make sure that any timetable to which you agree is realistic, and that you have a means of relief if there is a cause beyond your control that might prevent you from meeting your timetable.

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- Why acknowledge a breach? Often in term franchise agreements, manufacturers demand that dealers acknowledge that they are in breach of franchise agreement obligations or that they are deficient in performance (which can translate into a breach of the franchise agreement). Those admissions can only come back to haunt you. You can acknowledge that you have been told by the manufacturer that it claims to have standards you are not meeting, if that's the case. But never admit that you are in breach of the agreement and never admit that you have "deficiencies" that can be considered a breach of your agreement.
- What is the statutory magic language in your state to justify termination? Most state statutes have "magic language" – the standard that a manufacturer must meet to justify a cancellation of a dealer's franchise such as having "good cause" to terminate. Sometimes a franchisor will insert into a term agreement the dealer's acknowledgment that it is so deficient that the "magic language" threshold is met. This will be used against the dealer in the event of a future attempt to terminate or not renew the dealership. Know the "magic language" of your state statute, and do not agree that your prior performance justifies termination.
- Is a dealer's agreement to voluntarily terminate if it does not meet performance standards in a term agreement enforceable? Absolutely, and it's a terrible idea to agree. If it can, a franchisor may insert language into the term franchise agreement providing that the dealer agrees that if it does not meet performance standards it voluntarily terminates its franchise. Never go along with that.

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that can lead to treble damages plus attorney's fees, injunctions, and even jail time.



- Dealers should never discuss with other dealers refusals to advertise or limitations on advertising in media outlets. Legal actions can be and have been taken against group media boycotts by state attorneys general and by the U.S. Justice Department.
 - Dealers should never discuss with other dealers refusals to deal or limitations on dealing with a manufacturer. Such activities have been the target of federal Department of Justice and FTC investigations.
 - Dealers should never discuss with other dealers refusing to deal or limitations on dealing with suppliers. That could subject dealers to supplier lawsuits and governmental action.
- Interaction on policy issues with a dealer association that is considering the position it wishes to take in seeking government action are not group boycott discussions. However, a dealer who finds himself or herself in a discussion with other dealers about the terms on which they will stop or they will limit doing business with a media outlet, a manufacturer, or a supplier should insist that the discussion terminate immediately.

What the Government Doesn't Know About Dealerships

The last five years have seen an onslaught of federal laws and regulations affecting your business. The trend does not appear to be slowing. In prescribing these laws and regulations, the government makes assumptions about your dealership and the people that work for it. As we would expect from government folks with little or no business experience, these assumptions are often wrong. Let's talk about a few of those wrong assumptions, how they affect you, and what you should be doing to deal with government mandates and demands.

- **The government assumes that Job 1 for all dealership employees is compliance with federal laws and mandates.** Government folks' worklives are consumed by laws and regulations, and they assume that everyone operates the same way. Dealership employees are paid to sell cars, service cars, and satisfy customers. So contrary to the government's assumption, employees recognize the need for compliance but it is not the highest priority on their hierarchy of needs. Your challenge? Design a compliance system that takes this into account. Emphasize why compliance is important to employees, and make compliance mandates simple, understandable, and part of the work process. And train your employees.
- **The government assumes that change in a car dealership is easy.** Government policy is made by government workers who operate by memos and manuals. Want to change something in the government? No problem. Send a memo or a manual amendment. So they assume that if the government wants to make a change in dealers' business processes, make a rule change and management will simply issue a memo with which all dealer employees will comply. But dealership employees are wrapped up in their own productivity concerns. They develop methods by which they do their jobs. Changes in

government mandates negatively affect your employees' work processes. Your challenge? The compliance system must synthesize the requirements into an easy to follow set of directions. The directions must be concise and to the point. And you must train your employees in the new processes.

- **The government thinks that most dealership employees are lawyers.** Government folks will claim that is not true. But if that's the case, why are the documents turned out by government agencies so difficult to comprehend? How do you deal with this? Translate! The difficult government mandates must be translated into concise, easily understandable map points on a compliance map the dealership's staff can follow. And train on following the compliance map.
- **To the government, it's just another form; what could go wrong?** The government assumes that if it wants dealership customers to know something, it should just mandate another disclosure form. But salespeople don't want something new to interfere with their work flow. Salespeople develop a rhythm in their presentations and their processes. A new form threatens to interfere with that. Your challenge? Develop a script for presentation of the new form and explain its benefits. And train! Role play expected objections and overcoming them in training sessions.

You may have detected a common thread through this article – training. Compliance with new government mandates is never easy. The mandates require the restructuring of employees' established processes for doing their jobs. The only answer is to train your employees until they fully understand and implement your compliance system.