

DEFENDER

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Preliminary Injunctions in Dealership Termination Proceedings

Leonard A. Bellavia, Esq.

When the business relationship between a franchised auto dealer and the factory deteriorates to the point that involuntary termination will be attempted, one of the first priorities for the dealer and its counsel is determining whether there are grounds for getting a preliminary injunction to preserve the status quo until the issues can be resolved, either by settlement or litigation. Conversely, an aggressive strategy by the factory and its counsel might also include seeking a preliminary injunction to force an early resolution of the dispute.

Termination of dealer agreements frequently lands the factory and the dealer in litigation, or in some instances, arbitration. Under the federal Automobile Dealers' Day in Court Act and related laws such as the New York State Franchised Motor Vehicle Dealer Law, a factory may be required to receive approval from a court before termination is effective. The grounds asserted by a factory for termination may or may not stand up in court or in arbitration. Litigation is frequently expensive and time-consuming, and months may pass before a judge is able to decide the question of whether to uphold a termination. Arbitration may be less expensive and less time-consuming, but an arbitrator may not be able to fairly decide the termination issues in a time frame adequate to protect the business interests. Therefore, for either the factory or the dealer, preliminary injunctive relief may appear necessary to protect their business interests during the pendency of termination proceedings.

The request of a factory for a preliminary injunction is typically based on its desire to protect its brand name and reputation from harm caused by an allegedly under-performing or uncooperative dealer. If the factory can establish cause for termination, the factory will seek to enforce its right to prevent continued use of its trademarks and intellectual property by a dealer no longer authorized to use them. The request of a dealer for a preliminary injunction is typically based on its belief that not only is the attempted Termination unjustified, but that the goodwill and investment value of a franchised automobile dealership will be totally destroyed by termination. While experienced litigation counsel advise clients that more cases are ultimately resolved by settlement than by judges and juries, a dealer often needs the breathing space afforded by a preliminary injunction to continue operating its business while it has the time available to structure a satisfactory settlement. In the dealership termination context, the satisfactory settlement is not infrequently the sale of the dealership to a new owner approved by the factory.

While courts have varying formulations of the showing needed to justify issuance of a preliminary injunction, a common articulation of the requirements are: (1) irreparable harm, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions on the merits to make them a fair ground for litigation, and a balance of the hardships tipping decidedly toward the party requesting preliminary relief. While it is not possible to anticipate the numerous fact patterns that can surface in dealership termination disputes, the factory and the dealer will invariably have different viewpoints on the validity of grounds asserted for termination, whether proper notices were given, and fair opportunities extended to cure alleged deficiencies.

Dealership termination litigation, if not resolved after a decision on a motion for a preliminary injunction and an opportunity to settle the dispute on a business basis, can be very lengthy, complex and expensive. Different legal theories may be developed in the effort to prove the termination is justified or

unjustified. Legal theories vary and can include antitrust, tax reporting fraud and breach of contract, to name just a few. The evidence needed to determine the outcome on each legal theory may be extensive. Surveys and inspections can be carried out, and their validity questioned. Testimony of key management personnel can be developed, and extensive documentary and/or statistical evidence gathered. Expert witnesses may be necessary on the best management practices and customary methods of doing business, and on the fair market value of the business. Accounting methods and the adequacy of record-keeping may become part of the dispute. Regulatory requirements, including permits, periodic reports, and government approvals requested or denied, may all become relevant to the issue of whether cause for termination can be established.

In the well publicized case in Florida in which Anheuser-Busch terminated its exclusive beer distributor in an eight-county area for 29 years, Maris Distributing Company, where preliminary relief was not obtained, after four and one-half years of litigation, a jury found that Anheuser-Busch's termination of Maris for alleged deficiencies was pretextual, and that Maris had not falsified sales reports as Anheuser-Busch alleged. The jury verdict in favor of Maris for \$139 million was reduced by the court to \$50 million, with cross-appeals still unresolved nearly eight years after the termination. The end is not in sight to one of the most complex and costly distributorship termination litigations in history.

When justified in the particular circumstances, a well-prepared motion for a preliminary injunction, followed by a fair and a timely court decision on the motion, can set the stage for early resolution of the termination dispute through settlement or sale of the dealership, and lift from the parties the burdens and uncertainties of long and costly litigation.

Leonard A. Bellavia, Esq. of Bellavia Gentile & Associates, LLP, Mineola, NY heads the NADC litigations section.