SO YOU'VE GOTTEN A 180 DAY LETTER FROM YOUR FRANCHISOR: NOW WHAT?

By: David L. Turner, Esq.

It has become a more frequent occurrence in these days of struggling auto makers for franchise auto dealers to get a certified letter from their manufacturer (the "franchisor") stating that they have 180 days to correct performance deficiencies. What does such a notice really mean to the dealer, and how should he or she react if at all? This article will address these issues from the dealer's perspective and attempt to provide some guidance.

Two Requirements For Termination: Notice & Good Cause

First off, the dealer needs to understand Georgia statutory law concerning the requirements for termination or non-renewal of a franchise agreement. The applicable Code section, O.C.G.A. § 10-1-651, which is part of the Georgia Motor Vehicle Franchise Practices Act (the "Act"), O.C.G.A. § 10-1-620 et seq., sets out the process with which franchisors must comply in order to cancel, terminate or fail to renew any motor vehicle franchise agreement. This process is mandatory in all circumstances, even if the franchise agreement or a contractual waiver agreement indicates otherwise.

The two basic statutory hurdles that the franchisor has the burden of satisfying in order for it to lawfully cancel, terminate or fail to renew any franchise are as follows:

(1) it has satisfied the statutory notice requirement, and;

(2) it has good cause for cancellation, termination or nonrenewal.

The Notice Requirement

The statute states that the franchisor must give written notice not less than 90 days prior to the effective date of termination, cancellation or nonrenewal. This section must be viewed in the context of two other portions of the statute that require180 days advance notice. One section requires 180 days advance notice in order for the franchisor to legally establish "good cause" based on the following:

> [A] failure by the dealer to comply with a provision of the franchise which is both reasonable and of material significance to the franchise relationship, provided the dealer has been notified in writing of the failure within 180 days after the franchisor first acquired knowledge of such failure or after the dealer is given a reasonable opportunity to correct such failure for a period of not less than 180 days.

Where the franchisor is claiming a performance failure based on deficiencies in sales or service, then "good cause" is defined as the failure of the dealer to comply with reasonable performance criteria if the dealer has been given a reasonable opportunity, for a period of not less than six months, to comply with such criteria. Thus, where sales or service deficiencies are the identified basis for termination then a six month advance notice appears to be required. As a practical matter, the wording of the statute is likely to result in 180 days advance notice in most cases.

While the statute is not entirely clear on this point, a total of 270 days advance is likely to be given, 180 days to establish good cause plus 90 days under the general notice requirement section. The statute is sufficiently ambiguous for franchisors to potentially argue that 90 days or 180 days of advance notice is sufficient, though one would expect franchisors to behave cautiously and opt for ample or even redundant notice to avoid any potential claim concerning the adequacy of notice. If the dealer challenges a termination and the franchisor cannot meet its burden of showing "good cause," the Act allows the dealer to recover as damages the value of the dealership as an on-going business.

The notice requirement is reduced to only 15 days in extreme situations where:

- the dealer is insolvent or has filed bankruptcy;

- the dealer has failed to conduct customary operations during customary business hours for 7 days;

- the dealer, general manager or any owner with a substantial interest is convicted of a crime relating to the operation of the dealership or a felony;

- the dealer has a suspension or revocation of any required license for a period of 14 days, or;

- the dealer has engaged in fraud or intentional misrepresentation that materially affects the franchise.

So, the first point to be taken is that the franchisor, by sending the 180 day notice, is setting the stage for a termination or nonrenewal of the franchise agreement. While it is possible that some franchisors will send this type of notice for the purpose of motivating the dealer to generate more sales, without a true intention to terminate, the dealer who neglects to act does so at his peril. Termination can be declared perhaps as early as the end of the 180 day period unless the dealer undertakes some sort of remedial or preventive action in the meantime. Thus, any dealer who wants to be assured of a continuing entitlement to operate the franchise dealership should react quickly to this type of notice.

Individual Circumstances Affect How The Dealer Should Respond

Just how the dealer should react will depend on the dealership's particular circumstances. If the dealer has consistently neglected to perform his duties under the franchise agreement and has been in default repeatedly, the best course of action may be to try and negotiate a sale of the franchise. If this is not possible, the dealer should be mindful that the Act imposes post-termination duties on the franchisor to repurchase new vehicles, parts, certain supplies and special tools. The repurchase obligations vary depending on the particular circumstances, so dealers should consult counsel if this issue arises.

If the dealer believes that he can attain the performance goals set by the franchisor that are the stated basis for the deficiency, the dealer may elect to simply persevere during the 180 days following receipt of the notice letter. If the performance criteria established by the franchisor are met within 180 days, then the termination cannot proceed for failure to satisfy such criteria. Prudent dealers who are successful with this approach will want to seek a written withdrawal by the franchisor of the previous termination notice prior to expiration of the 180 days, so that termination will no longer be looming as an option for the franchisor.

But what if the dealer has been a loyal, good faith performer yet has been notified that he must achieve performance objectives that are unreasonable or unattainable? Remember, in order for the franchisor to establish "good cause" under the statutory definition, the failure by the dealer must relate to a provision that is both reasonable and of material significance to the franchise relationship. This would seem to indicate that good cause cannot be established by reference to minor deficiencies or the failure to achieve performance metrics that may not be of material significance. The performance objectives must also be reasonable, and, in the case of sales objectives, this is usually determined by reference to sales penetration rates in the applicable competitive market segments in the surrounding market. If the franchisor is not using objective market criteria to determine sales objectives cited as a possible basis for termination, then the dealer may need to challenge such criteria.

How Dealers Can Contest Unreasonable Demands

Dealers faced with unreasonable demands to achieve sales and service performance objectives need to take immediate action. A first step would be to promptly notify the franchisor that the performance criteria are not reasonable or material, seeking a withdrawal of the termination notice. If the franchisor is unwilling to comply with this request in fairly short order, the dealer should consider filing suit in order to delay termination until the court can decide whether the stated performance deficiencies are both reasonable and of material significance. Independent industry experts can be retained to assist dealers in this process. Such experts can objectively evaluate the reasonableness of the franchisor's performance demands in light of each dealership's actual performance in its market, using statistical analyses of pertinent market data concerning the franchisor's overall performance. In this writer's experience, franchisors

may resort to performance demands that rely on misleading or unfair interpretations of metrics, or which lack a reasonable rationale that is based on reliable and accepted analytical procedures.

When dealers feel compelled to initiate legal proceedings, the Act provides that dealers may file a petition with the Department of Revenue or a traditional lawsuit in any court of competent jurisdiction. Petitions filed with the Department of Revenue are referred to the Office of State Administrative Hearings for trial before an administrative law judge which usually occurs within six months. Thus an action which is filed fairly quickly after the dealer's receipt of a 180 day letter can be potentially resolved within 180 days. Even when such speedy resolution is not possible, dealers can seek an injunction to prevent termination until the underlying issues can be litigated. The Act has sufficient teeth to enable dealers to enforce its provisions, creating a right of action in which a dealer may seek to recover damages or obtain equitable relief (an injunction for example) or both. The Act provides for recovery of damages in appropriate cases, and a prevailing dealer may recover attorney's fees and expenses of litigation.

Conclusion

Franchise dealers in Georgia who receive statutory letters allowing 180 days to remedy deficiencies are at risk of termination or nonrenewal. Such dealers need to evaluate the stated deficiencies and develop a plan to best protect their investment in the dealership. Legal proceedings involving the use of independent experts may be advisable to rebut franchisor claims of performance deficiencies. Dealers can pursue remedies through traditional proceedings in the courts, or, alternatively, the Act provides for administrative complaints that can be quickly and efficiently resolved in proceedings before an administrative law judge.

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This article is for informational purposes only and is not intended to be legal advice. Dealers are advised to seek legal advice from counsel of their choosing in order to obtain specific advice concerning their particular situation.