



## The Deal on Wheels: Be ready for potential problems in a location change

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A dealership acquisition involving the relocation of a dealership can present special considerations, including a challenge by another dealer or a factory challenge. Planning for how these concerns can be dealt with should be addressed in the acquisition agreement (Buy/Sell).

The need to relocate a dealership can arise in a variety of situations. These include:

1. A dealership becomes available in your market. However, for one reason or another, the condition of the store at the pre-existing facility is not acceptable.
2. Your own facility becomes either unavailable (e.g. your lease is coming to an end) or undesirable from a marketing or facility compliance perspective.

When one of these situations arises, you should understand the challenges of a relocation and carefully plan the move.

- The most significant factor to consider in a negotiation for such a deal is the possibility that your move can be challenged by adjacent or nearby dealers based on a State's protest or encroachment statutes.

Such statutes give a dealer of the same line the right to challenge a relocation if it will injure the protesting dealer's business. These laws define a protected geographic area or other basis to contest the move. Typically, there is an exception for a minor relocation- e.g. less than 2 miles.

There are other legal grounds to stop the move beyond the protest statutes. One is the so-called common law challenge known as encroachment. Another is the argument that the move can impair the area of responsibility of the surrounding dealer(s).

Whatever the basis for the contest, once one is asserted, the completion of the relocation becomes extremely challenging and, at minimum, can significantly delay the move. As such, carefully examine the potential for a protest before making the decision to pursue a relocation.

Such consideration will benefit from consultation with experienced automotive legal counsel. It may also require consultation with a market analysis expert who can shed some light on whether the protest has merit from a lost sales/revenues perspective.

If you proceed, and a protest is filed, an effective defense of a protest is crucial. A protest proceeding is no different than any other litigation. It should be assigned to competent automotive litigation counsel.

Fortunately, in most cases, the manufacturer will assume the burden of the defense and will retain the expert. This can dramatically reduce the cost of the protest for the relocating dealer.

It is advisable for the Buy/Sell agreement to include a specific provision regarding this aspect. This provision will recognize the possibility of the protest and will stay (i.e. stop) the running of all contingencies until the protest is resolved or adjudicated.

- Another potential issue is a factory challenge to a relocation plan. All automotive franchise agreements expressly prohibit any change in facility without the manufacturer's approval.

Fortunately, many state franchise statutes provide protection in this regard. Such statutes effectively preclude an arbitrary turn down by the manufacturer. For the most part, these statutes impose a reasonableness standard. As in the case of protest statutes, the relocation laws allow minor moves. A relocation of a dealership from one side of the street to the other, or just down the block, should not present any legitimate concern on the part of the factory, and these laws are designed to validate such scenarios.

The relocation right is typically triggered by a formal (written) notice to the manufacturer. This notice should comply with any applicable statutory requirements. It is advisable for your lawyer to draft the notice because of the legal requirements. You should also check the facility provisions of the franchise agreement to ensure compliance with that aspect.

The Buy Sell must address this aspect as well. Aside from the usual franchise approval contingency, the agreement must also contain a specific relocation approval provision. This provision must set forth with the parameters of the facility requirements which will be considered acceptable. A relocation approval which imposes far greater requirements than those stated in the Buy Sell will be basis to terminate the deal (if the acquiring dealer so choses).

- Another challenging aspect of a relocation is the real estate acquisition component. The real estate contract must be carefully crafted to ensure protection in the event that obstacles are presented.

The contract must contain the usual contingencies for financing, environmental investigation, physical inspection, and zoning approvals. The contract must also include specific franchise-related provisions including:

1. The franchisor's approval of the property (site); and
2. The favorable disposition of any protests or challenges.

In the absence of these provisions, you can be placed in an unfortunate position where you must acquire a property that cannot be used for its intended purpose. If properly drafted, the real estate contract will allow for termination if one of the obstacles are presented and allow for extensions in order to resolve these problems.

The so-called deal on wheels can present some exciting opportunities. However, with opportunity comes challenge. Your relocation project should be carefully planned and lawyered to ensure its success, and the minimization of the anticipated obstacles.

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