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THE NEW PROTEST STATUTE: SOME OBSERVATIONS ONE YEAR AFTER ADOPTION

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Since its adoption in 1982, cases brought by dealer counsel under the "Protest Statute,"[1] against a manufacturer granting, relocating or reactivating a point, have been among the most difficult for dealer counsel to win on behalf of their clients. Manufacturers have succeeded in a substantial majority of cases brought before the Motor Vehicle Franchise Committee (the "Committee"). Recognizing that the statute needed to be amended to keep pace with changing market conditions, and noting that recent developments in the automobile industry have highlighted the unequal bargaining positions of dealers vis-à-vis manufacturers,[2] the New Jersey Legislature amended the Protest Statute (the "Amended Act"), effective as of May 4, 2011. The Legislature made clear that the Amended Act was designed to "level the playing field on which auto franchisees and auto franchisors do business, and to protect the consumer and the public interest in a strong and secure franchise system of responsible local businesses."[3]

Prior to the enactment of the Amended Act, if a manufacturer wanted to establish a new point or reopen or reactivate a point, dealers of the same line-make within an eight (8) mile radius from the proposed point had the right to file a protest with the Committee. If there were no existing dealers within the eight (8) mile radius, then only the single nearest dealer within a fourteen (14) mile radius from the proposed point had the right to protest. The Amended Act gives standing to all dealers within a fourteen (14) mile radius of a proposed new point or a reopened or reactivated point to file a protest.[4] Moreover, under the Amended Act, a manufacturer is required to provide not less than ninety (90) days advance notice of the establishment of a proposed point to all dealers of the same line-make within a twenty (20) mile radius of the proposed point. Furthermore, the Amended Act provides the right for dealers to file an action in Superior Court seeking to enjoin the grant of the point if the manufacturer has failed to provide dealers within the twenty (20) mile radius with such notice; and, if successful, such dealers are entitled to an award of reasonable attorneys' fees, court costs and expenses.[5]

Perhaps most importantly, the Amended Act has shifted the burden of proof to the manufacturer in protest cases. Specifically, the Amended Act establishes a rebuttable presumption that the proposed new point or the reopening or reactivation of a point is deemed to be injurious to existing dealers or the public interest, unless the manufacturer establishes **ALL** of the following by a preponderance of the evidence:

1. the proposed point materially enhances the availability of stable, adequate and reliable sales and service of the same line-make within the market area[s] of the dealers entitled to notice; [and]

2. the proposed point does not affect the stability of existing dealers in the same line-make; [and]

[1] N.J.S.A. 56:10-16, et. seq.
[2] New Jersey Assembly Statement: January 20, 2011
[3] Id.
[4] Relocation of a dealer to a point more than two (2) miles away from the existing location still follows the pre-amendment 8/14 geographic guideline (N.J.S.A. 56:10-16(f)); however, only in relocation situations, the Committee is now charged with balancing the hardship of a denial of a relocation against the injury to the existing dealer if granted (N.J.S.A. 56:10-23(d)(5)).
[5] N.J.S.A. 56:10-19.

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3. the existing dealers in the same line-make have not provided adequate representation of the line-make in their market areas for at least two (2) years based upon: (i) availability of motor vehicle sales and service facilities, (ii) equipment, (iii) supply of parts, and (iv) qualified service personnel; [and]

4. The manufacturer's action is in good faith.[6]

Even if a manufacturer can establish **ALL** four (4) of the above factors, the protesting dealer still has an opportunity to prevail. The protesting dealer need only establish any one of four separate factors to reach a **CONCLUSIVE** presumption that the proposed point is injurious to current dealers or the public interest. Three factors are carryovers from the 1982, 1993 or 1999 versions of the protest provisions.[7] However, the Legislature did modify one factor.[8] It is now conclusively injurious to dealers or to the public interest if the average market penetration of noticed dealers, in their manufacturer-assigned area of primary responsibility or territory, is at least equal to the average market penetration of all franchisees in the same line-make in New Jersey during the 24 months preceding the notice.

Although the Amended Act undoubtedly clarifies issues which were ambiguous prior to May 4, 2011, there will be many challenges raised by manufacturer counsel that dealer counsel must overcome. For example, under the requirement for a manufacturer to provide not less than ninety (90) days advance notice of its intention to grant, relocate or reopen a franchise, when does the clock start to run? If the manufacturer seeks to demonstrate that it manifested its intent to open a point prior to May 4, 2011, the effective date of the Amended Act, does the old statute or the Amended Act govern? Although very fact sensitive, a creative manufacturer counsel has raised this issue in efforts to deny a hearing on the merits to a protesting dealer who would be entitled to proceed with its protest under the Amended Act but, as argued by the manufacturer, not the statute as it existed prior to May 4, 2011.

In addition, manufacturer counsel has already put in play issues concerning the meaning of the undefined terms "market area"[9]and "area of primary responsibility or territory."[10] These simple words create complex issues for an Administrative Law Judge because the various tests to determine the presence of the requisite injury to the current dealers and/or the public must relate to a fixed area, i.e., an area of primary responsibility or territory assigned by the manufacturer or a recognized market area. Each manufacturer has its own vocabulary and procedures, which may differ for urban, suburban and rural locations. Where complexity reigns, a field day exists for manufacturer counsel and their expert witnesses to attempt to shape and mold facts and concepts such as market area and relevant territory to their notion of what is best for their client. In fact, this presents a significant challenge for dealers and manufacturers alike. Nevertheless, manufacturers, due to their far greater economic power and longstanding relationships with their experts, continue to have the advantage notwithstanding that the vast gulf in bargaining power between the parties has been narrowed by the Amended Act.

Another interesting question under the Amended Act is whether, in judging a New Jersey dealer's performance, sales delivered to areas outside New Jersey should be included when such a dealer is assigned areas of responsibility in New York, Pennsylvania or Delaware by its manufacturer. N.J.S.A. 56:10-23(b)(1) sets forth one of the tests used for determining a conclusive presumption in favor of a dealer and specifies "the State of New Jersey." This reference applies to the location of the dealership, not the customer. Therefore, from a logical standpoint, sales delivered in market areas contiguous to New

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[6] N.J.S.A. 56:10-23(a).

[7] N.J.S.A. 56:10-23(b). The following factors were maintained from prior versions of the Protest Statute:

(2) The proposed point is likely to cause not less than a 25% reduction in new vehicle sales or not less than a 25% reduction in gross income for the protesting dealer.

(3) The proposed dealer will not operate a full service business at the proposed point.

(4) The owner or operator of the proposed point has engaged in a materially unfair or deceptive business practice with respect to a motor vehicle business.

[8] N.J.S.A. 56:10-23(b)(1).

[9] N.J.S.A. 56:10-23(a)(1), (3).

[10] N.J.S.A. 56:10-23(b)(1).

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Jersey should be incorporated where manufacturers assign as primary areas of responsibility, such as out-of-state zip codes, census tracts or post offices, to New Jersey dealers located in close proximity to state borders. Moreover, customers cross state lines, both into and out of New Jersey, to purchase vehicles from a dealer. Shouldn't a Phillipsburg point include portions of Easton, Pennsylvania, a Mahwah point include portions of Spring Valley, New York, and a Penns Grove point include portions of Wilmington, Delaware?

As with any new legislation, there are unanswered questions with which the Office of Administrative Law and the Courts will have to grapple. In handling cases in support of dealers who desire to open a new point, counsel representing such dealers in a protest case need to be wary. The very dealer who has been granted an open point by the manufacturer could just as easily find itself with the need to file a protest if the manufacturer later attempts to establish another new point within 14 miles. Consequently, it is important that the dealer body through NJCAR and its counsel work to shape the statute, and the case law that develops, in a fair and equitable manner! For that matter, so should the manufacturers!!

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