

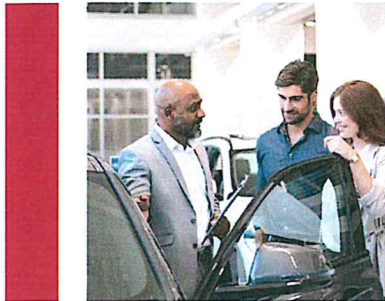


Greater New York
Automobile Dealers
Association

2020

MEMBERSHIP DIRECTORY+

SERVICES GUIDE



W W W . G N Y A D A . C O M

ENCROACHMENT PROTECTION – A DOUBLE-EDGE SWORD

The auto retail business, as with all industries, never stays the same. The market and the competition is in a constant state of flux. When new competition is presented, or when a new opportunity arises, the dealer must be protected. This typically takes the form of a new point, which is either granted to a competitor or issued to you. It can also take the form of a dealership relocation into your market, or your plan to relocate into the market of another dealer. Let's explore how all of this works for New York dealers and what you should know to protect your investment.

I. A Competing New Point.

One of the worst nightmares for a dealer is the dreaded notice from the factory that a competing point of the same line make will be established in your market. What is even worse is the stark reality that the point will be located just outside the protestable range of your store.

The New York Automobile Franchise Statute ("Act") survives certain protections for this type of encroachment on your business ("Protest Statute"). However, these are limited to certain geographical ranges. This is six (6) miles for densely-populated counties (more than 100,000) and ten (10) miles for the smaller ones. Furthermore, even if the new point is within the protestable range, and the dealer files a protest, he/she must ultimately win the case to stop the opening of the point.



Fortunately, the franchise statute places the burden on the manufacturer to prove that there is "good cause" to establish the new point. However, to prevail in a protest case is no mean task:

- First, the legal and related costs of a protest proceeding are very significant. (Needless to say, the law firm selected to handle this matter for you must have the correct expertise in this area. There are only a few that do). These can easily exceed \$100,000.00 and do in most cases.
- Second, the factory has Urban Sciences in its arsenal. This formative company will try to dazzle the judge in an effort to persuade the court that the new point will have little, or no, impact on your sales and service revenues. They even go as far to say that the new point will increase your revenues.
- Third, the only way to combat Urban Sciences is to hire your own market analysis firm. There are several good ones. Unfortunately, the typical range of fees is from \$100,000.00 (basic case) to \$200,000.00 (more complex cases). If you lose the protest, the statute requires that you must reimburse the factory's legal fees and costs (which presumably includes Urban Sciences fees. Needless to say, this is a substantial negative consequence that must be considered). Conversely, if the protesting dealer prevails, the manufacturer must reimburse his/her fees and costs.
- Fourth, the time, energy and stress of a protest proceeding should not be overlooked or under-estimated.

Nevertheless, the filing of a protest can be critical to your survival. At minimal, it may open the door to settlement discussions with the factory and/or the dealer that holds the new point rights. Typically, monies are ultimately offered to the protesting dealer to waive his/her protest rights, and dismiss the proceeding.

One of the most troubling scenarios is when the new point falls just outside of your protestable range (e.g., 61/2 miles if you are in a county with a population in excess of 100,000). Technically, the new point is not protestable if it is in your dealership's "relevant market area".

As such, the question arises as to whether the new point can still be challenged. There has been attempts to do this under your other principals of the franchisor. One is the argument that the change of the market area in your dealer agreement by virtue of the market area ascribed to the new point is illegal under the Act. Therefore, the new point should be stopped. Unfortunately, this argument has not met with favor of the New York courts, as yet. In a recent Audi decision, this very argument was rejected. It is always possible this case can be superseded by a higher court decision. However, this is not a scenario that can be relied upon under the current state of the law. The Protest Statute appears to be the only available avenue at present.

Finally, even if you are outside the protestable range, there is the possibility of resolving the dispute with the franchisor by invoking any applicable dispute resolution process that exists under your Dealer Agreement. This possibility should not be overlooked, although it should be noted that not all Dealer Agreements include a dispute resolution provision and some that do, are only limited to certain disputes, such as terminations.

II. Relocation.

The same principles and concerns apply to a relocation. If a competing dealer relocates into your market, whether with or without the factory support. A dealer has a right to protest a relocation. The same protest proceedings can be filed to stop it, as with a new point. There are, however, some special rules under the Protest Statute that apply – e.g., a relocation of less than 2 miles is exempt. However, by and large, the rules and process are the same.

III. The New Point/Relocation Opportunity.

Of course, the reciprocal concerns are in play when the dealer is the one receiving the new point opportunity, or the one who is relocating into the market of another dealer. Needless to say, this dealer needs to consider the implications of the Protest Statute when accepting the new point or deciding to relocate. It is never a good idea to start down this road without understanding the protest implications, not the least of which are the delays and costs that are associated with a protest proceeding. There are also other challenges of a new point. These were addressed in an article titled "The New Point: Opportunity and Challenge" which can be found at www.AboyouDobbs.com.

No matter what side you sit in a new point or relocation scenario, it is imperative that you understand your legal rights and that you consult with competent automotive legal counsel to protect yourself,

Provided by, Joseph S. Aboyou, Esq.

¹ The impending coronavirus crisis is a testament to this point.

² While the proceeding is pending, the new point cannot be established. This delay provides a significant tactical advantage to the filing of the protest.

³ *JJM Sunrise Automotive, LLC vs. Volkswagen Group of America, Inc.*, 53NYS.3d138 2017 N.Y. S OP 03160 (Sup. Ct. App. Div. 2017).

⁴ The Act gives the dealer the right to relocate on his/her own (i.e., without factory approval) in certain instances.