NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL®

NADC • 1800 M Street, NW, Suite 400 South • Washington, DC 20036 • Phone: 202-293-1454 • Fax: 202-530-0659 • www.dealercounsel.com

The National Association of Dealer Counsel (NADC) is a nationwide professional organization of attorneys who represent automobile and other vehicle dealers. For more information please visit www.dealercounsel.com.

Reprint from DEFENDER, May 2024.

Mediating Automotive Franchise Disputes

By Joseph S. Aboyoun, Esq., *Fox Rothschild*

There are few business developments more stressful than a significant dispute with your manufacturer. This development inevitably evokes the fear that termination of your franchise is just around the corner or that a major chargeback is imminent. The natural reaction is to engage legal counsel and start litigation to protect your interests. In certain cases this maybe the only choice. Alternatively, your immediate thought might be to place your dealership up for sale. This could end up to be a dreadful mistake. Fortunately, in many instances, there is another avenue – the private dispute resolution process ("D.R.P.").

Many automotive franchise agreements afford this opportunity. Unfortunately, there are several, including some very significant franchises, that do not. For the franchises that provide this mechanism, a dealer should closely examine its provisions and consider invoking the process before commencing a lawsuit. Indeed, under certain franchise agreements, the D.R.P. is mandatory and, as such, a prerequisite to the filing of a lawsuit.

The basic features of the D.R.P. are the following:

- It is an informal proceeding established by the manufacturer to resolve disputes[1].
- It is a **non-binding** mediation.
- The format can vary from manufacturer to manufacturer. However, the structure is essentially the same:
  - A neutral party or panel is appointed as the mediator.[2]
  - Each side is permitted to present its case.
  - The recommendation or "decision" of the mediator is not binding on the parties[3].
- The proceedings are strictly confidential. Nothing in the proceeding can be used against a party or submitted as evidence in a subsequent court proceeding. The mediator(s) cannot be called as a witness in those proceedings.

The following are the automotive manufacturers that include some type of D.R.P. in its Dealer Agreement: Alfa Romeo, Audi, BMW, Fiat, Ford, Land Rover, Lincoln, Kia, General Motors, Maserati, Mini, Nissan, Lexus, Toyota, Volvo, Mitsubishi, Mazda and VW.

The following are those without the D.R.P.: Acura, Honda, Hyundai, Infiniti, Chrysler, CJDR, Jaguar, Porsche, Lotus and Subaru.

It should also be noted that certain manufacturers have a less formal process to resolve disputes. Examples of these are Acura/Honda[4] and Mercedes[5]. However, such a process has very little success since there is no neutral party, and worse, it requires the dealer to resolve the dispute with the very same factory people that issued the default or threat.

The D.R.P. in the truck space is also a mixed bag. In this regard, Ford (trucks), Kenworth, Mack, Peterbilt and Volvo each provide a D.R.P. process in their respective dealer agreements. However, Freightliner, Hino and Isuzu do not.

The D.R.P. offers a much greater chance of a resolution. The most important component is the involvement of the neutral mediator/panel. This is the feature that truly drives a potential resolution. The

[1] Some franchise agreements only permit the D.R.P. for certain types of disputes. For example, the Nissan Dealer Service and Sales Agreement only extends the D.R.P. to termination and released material and to the establishment of an additional dealer.

[2] Sometimes, there is a so-called party mediator on the panel. For example, under GM's dispute resolution process, each party has a representative on the panel. In the case of a dealer, this is typically another dealer from outside the market. In the case of the manufacturer, this is typically one of its employees.

[3] Ford and Mazda are exceptions here. Under its so-called Dealer Policy Board rules, the Board's decision, in Ford/Lincoln

[4] Acura/Honda Dealer Agreement, Paragraph 22.

[5] Mercedes Dealer Agreement, Article XIII.

mediator/panel provides an impartial ear and voice in the process. A good mediator will closely examine the claims of each party. It will engage in a lively discussion with each side and test their respective positions, as well as point out the consequences of not settling and proceeding to court. This is typically done in private (so-called ex-parte) sessions.

Another significant benefit of the D.R.P. is that it can result in a confidential resolution of the franchise dispute. Conversely, as a public proceeding, a lawsuit creates significant exposure. After litigation commences, it is not long before employees, lenders, vendors, customers and suitors become aware of the problem. I need not point out what serious, negative consequences can flow from such exposure. Many dealerships are not able to survive the ordeal. All of this can be averted by a settlement reached in a D.R.P.

Another advantage of the D.R.P. is that, upon the initiation of the process, most manufacturers will agree to stand down until the mediation is concluded. For example, a termination process will be postponed or a chargeback will be delayed. Needless to say, it is imperative that a "stay" be confirmed in writing.

From my vantage point of 40+ years as an automotive attorney, the D.R.P. is a truly unique opportunity to resolve a manufacturer dispute effectively and efficiently. By meeting one's adversary face-to-face, the hardened positions are slowly softened. The bravado that comes with the "safe distance" of confrontational and legally self-serving emails, letters and phone calls starts to disappear. Of course, this does not happen at the outset. It is a process of "living with the enemy" in an extended mediation session. Since nothing in the DRP (if unsuccessful) can ultimately be used in a litigation, one's guard is naturally lowered. All of this is enhanced by the efforts of the mediator(s). The entire process has a positive, productive and, mostly, friendly tone.

Unfortunately, this can be weakened and, in certain instances, defeated if one of the parties and/or its counsel attend without any intention to resolve the matter. I have seen this happen. It is particularly disconcerting if the other party arrives without any authority to settle. A manufacturer that does this or allows its lawyer to do so is clearly acting in bad faith and in violation of its affirmative duty to respect & fulfil its obligations under its mediation process. However, in my experience, this is only seen in a small minority of D.R.P's.

In fact, the statistical results of the D.R.P. are quite impressive. As the mediator/panel will quickly point out at the beginning of a session, the success rate of D.R.Ps are well documented.[6] Clearly, the vast majority of these (at least, two-thirds) end up with a resolution.

Finally, there are two additional benefits of the D.R.P. that should be noted. First, the cost is very small. Typically, the lawyer fees are mostly limited to the preparation of a so-called mediation position paper & the lawyer's attendance at the session, which is usually a single day. The cost of the D.R.P. is a small fraction of a court proceeding. Second, the mediation gives each side a much better understanding of the strengths or weaknesses of its position and the position of the other side. It provides what the litigation attorneys call "free discovery".

To be sure, there are instances in a dispute with the franchisor where litigation is inevitable. There are also instances where the dispute can be averted by effective negotiations with the manufacturer. However, in most cases, the D.R.P. can win the day.

Joseph Aboyoun is the Co-Chair of Fox Rothschild's Automotive Practice and a seasoned business lawyer with over three decades of experience. Joe provides comprehensive legal counsel to clients in the automotive and related industries. He focuses his practice on representing clients in the purchase and sale of motor vehicle dealerships from start to finish, as well as updating finance agreements with lenders, handling franchise protests, franchise terminations, and other disputes that can arise. He guides his clients in franchise system acquisition, franchise law compliance and dealer rights, licensing agreements and site control. Joe also has extensive experience resolving franchise disputes through applicable mediation processes. Additionally, Joe advises dealers and owners of many closely held businesses on estate and succession planning matters including buy/sell agreements and estate tax reduction techniques.

[6] *See*, for example, Trends in Mediation by Michael W. Hawkins, Cincinnati Bar Association, March 2024.