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The 2011 Franchise Practices Act Amendments — One Year Later

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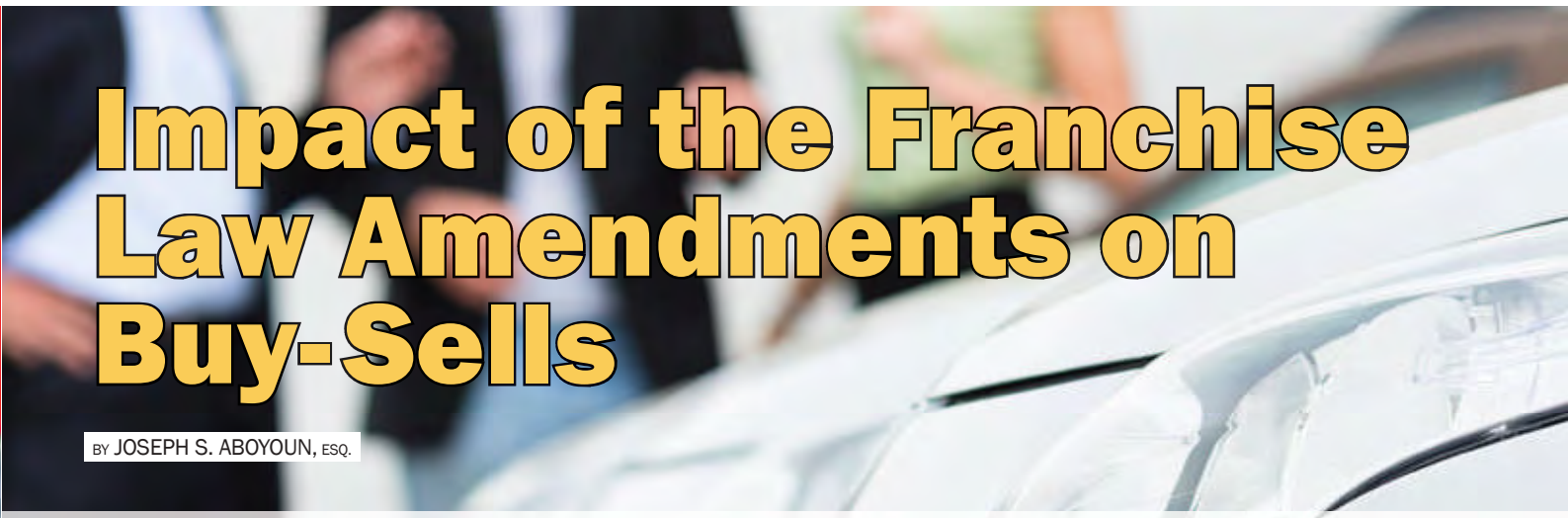

Impact of the Franchise Law Amendments on Buy-Sells

BY JOSEPH S. ABOYOUN, ESQ.

The enactment of the franchise law amendments, which became effective May 4, 2011, was a remarkable achievement on behalf of NJ CAR, its members and the lawyers actively involved in protecting the legal interests of the dealer. Many of these amendments have a direct and significant impact on buy/sell transactions. Needless to say, the manufacturers are responding to these law changes in their hostile way.

The amendments are permeated with provisions that will (and have already had) both a direct and indirect impact on buy/sells.

The following are the most significant:

The new law prohibits a manufacturer from conditioning the approval of a buyer on any requirements other than his or her qualifications to be a dealer;

The amendments also preclude the franchisor from including any term or condition in the franchise agreement proffered to the buyer which violates any provision of the New Jersey franchise law;

There are now severe restrictions on the franchisor's ability to impose an exclusivity requirement, a facility upgrade requirement, or a site control arrangement on the buyer. The manufacturer can potentially overcome these prohibitions by entering into a voluntary agreement with the buyer and providing a separate and valuable consideration;

A defined procedure for establishing the completeness of a franchise application and the precise deadline for the issuance of manufacturer approval are now provided; and

The right of a dealer subject to a termination to sell his or her franchise during the legal battle with the franchisor is now clearly established.

As explored below, each of these provisions have improved the buy/sell climate in New Jersey, at least from a legal standpoint.

In addressing buy/sells at a recent conference of the NADC, the national association of lawyers representing automotive dealers, I commented that one of the most significant pitfalls in a buy/sell is factory interference. For years, this was evidenced by the manufacturer's view that a buy/sell was its opportunity to restructure the franchise relationship. This typically took the form of a substantial facility upgrade and, sometimes, a relocation. It also involved other significant conditions, such as a substantial increase in the working capital requirement or the imposition of sales performance and CSI thresholds. Such matters have now been addressed in the new law as summarized above. Needless to say, such conditions to approval had a significant, negative impact on the deal. In many instances, the deal required renegotiation; in others, the buyer merely walked away.

With the legal changes now in effect, the manufacturers understand that they do not have the unfettered discretion to impose whatever requirements or conditions they deem fit upon the buyer. They know that there are now severe limitations.

In handling buy-sell transactions since the new law came into effect, I have seen firsthand a more tempered position on the part of the manufacturers with regard to the conditions that they would typically impose upon a buyer. Having said this, I do not believe that the legal changes have fully sunk in with the factories and, as discussed below, they continue with their efforts to persuade a buyer to accept their conditions of approval.

The changes affecting the application process have also been beneficial. As many of you know, in the past, the manufacturer would never concede that a completed application has been submitted.

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Since the manufacturer's 60-day deadline for approving a buyer did not start until a completed application was submitted, this became extremely problematic. Now, if the manufacturer does not request additional information within 15 days of its receipt of the application, the application is effectively deemed completed. If additional information is requested and the information is submitted within 30 days of the request, the 60-day deadline is not extended. In our handling of buy/sells, we routinely monitor the application process. With the new law, we now ultimately send a letter to the manufacturer after the 15th day to confirm that the application is deemed completed under the new law. This has assisted in expediting buy-sell closings.

Under the old law, it was unclear whether a dealer who was subject to a termination had the right to sell his dealership or franchise. This is now clearly established under the new law. I have already been involved in such a case involving a domestic dealer under termination. A buy-sell was signed during the lawsuit proceedings and has been submitted to the manufacturer and is now being processed. There is no question that such a buy-sell would have likely been rejected under the old law.

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Needless to say, the manufacturers and their legal counsel have not been enthralled by the amendments. While, on the surface, they will purport to comply with the new rules, in my experience, they are implementing their usual efforts to avert their legal responsibilities. A prime example of this, which I have seen in actual deals handled by my office, are efforts to induce the buyer to accept approval conditions that are in conflict with the new legal constraints. In this regard, they seek to establish that the buyer's acceptance of the requirements is voluntary. They also try to include some monetary consideration (e.g., facility money) in order to establish that they have provided the buyer with a separate and valuable consideration to agreeing to the new conditions (e.g., facility upgrade). In some of the instances that I have seen, this consideration is grossly inadequate. Obviously, the factories will continue in their inimitable ways. However, with the new rules now in place, dealers and buyers alike now have a much stronger arsenal at their disposal. **nj car**

Mr. Aboyoun is the founding member of Aboyoun & Heller, L.L.C. He has specialized in automotive buy/sell transactions and automotive franchise issues for well over 30 years