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Weathering Farm Equipment Dealer Agreements: *Lessons from the Auto Sector*

RED DAWN

On November 19, 2015, Case IH presented their dealers with a “finalized” version of their new Sales and Service Agreement (SSA). Upon reading the contract, I had a flashback to 2009 and the challenges that we were presented by some of the automobile manufacturers. As many of you know, we also represent North Dakota’s franchised new car dealers through our other organization, the Automobile Dealers Association of North Dakota (ADAND). Before I give you my “non-legal” opinion on the new SSA, let’s take a look at recent history within the auto sector....

THE STORM

In 2009, U.S. automobile production fell to its lowest level in nearly 50 years. Due to a number of factors, two major auto manufacturers were unable to remain solvent. Both Chrysler and General Motors declared bankruptcy during the spring.

The bankruptcies caused the franchise agreements that dealers had with manufacturers to become null and void. The “new” Chrysler and GM that emerged were “free and clear of all claims” and obligations, including their contracts with dealers. Both companies then proceeded to collectively terminate thousands of dealers. In fact, the termination process was so unreasonable and unfair that our U.S. Congress had to step in and pass legislation in an attempt to reinstate some of those dealers that were wrongfully terminated.

Following the bankruptcies, the manufacturers developed new franchise agreements that were completely one-sided and entirely unfair. They were take-it or leave-it arrangements under which dealers had no choice but to sign the contracts or not be a dealer.

With this in mind, one of the manufacturers developed a contract that attempted to force dealers to waive all of their rights under their respective state laws. Since the manufacturer believed that dealers would have no rights and no choice but to sign the agreement, it then went on to demand the following:

Market Share Requirements: The manufacturer declared that it would determine the annual number of vehicles that dealers must sell in order to fulfill sales expectations. *(Compare to Section 9.1(a) of the Case IH SSA.)*

Inventory Stocking Requirements: Upon manufacturer request, dealers were required to order and accept any number of vehicles required to fulfill factory sales expectations. *(Compare to Section 8.1, 8.2, 19.1 of the Case IH SSA.)*

Exclusivity: The manufacturer demanded that dealers abandon any other franchise they had with another manufacturer and maintain exclusive, stand-alone facilities for their brand alone. *(Compare to Section 8.3, 9.2 of the Case IH SSA.)*

Consent to Jurisdiction: The manufacturer stripped dealers of the option to seek judicial remedy in their home state. *(Compare to Section 32.2 of the Case IH SSA.)*

At Whim Requirements: Very simply, the manufacturer required dealers to comply with any future “subsequently published guidelines” as they pertained to any aspect of dealership operations.....period. *(Compare to Section 27.2 of the Case IH SSA.)*

Premises Requirements: The manufacturer retained the ability to force dealers to move their facilities and/or to conduct substantial renovations to their dealerships in order to be compliant with the manufacturer’s “image programs.” This included the requirement to follow the manufacturer’s strict remodeling guidelines with zero promise of any financial assistance.

The contract also stated that if dealers were unable to comply with any of those demands, even through no fault of their own, the manufacturer could immediately terminate them. *(Compare to Section 27.3 of the Case IH SSA.)*

It is important to understand that every single one of those demands would have violated North Dakota state law. However, the manufacturer knew that dealers really had no choice but to sign the agreement.

I went into some detail to explain the events that took place immediately following the bankruptcies for two reasons: 1. to give you a clear indication of how one giant, out-of-state auto manufacturer attempted to impose unreasonable/illegal demands upon dealers and 2. to reconfirm the need for strong state franchise laws to protect dealers from unfair business practices.

FLOOD CONTROL

In response to the new auto dealer agreements, at least 47 states introduced legislation in an effort to quell the swelling auto manufacturer tide. Through the ADAND, we did so as well during both the 2011 and 2013 legislative sessions, all in an effort to enhance and strengthen our state franchise laws. And guess what? Our bills sailed through the North Dakota legislature with almost unanimous votes. One reason for this success is that our state legislators understand the need to protect North Dakota dealers, who are often the cornerstone of their local communities and one of the top employers in town. Legislators recognized that the auto contracts were completely one-sided and there was a need to defend our ND values and businesses. Another reason is that our grass roots lobbying efforts were calculated, concise, and tremendously effective. Our network of 225 automobile and farm equipment dealers reached out to their local legislators and won the day.

HEADWINDS

The following paragraphs explain my perception of the impact of several of the provisions within the new Case IH SSA, and how those provisions compare to North Dakota state law. *Disclaimer: this article was not written by an attorney and does not constitute legal advice. Readers are advised to consult an attorney regarding any legal interpretations or questions.*

1. Exclusivity/Purity

Section 9.2 *“...if Dealer undertakes or engages in another business activity at a Dealer Location (s) separate from its representation of new Products pursuant to this Agreement, which activity involves a considerable commitment of Dealer’s effort and resources, Dealer agrees to make such separation of the personnel, facilities and other non-capital resources devoted to that business as is satisfactory to Case IH...”*

Section 8.3 *“...if Dealer represents non-Case IH products, Dealer shall at any such location: (a) maintain internal and external display areas for new Products separate from non-Case IH products; (b) display new Products in the most visible and desirable position and in an area of greater size or space than the area used to display non-Case IH products.”*

In many cases, a main line manufacturer may not produce a particular line of product that has demand in a given region, or they may have a significantly inferior product relative to their competitors. As such, in an effort to fulfill customer requirements, dealers must establish relationships with other manufacturers in an attempt to fill product gaps and fulfill customer expectations. Dealers may expend a substantial amount of time, treasure, and talent to develop a market for any given non-main line product. These exclusivity/purity requirements strip independent businesses of their right to exercise discretion in retailing products that the market demands.

Both of these provisions appear to be illegal under North Dakota State law.

North Dakota State Law

51-07-01.2.

A manufacturer...may not:

3. Coerce or attempt to coerce a farm equipment dealer into a refusal to purchase farm equipment manufactured by another farm equipment manufacturer.

2. Equipment/Parts Stocking Requirements

Section 8.1 *“Dealer shall order...and prominently display, at all Dealer Locations...new equipment...at the level deemed necessary by Case IH to meet Dealer’s Equipment Sales obligations in accordance with Dealer’s Business Plan pursuant to Section 13...”* **Section 13.1** states *“Dealer shall complete...a written plan...that shall contain...objectives required by Case IH...which may include...(a) Equipment inventory stocking...to obtain Dealer Market Share requirements stated in Section 9.1(a)...”*

Section 8.2 “...Dealer agrees to order and maintain in inventory all Parts at the level deemed necessary by Case IH to meet Dealer’s Parts sales obligations in accordance with Dealer’s Business Plan provided pursuant to Section 13 of this Agreement...”

Section 19.1 “Case IH may specify in writing the minimum quantity of a given Product that Dealer shall be obligated to order at one time as a condition for filling such order, provided that such minimum quantity requirements will be consistently imposed on Dealers.”

Sections 8.1 and 19.1 are of particular concern as they allow Case IH to determine minimum levels of wholegood stocking and ordering. In 2008 and early 2009 there were several automobile manufacturers that had grossly misjudged market demand for new vehicles and as such, had factory yards that were overflowing with vehicle inventory. Their solution to their burgeoning vehicle supply problem was to require dealers to order those units and, as a result, incur the corresponding carrying costs.

All of these provisions appear to be illegal under North Dakota State law (NDCC 51-07-01.2, subsections 1 and 2).

North Dakota State Law

51-07-01.2.

A manufacturer...may not:

- 1. Coerce or attempt to coerce the farm equipment dealer to accept delivery of farm equipment, parts, or accessories that the farm equipment dealer has not voluntarily ordered.*
- 2. Condition or attempt to condition the sale of farm equipment on a requirement that the farm equipment dealer also purchase other goods or services...”*

3. Market Share

Section 27.3(c) *“If Dealer is in breach of Section 9.1(a), Case IH may terminate Dealer for such default....”* **Section 9.1(a)** *states “Dealer shall...attain within Dealer’s Sales and Service Market (SSM)...Market Share that is equal to at least 90% of either, in Case IH’s sole discretion, the Case IH State Market Share or the Case IH Regional Market Share. In evaluating Dealer’s market share performance, Case IH, in its sole discretion, may (i) group Product Lines and/or (ii) evaluate Dealer’s performance on a per Dealer Location basis.”*

The current SSA requires dealers to achieve sales expectations that are satisfactory to Case IH. The new SSA replaces that language with much more specific sales expectations which require Market Share that is equal to at least 90% of the state or regional Case IH market share. Following a 12 month cure period, Case IH may terminate a dealer for not fulfilling market share expectations.

North Dakota State Law

51-07-01.1

1. *A manufacturer...may not terminate, cancel, or fail to renew the contract with the retailer without good cause.*
2. *..., **good cause** for terminating, canceling, or failing to renew a contract is limited to failure by the retailer to substantially comply with those essential and reasonable requirements imposed by the contract between the parties if the requirements are not different from those requirements imposed on other similarly situated retailers....*

Simply put, **it is illegal to terminate a dealer except for good cause** as defined under #2.

4. Replacement Agreement

***Section 27.2** “In the event Case IH offers to all authorized dealers in the state...a new dealer agreement or an amendment to this Agreement..., Case IH may terminate this Agreement at any time...and shall furnish Dealer a copy of the Replacement Agreement with such notice....”*

This provision appears to be illegal under North Dakota State law. A manufacturer may not terminate, cancel, or fail to renew an agreement without “good cause” which is defined above under Market Share.

5. Case IH’s Exercise of Termination Rights

***Section 27.5** “Case IH may exercise its termination rights under Sections 27.3 and 27.4 without regard to the performance of other authorized dealers or to the circumstances under which Case IH has terminated or refrained from terminating the sales and service agreements of other authorized dealers.”*

This provision seems to be intended to enhance Case IH’s ability to discriminate among dealers with respect to termination considerations. This provision is particularly troubling, as Case IH could now have a much greater ability to arbitrarily determine which dealers they want to continue as going concerns and those that they want terminated. For example, one dealer may be allowed to miss market share expectations while another similarly situated dealer could be terminated for the exactly the same reason. Regardless, as previously mentioned, it is **illegal to terminate a dealer without good cause**, which is defined above.

6. Location Termination – Buyback Provisions

Section 27.3(e) *“As an additional or alternative remedy for any breach by Dealer of the Agreement, Case IH, in its sole discretion...may...remove authorization for the Dealer Location at which such breach occurred. In such event...Case IH will repurchase new Parts and Signs located only at such Dealer Location as provided in Sections 29.1(b) and (c).”*

This language attempts to provide Case IH with the option to terminate a branch location(s). This is significant for two reasons: 1. it appears to allow Case IH to circumvent North Dakota’s termination for “good cause” statutes, which apply to contracts, not single locations and 2. it nullifies ND buyback provisions, which apply to the termination of a dealer’s contract, not a single point location.

Arguably, the termination of a single point would *“substantially change the competitive circumstances of the dealership contract...”* **which state law prohibits** with an exception for the *“failure of the farm equipment dealer to comply with the terms of the written contract....”* (NDCC 51-07-01.2 (5)) However, when one considers ALL of the provisions within the SSA, it may be likely that a dealer is “failing to comply” with at least one provision at any given point in time.

Section 29.1(b)(ii) *“Repurchasable Parts shall be repurchased at the then current dealer price (less discounts and freight), less a restocking charge as set forth in the Parts Return Policy.”*

Under 29.1(b)(ii), parts may be repurchased at a net value that might be significantly less than a repurchase made in accordance with North Dakota’s buyback provisions. Among other conditions, state law requires the manufacturer to pay both inbound and outbound freight as well as imposing an implied restriction on restocking and other fees that may be levied by the manufacturer.

7. Authorized Products

Section 5.1(c) *“In the event Dealer is not meeting its obligations under this Agreement with respect to a particular Product Line or specific Equipment in a Product Line, Case IH in its sole discretion may remove such Product Line or Equipment.... Dealer thereafter will no longer be authorized to sell or perform Warranty Service for such Products...”*

This language allows Case IH to remove product lines, and even goes so far as to strip a dealer of their ability to perform warranty work on a unit they may have just recently sold. Case IH is reserving the right to eliminate a dealer’s ability to fully service an existing customer(s). This is especially troublesome for customers in a rural state like North Dakota where the closest dealer “allowed” to perform warranty work may be more than 100 miles away. How is this a benefit to the customer or the manufacturer?

Removing a product line or specific equipment may “*substantially change the competitive circumstances of the dealership contract...*” **which state law prohibits** with an exception for the “*failure of the farm equipment dealer to comply with the terms of the written contract.....*” (NDCC 51-07-01.2 (5)) However, when one considers ALL of the provisions within the SSA, it may be likely that a dealer is “failing to comply” with at least one provision at any given point in time.

8. Limitations Period

Section 30.5 *“All claims for any breach of this Agreement, and all claims arising out of the relationship between the Parties established by this Agreement, shall be made within two (2) years from the date such claim accrued.”*

This language amends the statute of limitations for filing claims to two years from the date the claim arose. It is very important for dealers to keep this two year limitation in mind if they are contemplating legal action.

9. Chargeback for Improper or Unsubstantiated Claims

Section 16.6 *“Dealer’s submission of unsubstantiated Dealer Claims or Dealer Claims not in compliance with the requirements of the DOG (Dealer Operating Guide) will result in a chargeback to Dealer for such claims.... If Dealer refuses to permit an audit, fails to maintain a substantial amount of the required records (16.5), or....., the chargeback will include all amounts paid on Dealer Claims for the prior two (2) years, including any dealer settlement allowances....”*

This language allows Case IH to chargeback **all** payments (sales allowances/programs, warranty, etc.) made to a dealer during the previous two years if the dealer fails to perform as stated in 16.6. This provision could be particularly onerous to multiple store dealers, as a failure at a branch location may create company-wide exposure for payments associated with all of the rest of the locations. **This one provision alone could be absolutely devastating to a dealer.**

10. Equipment Relocation

Section 20.4 *“Case IH may request Dealer to transfer new Equipment to another authorized dealer.... If Dealer refuses, Case IH, in its sole discretion, may decline to pay, on Dealer’s behalf, the wholesale finance interest charges associated with that specific Equipment, and may decline to make available to Dealer any retail sales programs for such Equipment.”*

This language requires a dealer to transfer new equipment to another, possibly competing, dealer or risk losing interest payments (free flooring) and other programs associated with that equipment.

11. No Group Litigation

Section 30.4 *“The Parties agree that any and all dispute resolution proceedings between them, including litigation, arising from or related to this Agreement shall be conducted on an individual basis only..”*

This provision eliminates a dealer's ability to join with other dealers in an effort to commence any type of dispute resolution proceeding, or participate in a class action lawsuit against Case IH. **If this provision is even legal**, it is likely to greatly increase the cost for an individual dealer to pursue judicial remedy, and may also greatly decrease a dealer's desire to pursue a claim against Case IH.

DAYBREAK

In 1991, the ND legislature created the manufacturer "prohibited acts" section within North Dakota state law. They recognized the need to protect North Dakota farm equipment dealers and their employees, and ensure that there is a baseline of fairness in dealers' contracts with manufacturers.

As previously mentioned, one of the protections that exists for both automobile and farm equipment dealers prevents manufacturers from demanding that dealers maintain exclusive facilities. That provision alone saved 21% of North Dakota's automobile dealerships from closing their doors during the 2009 auto manufacturers' bankruptcy process.

The investment that is required of dealers is such that they might not be able to operate without these protections. Creditors analyze each dealer's ability to retain a franchise and make payments on floorplan loans, building loans, operating loans, etc. Most dealers operate independent, self-financed, family owned businesses that invest hundreds of thousands, and in some cases millions, of their own dollars into representing one brand. Franchise protections have a direct impact on the ability of dealers to fulfill both their short and long term obligations, not to mention the thousands of North Dakota employees who count on dealers to sustain their families.

The national Equipment Dealers Association (EDA) has indicated that they have concluded their attempts to negotiate the CNH contract. However, **our association still has several major concerns** that we believe need to be remedied. I have had numerous discussions with several of my fellow association leaders who share the same concerns. Through the power of regional associations, we will continue to work hard to address our concerns and develop solutions that are agreeable to all parties. We will continue to cultivate the manufacturer/dealer partnership as a "TEAM" concept and work with, not against, manufacturers to resolve concerns.

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*Matthew Larsgaard
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The number one job of association managers is to help create the best possible business environment for both their dealers and the manufacturers, knowing that **the success of each is absolutely critical to the health of all**. We are very hopeful that a non-legislative conclusion will be found. However, if not, we as regional associations may have no choice but to approach our respective legislatures in an effort to provide relief for our dealers. If that is the case, we will address the concerns mentioned above and, in the process, take a wide, pre-emptive look at any other areas that should be strengthened such as warranty reimbursement (labor, parts, and time allowance), mandatory participation in advertising/promotions, transparency for market share requirements, etc.

Promoting fairness in franchise contracts is beneficial to dealers, their employees, our communities, the overall Ag economy in North Dakota, and the manufacturers as well. We are fully committed to working toward this end.

For the Dealers,

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