Manufacturers: The Very Visible Hand in Every Transaction

Most owners considering the sale or purchase of a business enter the process thinking there will be two parties at the table – buyer and seller. Unfortunately, for equipment dealers, the rights of manufacturers in dealer agreements mean that it usually takes three to tango. Like it or not, your dealership is tied to your manufacturers, including the decision of how, when and to whom you sell. Almost all dealer agreements with a major manufacturer (and most shortlines) include language requiring you to get consent before selling your dealership or any ownership interest in your dealership. Because manufacturers have a contract right to be involved in the transfer, it is important to understand the process and your legal rights. **Process**. There is no definite right or wrong process to follow when dealing with your manufacturers. Your approach may need adjustment depending on your manufacturer's own approval process and your rights under your state fair dealership law. However, there are usually at least three key process elements involving manufacturers when dealerships are transferred:

- *The Preliminary Survey: What does my manufacturer think of me?* In this era of dealer consolidation, most buyers are owners of other dealerships. As a result, a recommended first step for a dealer interested in expanding is a conversation with your manufacturer to determine if they consider you a viable candidate for buying another dealership. Some manufacturers may proactively approach dealers about growth, but don't hesitate to initiate the process. If a manufacturer doesn't view you as someone that will be allowed to add dealerships (or ready to add dealerships), it will save you time and effort to learn that upfront rather than after negotiating a deal with a seller.
- *Information: What information can the manufacturer provide about the selling dealership?* Manufacturers can be an information resource in a buyer's preliminary due diligence. For buyers, receiving information from a manufacturer may provide comfort by confirming the accuracy of information in the seller's records. For sellers, manufacturer participation in the process may save time in the due diligence process, but sellers should implement the following before information is shared by the manufacturer:
    - Manufacturers will usually require you to give permission to disclose your information to a potential buyer. When doing this, be careful to specify what types of information may be disclosed and perhaps specifically identify some things you do not want disclosed. For example, you may want the manufacturer to disclose market share information, but you may not want the manufacturer to tell the buyer your market share goal (or share correspondence relating to a failure to meet that goal).
    - Only grant permission to disclose information after you have a confidentiality agreement signed with your buyer.
- *The Business Plan.* Most manufacturers will require the buyer to submit a business plan before approving a transaction. Although this plan may not be reviewed until a purchase agreement is negotiated with a seller, it is important to ask your manufacturer about its business plan requirements (and template, if available) and timing once you have reached agreement on price and other key terms with the seller. Once a deal has momentum, you don't want to slow it down because you're behind in completing your business plan.

Legal Rights. Despite the broad rights manufacturers require in dealer agreements, dealers in many states have protections relating to dealer transfers in their fair dealership laws. Understanding these rights is important. These laws contain several types of protections relating to the dealer transfer process. The most common are listed below:

- *Timing for Approval*. Many states require manufacturers to respond to a dealer transfer request within a specific time frame (usually 30-90 days). The time period may not start until the manufacturer has key information about the buyer so timely completion of the business plan becomes even more important.
- *Reasons for Withholding Approval*. If a manufacturer rejects a transfer, it must often give all the reasons why the transfer was rejected. This will give you a chance to address the reasons or may provide a basis for challenging the legality of the manufacturer decision.
- *Standard of Approval.* Some fair dealership laws prevent manufacturers from "unreasonably" withholding consent to a transfer.
- *Conditions of Approval*. Manufacturers may try to require buyers to drop a line of equipment produced by another manufacturer. This type of condition will be prohibited by some fair dealership laws.

Adding a third party to your sale negotiations will inevitably complicate your transaction and may be frustrating. The good news is that an understanding of the process and your legal rights in advance will help set your expectations accordingly and hopefully make the process go more smoothly.