Does a "Product Withdrawal" or a "Market Withdrawal" Constitute Statutory "Good Cause" for Termination?

By

J. Michael Dady and Jeffery S. Haff[1]

Through a midnight announcement on January 9, 2017, Polaris Industries, Inc. announced that it would "Wind Down Victory Motorcycle Operations" in an effort at "Strengthening Its Position in the Powersports Industry." Many dealers have carried Polaris's Victory line of product for many years, putting their time, effort and money into selling and representing the product. But, then, in the middle of the night, Polaris announced that, although the dealers have done absolutely nothing wrong, the following would happen:

1) The dealers will no longer be receiving any more new motorcycles;
2) Polaris has already told the entire universe of consumers that it will not be making or selling the Victory product line anymore; and
3) Polaris will not compensate the dealers for their lost future cash flow or other financial losses the dealers will suffer from the loss of the product line.[2]

A Polaris dealer who pulls out and reads his or her written dealer agreement will see that the agreement is generally not favorable to the dealer. These agreements often include an acknowledgement that a product may be withdrawn by the manufacturer without liability to the dealer. These same agreements may include a "no damages" clause, which states that the dealer has no remedy at all upon termination, or the sole remedy is to seek reinstatement as a dealer. The dealer agreement may require arbitration in the manufacturer's backyard and may severely limit the arbitrator's ability to award damages. What is a dealer with such an agreement to do?

First, a dealer needs to obtain legal advice as to the dealer's federal and state statutory rights. For example, motor vehicle dealers generally are not required to arbitrate legal disputes

---

[1] J. Michael Dady and Jeffery S. Haff are partners at Dady & Gardner, P.A., a ten lawyer franchisee boutique law firm, in Minneapolis, Minnesota. For more information, consult our website at www.dadygardner.com.

[2] Polaris has subsequently provided two alternatives to dealers – stay on as a parts and service only dealer with no new units to sell, or exercise their state "buy back" rights and exit from Polaris.

unless the dealers agree to do so *after* the dispute has arisen. *See*, 15 U.S.C. § 1226(a)(2). Therefore the arbitration clause in a standard dealer agreement may be void. Many state dealer statutes contain non-waiver language and require that a manufacturer prove that "good cause" exists under state law before a termination of a dealer's right to continue as a dealer for a particular product line may occur. The courts generally will apply these dealer protection statutes, notwithstanding any clauses to the contrary in a written dealer agreement.

Therefore, while an auto dealer in Ohio may have signed a dealer agreement saying:

- he must arbitrate in Minnesota;
- only Minnesota law applies; and
- the dealer may be terminated without "good cause" and without any compensation.

the actual result under applicable law may be that this dealer may sue in an Ohio court and may be protected by an Ohio statute against termination without "good cause." The dealer may have a viable claim to recover all damages from loss of the product line, plus his costs of collection and attorneys' fees.

Two more difficult legal issues to consider are: (1) is the announced behavior of the manufacturer actually a "product withdrawal" or a "market withdrawal"? and (2) if it is such a withdrawal, does this product withdrawal or market withdrawal meet the statutory definition of "good cause" for termination? The case law generally indicates that a withdrawal of a product from a market only could possibly constitute "good cause" if there is a "total market withdrawal" that is "economically necessary." For example, continuing to sell the product to certain dealers or selling it under a different name may defeat a "product withdrawal" argument, and the

existence of other economically viable alternatives to a total market withdrawal may render that market withdrawal not "economically necessary."

Courts have been split on whether an actual "product withdrawal" or "market withdrawal," even for some legitimate business reason, constitutes proper legal cause for termination. Thus, it is important to remember that just because a product manufacturer or supplier says that (1) it is withdrawing a product; and (2) the dealer has no legal recourse, that does not make either of those two statements necessarily true. In the final analysis, a dealer who is victimized by a "product withdrawal" or "market withdrawal" may very well have viable arguments on both liability and damages issues. The dealer should not assume that either his dealer agreement or the manufacturer's termination letter accurately or adequately describe the dealer's legal rights. At the very least, the damaged dealer should seek legal counsel to determine its legal rights to recover damages for what may be (or may not be) a wrongful termination under applicable state law, and, as we often say to our dealer clients and their dealer associations, "dealers should not rely on their manufacturer for their legal advice!"