Legal Updates: Effective Estate and Succession Planning for Auto Dealers; NY Dealers Challenge Ford's Model e Program

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Auto dealership owners have invested blood, sweat, and tears into building and growing their businesses. Having a comprehensive estate plan in place can help preserve that investment into the future for the owners, their families, and for those dependent on the dealership operations. Failing to plan will have the unfortunate effect of shortchanging the family, the employees, and the owner's legacy.

The combined federal and state estate tax rates for many car dealers can exceed fifty per cent (50%). Absent planning, over one half (1/2) of a dealer's hard-earned assets would go to pay estate taxes, leaving far less for family. Often, the dealership and related real estate comprise a significant portion of the estate being taxed. In instances where proper planning has not occurred, heirs are frequently forced to sell the dealership and/or the real estate, often at distressed sale prices, in order to pay the estate taxes.

Since dealership owners know the livelihoods of their employees, in addition to the owner's family, are dependent on the dealership's operations, creating a plan is complex, particularly when considering the family's wishes after an owner's retirement or death and the associated tax issues. In addition to the tax questions, there are additional questions to address, such as who will carry the company into the future? How would a dealership owner treat children who are not involved in the dealership's day-to-day operations? How can transitions be structured so that family members are treated fairly, and the dealership does not falter after a dealership owner's death?

In addition to the questions above, dealers have unique challenges when it comes to estate planning. Some of these challenges involve having multiple businesses for leasing or warranties, floor plan loans, business decision-making in the event of significant illness, and the limitations OEMs place on dealers. A good estate plan will account for these factors while addressing the tax issues.

There are many techniques to address a dealer's estate and succession planning concerns. Let's take a brief look at some available techniques often used.

One way to create estate tax savings is to utilize annual gift exclusions. Individuals with sufficient assets can use the federal gift exclusion to give up to $17,000 ($34,000 together with a spouse) to an unlimited number of family members or other recipients. Used consistently, this can save considerable estate tax. For example, a $34,000 gift can be viewed as reducing estate tax by $13,600, based on the 40% federal estate tax rate. This savings increases for states that have an estate tax as well, such as Massachusetts. Over time this reduces the estate tax significantly.

Trusts are also frequently utilized. There are different types of trusts for different circumstances, and often one trust can combine trusts for nearly every estate out there including; revocable, irrevocable, and charitable trusts. These are some of the most frequently used trust vehicles. Often, dealership owners utilize more than one type of trust in their planning.

A common type of trust is a revocable trust, sometimes referred to as a revocable "living" trust. This is a flexible trust where the owner transfers property to a trust while retaining the ability to amend or revoke the trust. This allows them to control, add, and remove property during life. Because it is amendable, the trust can be changed due to life circumstances such as the death or birth of an heir or a change in one's marital status.

Irrevocable trusts are also used, often to make gifts to remove property from the owner's taxable estate. As the name implies, these trusts are not amendable by the grantor, but once property is transferred to them, if correctly implemented, the property is removed from the owner's taxable estate, and the subsequent growth of the assets benefits the trust beneficiaries, not the owner's taxable estate.

An additional planning tool is a buy-sell agreement. A buy-sell agreement is an arrangement that eliminates some of the pitfalls associated with succession, including having heirs demand a sale of the business at distressed prices. Generally, there are two types of buy-sell agreements: cross purchase agreements and stock redemption agreements. In a cross-purchase agreement, each owner of the corporation purchases an insurance policy on the other owners. The buyer is both owner and beneficiary of the policies. Upon the death of a co-owner, the other owners can use the insurance proceeds to buy the deceased owner's interests. In a stock redemption agreement, the business owns policies on the lives of the owners. When an owner dies, the business buys the deceased shareholder's interest in the company with the insurance proceeds.

Estate and succession planning is a fantastic opportunity to provide not just peace of mind for one's family today, but it provides options for what tomorrow looks like, whether that means additional growth, a new business venture, or charity.

NY, Illinois Dealers Challenge Ford's Model e Program

Recently a group of Ford dealers in New York obtained a favorable legal decision that granted a stay over Ford Motor Company's implementation of its Model e Electric Vehicle Program ("Program") in the state until the dealers' challenge to the Program is decided. As we discussed in our Novem-

ber 2022 article, Ford shocked many in the automotive industry last Autumn when it announced the Program and gave its dealers less than two months to opt in.

The Program, which is currently being implemented nationally, requires dealers to make significant financial investments of between $500,000 and $1.2 million in charging stations and other infrastructure or be prevented from selling or servicing Ford and Lincoln-branded electric vehicles until at least 2025. The Program also requires dealers to accept trade-in values unilaterally determined by Ford, greatly reducing competition among Ford dealers to the detriment of both consumers and dealers. In response to these drastic changes, several dealers and dealership groups across the country brought legal challenges to the Program under their respective state dealership laws.

Late last year, four New York Ford and Lincoln dealers sued Ford in the NY state courts under the state's Franchised Motor Vehicle Dealer Act, arguing that the Program constitutes an unlawful modification to the dealers' franchise agreements. The dealers argue that they will lose the ability to sell and service EVs and will eventually be run out of business given Ford's shift towards the sale of EVs if they decline to participate in the costly Program. The dealers also allege that the Program requires an unlawful allocation of their resources, and that Ford is attempting to impose unfair pricing requirements and profit margin reductions on their businesses. Ultimately, these dealers, like dealers across the country, allege that the Program is an attempt by Ford to bypass the dealer network altogether and sell its vehicles directly to consumers.

The New York Franchised Motor Vehicle Dealer Act, similar to our Massachusetts franchise law at MGLA Chapter 93B, protects dealers from unilateral modifications to their dealer agreements that result in negative consequences for the dealer. The legal protections are not limited to modifications in the franchise agreements, but also cover "any change or replacement of any franchise if such change or replacement may substantially and adversely affect the new motor vehicle dealer's rights, obligations, investment or return on investment."

The New York dealers moved for an automatic stay of the Program requirements and restrictions until the Court issues a final judgment in the litigation. New York law provides for an automatic stay in cases in which a dealer challenges a modification to its franchise. In response to the motion, Ford argued that the dealers do not qualify for an automatic stay because the Program terms are not modifications to the dealers' franchises, but rather are reasonable requirements of a voluntary program. In addressing these arguments, the Court stated that the relevant question for purposes of the dealers' request for a stay was not whether the Program terms are voluntary or reasonable, but whether the effect of the Program arguably modifies the franchise relationship.

After analyzing the Program provisions, the Court agreed with dealers that the Program could be interpreted as modifying their franchises. The Court noted that, prior to the implementation of the Program, Ford dealers had sold and serviced Mustang "E" electric SUVs and certain hybrid vehicles, such as the Ford Fusion Hybrid sedan. Given this prior course of performance, as well as the required financial investments, pricing structure changes, and penalties for declining to participate, the Court found that the Program terms could be characterized as "a significant change in the current business model". Thus, Ford's Model e Electric Vehicle Program has now been stayed in the state of New York until a final judgment is issued in the case. Ford has appealed the Order.

Although the outcome of the New York litigation is still pending, the recent order granting a stay is an encouraging sign for Ford dealers in other states, showing that at least one Court has found merit to dealers' argument that the Program constitutes an unlawful, unilateral modification to their franchise agreements. Notably, however, the South Dakota Office of Hearing Examiners reached the opposite conclusion in a decision issued last Spring, finding that the Program did not constitute a change to the franchises of South Dakota Ford dealers.

Also this year, 26 Ford dealers brought a similar legal challenge in Illinois, arguing that the Model e Program violates the Illinois Motor Vehicle Franchise Act. In a major victory for dealers, the Illinois Motor Vehicle Review Board determined that Ford violated the Act when it terminated the dealers' Next-Gen Agreements and prohibited them from selling and servicing Ford EVs after December 31, 2023, unless they enrolled in the Model e Program. The Board disagreed with Ford's argument that the Program was voluntary, finding that participation was mandatory for dealers to maintain their current status. Having previously made EVs available to dealers to sell, the Board held that Ford cannot take those products away without terminating or substantially modifying their franchise agreements.

The Board further determined that Ford violated the Illinois dealer franchise law by requiring dealers to purchase and install EV chargers and offer chargers to the public, which is akin to requiring dealers to offer a secondary product in the form of electricity. Finally, the Board agreed with dealers' arguments that the Program unfairly burdens dealerships located in rural areas by requiring the same number of expensive fast chargers as dealers in major urban areas.

The decision of the Illinois Motor Vehicle Review Board is a significant victory for Illinois Ford dealers that will serve as additional persuasive authority to other courts and governing bodies that are considering these issues around the country.

The saga of Ford's Model e Program serves as an important reminder that dealers need to vigorously assert their rights, as manufacturers make drastic changes and implement programs that often cause harm to dealers and marginalize their role in the sale and servicing of motor vehicles.

We will continue to monitor these developments as they play out in legal challenges pending in various states.

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