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# New Hampshire Supreme Court Holds Settlement Unenforceable Under Anti-Waiver Provisions of State Motor Vehicle Franchise Law

***Strike Four, LLC v. Nissan North America, Inc.*, No. 2012-193, 2013 N.H. Lexis 37 (April 12, 2013).**

State motor vehicle franchise laws often proscribe agreements that purport to waive the statutory protections afforded to dealers. Thus, when a new franchise relationship is formed, a manufacturer cannot pressure the new dealer into forgoing legislative safeguards against termination or encroachment, among other things. But what happens when a dealer waives such rights in connection with a settlement of litigation? In New Hampshire, at least, such a settlement agreement will not be enforceable, according to a recent ruling by that state's supreme court.

In *Strike Four, LLC v. Nissan North America, Inc.*, the New Hampshire Supreme Court held that the anti-waiver provisions of the state's motor vehicle franchise act, N.H. Rev. Stat. Ann. ? 357-C:1, *et seq.* (the Act), govern all agreements between manufacturers and dealers, including settlement agreements, and that parties cannot voluntarily agree to waive legal challenges under the Act or discontinue a dealership without abiding by the Act's termination provision, even for settlement purposes.

**The Parties' Original Dispute and Settlement**

In 2005, Nissan North America Inc. (Nissan) issued a notice of termination to its dealer, Strike Four LLC. The dealer filed a protest of the termination with the state Motor Vehicle Industry Board (the Board) pursuant to a procedure provided for in the Act. The protest was stayed while extended efforts to resolve the dispute were conducted by the parties. A settlement was finally reached in 2007 pursuant to which the dealer agreed to withdraw its protest and the parties entered into a new, two-year term agreement. As part of the settlement, the new agreement provided that if the dealer failed to meet certain sales requirements, it would sell the dealership to a Nissan-approved buyer. The dealer, who was represented by counsel throughout, expressly acknowledged in the settlement agreement that the terms were "fair and reasonable" and that it waived any right to challenge the enforceability of the settlement agreement under the Act. *Strike Four*, 2013 N.H. Lexis 37 at *2-4.

**The Dealer's Challenge to the Settlement Agreement**

When the dealer demonstrated low sales volume, Nissan advised the dealer that it was "highly unlikely" that the dealer would meet its sales requirements by the deadline set in the settlement agreement. Accordingly, Nissan suggested that the dealer begin to actively look for a potential buyer for the dealership. In response, the dealer filed a new protest action, arguing that the settlement agreement was unenforceable under the Act because the sales requirements were unreasonable and the provisions requiring the dealer to voluntarily divest itself of the dealership were inconsistent with the protections afforded under the Act. Nissan filed a counterprotest alleging that the dealer acted in bad faith by, among other things, challenging the enforceability of the settlement after agreeing not to do so. The Board dismissed the dealer's protest and sustained Nissan's counterprotest. The Board's decision was reversed by a state trial court and then the matter was appealed to the New Hampshire Supreme Court. *Id.* at *4-8.

**Settlement Agreements Are Subject to the Anti-Waiver Provisions in the Act**

In the appeal, Nissan argued that the anti-waiver provisions in the Act do not apply to settlement agreements as a matter of public policy. The court disagreed, holding that the broad and express terms of the Act govern all agreements executed between a manufacturer and dealer. The Act provides: "[a]ll written or oral agreements *of any type* between a manufacturer...and a motor vehicle dealer shall be subject to the provisions of this chapter, and *provisions of such agreements which are inconsistent with this chapter shall be void as against public policy and unenforceable*. ..." N.H. Rev. Stat. Ann. ? 357-C:6, I (emphasis added). Further, the Act contains additional anti-waiver language in its termination section. ? 357-C:7. While the court acknowledged that other jurisdictions carve out settlement agreements from statutory anti-waiver provisions in franchise acts, the court held that the broad language of the New Hampshire Act allowed for no such exception.

Based on the anti-waiver provisions in the Act, the court held that the automatic divestiture obligation in the settlement agreement was invalid to the extent it vitiated statutory termination protections. In other words, the court held that the parties could not contract to voluntarily waive (1) challenges to the illegality of the settlement agreement, and (2) the termination protections of the statute?-- even for settlement purposes.

Interestingly, despite its holding, the court found that Nissan may nonetheless be entitled to attorney fees under the Act, due to the dealer's bad faith. Nissan alleged that the dealer forestalled the 2005 termination for years by negotiating a settlement and that only after receiving the benefits of being Nissan's dealer did it reveal that it did not intend to meet its obligation. The court remanded this issue to the Board for further factual determinations.

The holding in *Strike Four* is a stark reminder that litigants seeking to resolve motor vehicle franchise disputes should determine whether their settlement agreements may be subject to challenge as violative of a broad anti-waiver provision. In such situations, the parties should determine whether the anti-waiver provision is narrowly applicable only to franchise agreements (and not settlement agreements) or whether there is authority for carving out settlements from anti-waiver statutes either expressly or as a matter of public policy in favor of settlement enforcement.