

**Needed: A Few Good Dealers to Challenge the Chrysler VPA Incentive Program**

by : Richard N. Sox, Jr.

The attorneys at Myers & Fuller, P.A. have been going to school on Chrysler's Volume Performance Allowance (VPA) program for over a year now. We have had complaints about the program for some time. With the news recently that Chrysler is continuing this onerous program for at least another year, I thought I would post the "help wanted" sign again. From what Chrysler dealers have been telling us, we believe that the VPA program is illegal as it is applied to many Chrysler, Dodge and Jeep dealers. All we need to shut this program down is a few good dealers who have had enough.

The dealers who are ideally postured to challenge the program have had their VPA target set at an unattainable level. These dealers have potentially three claims against Chrysler. First, such a dealer would have a claim for breach of the dealer agreement due to Chrysler's failure to set a reasonable sales goal. Second, a violation of the dealer's state franchise protections requiring reasonable sales performance standards and/or requiring the manufacturer to act in "good faith" toward the dealer. Third, such a dealer would have a claim for violation of state and/or federal price discrimination laws if the dealer is in the position of competing against a larger Chrysler dealer who is receiving the VPA money. All these claims would be accompanied by a request for a reward of damages in the form of lost incentives or lost profit on sales in the case of a price discrimination claim.

The lawsuit described above would look a lot like our current case against Kia Motors challenging its multi-tiered incentive program, except the incentives lost by Chrysler dealers could be dramatically larger under the VPA program. It appears that the per vehicle bonus is higher under the VPA than under the Kia program and, in many cases, involves a greater volume of vehicles. If we could challenge the VPA program on our own we would. *This is an in-your-face attempt to force dealers to sell cars at ridiculously slim margins and to force small dealers out of business.* Those Chrysler dealers affected by the VPA program are the only ones that can do anything about it. It is high time for those dealers to stand up, be counted and protect the significant investment made in their dealership. Chrysler has decided that, despite the dealers' outcry against it, the VPA program will remain in place. Chrysler needs to regret that decision!

**Beware of potential new MB market share and facility demands**

I know this may sound like "pick on DaimlerChrysler day" but if the shoe fits...

Several of our Mercedes Benz dealers have contacted us following recent discussions with their MB representative. Their factory representative stated that until the dealer achieved market share they will be issued a one-year term dealer agreement. Along with the one-year term dealer agreement, these dealers are being asked to execute a "dealer improvement addendum." This addendum asks the dealer to agree that "Dealer acknowledges its low sales performance with only X units registered is substantially below national levels of Y percent."

Some of these same dealers, as well as other dealers who apparently are meeting sales performance requirements, have also received a "dealer improvement addendum" that states "Dealer hereby acknowledges that its dealership facility does not meet MBUSA facility requirements for space and image." According to the addendum, the dealer has approximately eight months to construct an acceptable facility.

If the MB dealer doesn't comply with the sales performance and/or facilities requirements after signing the addenda, they are subject to termination under the terms of the standard provision of the dealer agreement.

We understand that this all started with a wonderful little pep rally held by Mercedes Benz President, Ernst Lieb, during this year's NADA convention. Apparently, Mr. Lieb told dealers that it was going to be his way or the highway. Either dealers would sell more cars and upgrade their facilities to Mercedes Benz' lofty standards or else.

Dealers should never sign an addendum to their dealer agreement that causes them to admit they have not performed adequately. If MB has a problem with your sales performance, it can take action under the standard terms of your dealer agreement. In that case, you have all the protections of your state law to argue that the performance standard is not appropriate as applied to you and, thus, MB does not have good cause to terminate you. If you sign an addendum, you potentially give these arguments away!

As a general rule, your dealer agreement has minimum facility guidelines. By contract, you only have to meet those guidelines. Anything else is to be done at your option. Our very strong advice is not to sign the dealer improvement addendum. Once you do, it is very difficult to unwind your admission that your facility is not acceptable and that you have agreed to construct a new one within a certain time frame. It is very difficult for us as dealer lawyers to explain to a judge that even though you are a sophisticated businessperson, you didn't know what you were agreeing to do.

Instead of signing the dealer improvement addendum or one-year term dealer agreement, where applicable, we are recommending that you write a letter to your MB representative, which puts the ball back in its court. Ask them what they are basing the facility requirements upon (i.e. expected units in operation), how are they calculating market share and explain to your representative that, as it is, allocation of popular vehicles is limited and, thus, additional sales to either meet required market share or to justify construction of a larger facility is questionable. Have an experienced motor vehicle franchise lawyer assist you with crafting your response.

**Rich Sox** is a lawyer with the firm of Myers & Fuller PA, with offices in Tallahassee, Florida and Raleigh, North Carolina. The firm's sole practice is the representation of automobile dealers in their quest to establish a level playing field when they deal with automobile manufacturers.