

## Current Hot Topics in the Automotive Industry

by : Richard N. Sox, Jr.

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With so much going on in the automotive industry these days, I think the best use of the limited space I have in this column is to provide you with a brief discussion this month of several topics that are hot and heavy at Myers & Fuller, P.A.

### Continuing questions from Ford and LM dealers

The calls keep coming in from both Ford and Lincoln-Mercury dealers complaining (rightfully so) that they are suffering devastating losses to their bottom line. As we have said more than once in this column, the problem with Ford and Lincoln-Mercury is unique in that, unlike Oldsmobile, Plymouth, Isuzu, Pontiac, Buick and GMC (discussed below) Ford has taken no action that we know of that would qualify as a “constructive termination” of the franchise. It hasn’t told the world that it is planning on discontinuing any of the linemakes; it hasn’t taken away a vehicle from one linemake and rebadged it under another; and it hasn’t arbitrarily reduced the model offerings to the point of not marketing to previously served customer segments. Instead, Ford has simply not been able to put out product that can get traction with American consumers. We are not aware of any legal claim that can be brought by a dealer against Ford under these circumstances. Making poor management/product development choices in and of itself is not actionable short of gross negligence or fraud.

With that said, we are advising our Ford and Lincoln-Mercury clients to press forward on two fronts. First, continue to write letters to your regional representatives demanding that Ford follow through with its stated goal of reducing the dealer count. We are aware of only a few markets where Ford has aggressively come in and made a proposal to assist the dealers in buying out one of the other dealers who is ready to get out of the business. It may be important in the future to have Ford’s failure to respond to these requests documented.

Second, we are advising our Ford and Lincoln-Mercury clients to look at acquiring other available franchises to bring into their dealerships. We are well aware that Ford has beaten into everyone’s head that duals will not be permitted. I hate to tell it, however, that the time of reckoning has come! Ford cannot expect its dealers to continue to lose the investment it has spent years nurturing and not take any action to stop the bleeding. We believe now is the time for Ford dealers to press the issue by proposing the approval of the addition of another linemake to the dealership (assuming the new linemake’s manufacturer agrees to the dual) and let Ford explain why that isn’t appropriate under the current economic circumstances. Not only do some state laws expressly prevent the manufacturer from refusing to allow a dual, but under the circumstances, we believe some of the more general “good faith” type of provisions of your state franchise laws can be used to hold Ford accountable. The issue will come down to whether the dealer can demonstrate that, with the addition of the new franchise, the Ford and/or Lincoln-Mercury linemake will still have adequate space in your facility. With the decline in sales, service and units in operation, many dealers will be able to show they have space not reasonably needed by the Ford franchise. In some cases, it may make sense to compromise and provide a separate showroom but have shared service. At this point, any combination of operational assets that can be obtained will help.

### Imports smell blood – Nissan and Acura ramp up market studies

You can add Nissan and Acura to the list of imports that are circling like sharks with blood in the water. That red tinge in the proverbial water is coming from the domestic automakers and their dealers. We have previously written about a major up tick in market studies and resulting proposals for additional dealership points by both Toyota and Honda. Now, Nissan and Acura are getting in gear. Nissan was particularly aggressive in adding new dealerships a few years ago but has since slowed. That appears to be changing now as we have had several clients call to tell us that Nissan and Acura alike have notified

them that a market study is scheduled for their market.

We typically see the bulk of market studies and notices of new dealerships approximately a year after each 10-year government census. The last United States government census was in 2000. The manufacturers have at their disposal a company called Urban Science, which is part of what we have affectionately named the "evil empire." Urban Science employs actuaries and economists who take the United States census data and run it through its own systems to obtain results, which inevitably call for new points to be added to various markets. Without new census data we can only conclude that the imports are looking to capitalize on the decline of the domestics.

Our advice for dealers receiving notice from their manufacturers that a market study is planned for their market is to contact experienced franchise legal counsel to assist you in writing a response to the manufacturer. Among other items, that response should include a discussion of the investments you have made in your dealership, a discussion of any unique circumstances involved in your market, a statement that you believe you are more than adequately serving the customers in your market, a request for the completed market study and a statement that objects to any proposed additional point being added to your market.

If a new point is ultimately proposed, it will be time to decide whether you want to fight the addition of that new dealership. With so many of the manufacturers, particularly import manufacturers, demanding new and vastly larger facilities, I would submit that import dealers should seriously consider standing up for their right to obtain a reasonable return on their ever-increasing investment.

#### **Mercedes Benz initiates market share and facility demands**

Several of our Mercedes Benz dealers have contacted us following recent discussions with their MB representative. Their factory representative stated that until the dealer achieves market share they will be issued a one-year term dealer agreement. We understand from these dealers that MB has not talked much about market share in the past and certainly hasn't ever made any specific demands on the dealers to meet "market share," however MB is choosing to calculate that number. 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 admit 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, they are subject to termination under the terms of the standard provision of the dealer agreement. We understand that MBUSA's new president, Ernst Lieb, met with dealers in Dallas not long ago and raised cane about dealers' sales performance and facilities. We are told that he stated in no uncertain terms that every dealer will bend to his will!

We have seen some version of this before with Toyota, Nissan and VW to name a few. In particular, we have seen this as it relates to a new image/facility program. The manufacturer makes a determination that it is time for every dealer to have the latest, greatest facility and it is not up for discussion. When this happens, we encourage dealers to take a deep breath and not get caught up in the pressure being applied by the factory. Remember, you have already signed a dealer agreement. As a general rule, that 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.

As it relates to sales performance, we likewise recommend that dealers not ever 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 inappropriate as applied to you and, thus, MB does not have good cause to terminate you. If you sign an addendum, you give these arguments away!

Instead of signing the dealer improvement addendum, or one-year term agreement where applicable, we are recommending that you write a letter to your MB representative, which puts the ball back in its court. Ask MB what it is basing the facility requirements upon (i.e. expected units in operation), how is it calculating market share (this is always a fun one) 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. Just remember what happened to your fellow VW dealers who bought into the promises several years ago by VW that popular models would continue to come and in sufficient numbers. They got stuck with huge marketplace facilities that are just now turning a profit.

It is critical that if this is indeed a widespread assault by MB that the dealers all sing from the same songbook and all push back. Stand up for your rights; it is your money and your hard-earned investment, not Mr. Lieb's!

**Rich Sox** is a lawyer with the firm Myers and Fuller, P.A., located in Tallahassee, Florida. 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.