the Myers & Fuller, P.A. report

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Leveling the playing field between automobile dealers and manufacturers for over 20 years.

Inside

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Introducing the Myers & Fuller Report

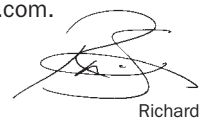
a newsletter for motor vehicle dealers and associations

WELCOME to the first installment of *The Myers & Fuller Report*. We intend for our newsletter to be published quarterly for use by motor vehicle dealers, dealer associations and their advisors in keeping abreast of challenges facing dealers across the United States.

As you may know, Myers & Fuller has been representing automobile, truck and motorcycle dealers and dealer associations for over 20 years in disputes with manufacturers and consumers. Our practice includes counseling dealers on matters such as buy-sell transactions, terminations, relocation and addition of competing dealerships, finance and insurance, warranty and sales incentive audits, improper allocation, transfer turndowns, market realignments, internet sales, site control, exclusivity, environmental cleanup and consumer class action lawsuits. In addition to our litigation services, we assist numerous dealer associations in crafting franchise law solutions to the many manufacturer, finance and insurance as well as consumer challenges facing dealers. Lastly, we provide our clients with onsite finance and insurance compliance reviews which include reviewing and recommending changes to processes and forms used at the dealership.

Our goal with *The Report* is to provide you up-to-date information on new developments in manufacturer initiatives, finance and insurance challenges and consumer claims. We will include articles on broad topics affecting dealers as well as specific discussion on the outcomes of our manufacturer and consumer disputes.

We hope you will find *The Report* to be a valuable resource. Please do not hesitate to contact me with questions on any topic we cover or with suggestions on how to improve *The Report*. My email address is rsox@dealerlawyer.com.



Richard N. Sox, Jr.
Managing Partner

News Brief

Nissan Termination Trial Awaits Judge's Ruling

MYERS & FULLER ATTORNEYS RECENTLY COMPLETED DEFENDING A LARGE VOLUME NISSAN DEALER IN A TERMINATION ACTION BROUGHT BY NISSAN. The trial lasted 3 weeks and included testimony that Nissan's sales performance standard (regional average) was not reasonable, that Nissan intentionally withheld allocation from our client and that Nissan representatives were driven by a relentless push to force dealers to comply with the NREDI facility program.

Our client testified that it had made a business decision not to spend millions of dollars to build the new facility until more time passed following a prior facility upgrade. Almost immediately after notifying Nissan of this decision, the relationship soured. Nissan records indicated that other dealers in the same region were performing at a lower percentage of regional average than our client and for a longer period of time but had not, in some cases, even received a Notice of Default let alone a Notice of Termination. The common thread was that each of these underperforming dealers had agreed to participate in the NREDI facility program.

We argued that under applicable State franchise laws, Nissan's actions were discriminatory, not based upon consistently applied standards and not undertaken with good cause. We expect a ruling before the end of the year.

News Briefs

Honda Dealer Agreement Protest

FLORIDA FRANCHISE LAW PROTECTIONS CONTAIN A PROVISION FOUND IN ONLY A HANDFUL OF STATES WHICH ALLOW DEALERS TO PROTEST "ANY ADVERSE" CHANGE TO A DEALER AGREEMENT. As a result, Myers & Fuller has represented numerous groups of dealers in protesting proposed new Dealer Agreements over the last several years. The latest group of dealers to protest a proposed new Dealer Agreement was the Honda and Acura dealers. Apparently, Honda piecemealed its new Dealer Agreement out dealers State by State over the last 3 years. We believe Florida may have been the last State in which Honda proposed their new Dealer Agreement.

Honda and Acura's new Dealer Agreement contained new terms which places many more demands upon the dealer body, including as an example, a requirement to maintain facilities that are at all times consistent with other Honda dealers as well as other linemake dealers (read "Toyota dealers") in the market. Shortly after filing the protest, Honda representatives planned a meeting to take place in early October for the purpose of discussing a compromise. This is the typical response we have seen from the manufacturers. Every new Dealer Agreement we have protested has resulted in a settlement which removes some of the onerous terms and leaves others in the new Dealer Agreement. To our surprise, a couple of weeks prior to our scheduled settlement meeting with Honda representatives, Honda's attorney called to inform us that Honda was withdrawing its demand that dealers sign the new Agreement. Honda was making execution of the new Dealer Agreement entirely optional for our clients.

Lawsuit Brought Against BMW's Value-Added Program Settled

THE ATTORNEYS OF MYERS & FULLER RECENTLY SETTLED A LAWSUIT BROUGHT AGAINST BMW RELATED TO ITS VALUE-ADDED PROGRAM. Our firm represented a large volume BMW dealer in the Northeast who renovated his facility to BMW's then approved specifications in 1996. BMW expressly approved those facilities and made our client eligible for all Value-Added monies available under the Program. After a Brand Value assessment in 2002, our client was disqualified from the Program beginning January 1, 2002. The disqualification was based upon BMW's Market Manager's personal judgment in construing the subjective criteria of the Brand Value Program. Between 1996 and 2002, the requirements for satisfying the Program were substantially the same.

Myers & Fuller filed a federal court lawsuit claiming violations of both State and Federal price discrimination laws, unlawful coercion, breach of the Franchise Agreement and constructive termination. After months of vigorous litigation, including numerous hearings, depositions and document review, we reached a settlement of the lawsuit with BMW. The terms of the settlement, as with all manufacturer settlements, are confidential. However, we can say that our client is very pleased with the outcome.

Incentive programs like BMW's Value-Added Program, if not constructed properly, leave a tremendous amount of discretion with the manufacturer representatives. We believe such programs are illegal under Federal law and may be illegal under your State franchise laws.

Myers & Fuller, P.A. Dealership Seminar Opportunities

contact us today to schedule or modify one of these seminars for your organization

DEALERSHIP MERGERS & ACQUISITIONS/ SUCCESSION ISSUES

DEALERSHIP MERGERS AND ACQUISITIONS/SUCCESSION

Duration: 1.5 to 2.5 hours
Content: Discussion of issues surrounding Letters of Intent, Asset & Stock Purchase Agreements, manufacturer franchise application process, and proper succession planning.

A WALK THROUGH THE MANUFACTURER FRANCHISE APPLICATION PROCESS

Duration: 1 hour
Content: Detailed, step-by-step, walk through of the manufacturer application process involved in buying and selling a dealership.Includes examples of various manufacturer applications and the particular items certain manufacturers look for.

FRANCHISE LAW ISSUES

MAJOR TOPIC REVIEW

Duration: 2 to 3 hours
Content: Review major issues impacting franchises including points of sale, terminations, ownership transfers, management changes, incentive programs, audits, dealership succession, mergers and acquisitions.

FRANCHISE BY FRANCHISE REVIEW

Duration: 1 to 2 hours
Content: Covers latest franchise trends as well as issues covered in MAJOR TOPICS REVIEW as they apply to particular linemakes.
Audience: Most commonly presented to 20 Group meetings.

LEGISLATIVE REVIEW

Duration: 1 to 2 hours
Content: Reviews a specific State's motor vehicle franchise law provisions. Covers both the important provisions which should be taken advantage of by the motor vehicle dealers within the State as well as areas in which the franchise laws could be updated.
Audience: Motor Vehicle Dealer Association directors and board members.

STATE OF THE INDUSTRY

Duration: 1.5 to 2.5 hours
Content: Covers the latest trends in the industry – topic by topic. Focuses on the latest trends in sales incentive programs, facility/image programs and dealer body consolidation programs, etc. Includes recommendations to avoid participation in unreasonable programs and protect the dealer's investment in the franchise.

FINANCE AND INSURANCE ISSUES

INTRO TO KEY F&I CONCEPTS

Duration: 1 to 2 hours
Content: Overview of current industry developments and legal compliance requirements facing dealership F&I departments. Question and answer is an integral part of this presentation.

CONTINUING EDUCATION FOR F&I (Intermediate/Advanced Level)

Duration: 2 to 3 hours
Content: Overview of key elements of dealership forms as well as a detailed discussion of state and federal laws covering F&I dealership operations. Includes suggestions on improving F&I performance while reducing liability.

COMPREHENSIVE ON-SITE F&I REVIEW

Duration: 7 to 8 hours
Content: On-site comprehensive review of dealership policies and procedures. Sampling review of dealership deal files. Update forms and training for management and staff. Conduct exit meeting with Dealer/Principal to discuss results of review.

Letters of Intent by Robert Bass

"LET'S WRITE UP A LETTER OF INTENT AND GET THIS TRANSACTION ROLLING . . ." That phrase is often uttered after discussions and negotiations between a buyer and seller. But are letters of intent – affectionately referred to in the biz as a "LOI" – really a necessity? Are there alternatives for the parties to a transaction? Every transaction is different from the previous, and not every deal will begin with the negotiation and drafting of a LOI. But, it is important for buyers and sellers to understand when a LOI may be useful given their respective and unique circumstances.

Let's look first at the enforceability of a LOI. Generally speaking, a LOI is described as an agreement to agree; neither party can drag the other to the church and force a marriage. Sloppy drafting of a LOI, however, can create ambiguities over the issue of a binding versus non-binding agreement. Care must be taken to ensure that the effect of the LOI is not to bind the parties in a legal contract, if that is the intent of the parties. That said, the parties can, and should, include certain provisions in the LOI that are enforceable in a court of law. Consequently, most of the time a LOI contains both binding and non-binding terms, and careful, clear, and precise drafting to separate the two is critical. It is best to separate non-binding terms from binding terms, setting out the latter in a separate and distinct section of the LOI.

ADVANTAGES TO SELLER

If the parties desire that all the contents of a particular writing be fully non-binding, the drafting of a document titled "term-sheet" or "proposal" is the best approach to take. Essentially, the parties set down the economic terms in bullet-point fashion with no words of agreement exchanged. The lawyers then use the "bullets" to draft the definitive transaction agreement. This approach is often useful in a transaction where the parties are very familiar with each other and there is a great degree of trust. The use of a term-sheet also saves on transactional costs, as the legal fees for crafting a LOI are eliminated.

So why would a seller insist on a LOI? Sellers often use them to flesh out prospective buyers. The theory is a buyer is not going to go to the time and expense of negotiating a LOI unless the buyer is serious about working in good faith toward entering into a definitive agreement. In that case, a LOI serves as a screening tool.

Aside from summarizing the economic terms of a transaction, a seller may also use a LOI to provide protection against the improper use of confidential information exchanged between the parties during a due diligence phase prior to execution of a definitive agreement. This is especially useful when the parties have not entered into a confidentiality or non-disclosure agreement. Sellers also can use a LOI to protect their employees. A binding term can be included in the LOI that prevents a buyer from soliciting the seller's employees. Consequently, a LOI can protect a seller from a competitor posing as a buyer only to obtain confidential information and poach on the seller's talented employees. It is important that the LOI expressly state that such protections are binding provisions to which the parties are agreeing.

It is important for buyers and sellers to understand when a LOI may be useful given their respective and unique circumstances.

Sellers also use a LOI to set limits on the warranties and representations that will be set forth in the definitive agreement. Non-compete, employment or consulting, and earn-out agreements are often described in detail in a LOI.

ADVANTAGES TO BUYER

Buyers have different reasons for entering into a LOI. Buyers can insist that a LOI contain a binding term providing the buyer exclusive rights to negotiate with the seller, that is, prohibiting the seller from continuing to shop the deal to other prospective buyers. Taking the deal of the market prevents a bidding war from occurring and is perhaps the number one reason why a buyer would insist on using a LOI instead of a mere term sheet. To add teeth to the no-shop provision, a buyer might insist on adding language imposing a break-up fee. Such a term would require the seller to pay to the buyer a pre-determined sum as liquidated damages should the seller violate the no-shop provisions of the LOI.

A buyer might also insist on drafting a LOI so it can quickly get evidence of a prospective transaction to use while shopping for financing. Buyers often use a LOI to set out a structured schedule for obtaining due diligence information and documents.

As a seller and buyer begin discussing and negotiating a transaction, the parties should early on decide how they wish to begin putting the deal into writing. While the parties may choose between a term sheet or a LOI, neither is requirement. A buyer will often skip the LOI or term sheet step and communicate its offer by presenting a proposed definitive agreement. Regardless of the approach, it is important to discuss the pro-cons with your lawyer and determine which approach is best given the circumstances.

summary

- *Letters of intent are a useful way to put into writing the material terms of a proposed transaction.*
- *A variety of protections can be included in a letter of intent, with such protections being binding and subject to enforcement in a court of law.*
- *Care should be taken on which terms should be binding and which should be non-binding.*
- *Parties to a transaction may wish to draft a term sheet instead of a letter of intent if the parties are comfortable with each other and want to move rapidly to the drafting of the definitive agreement.*
- *Discuss the pros and cons of letters of intent with an experienced motor vehicle franchise attorney.*

Protection From Unfair Termination by Richard N. Sox and Loula M. Fuller

ALTHOUGH CONGRESS AND VIRTUALLY EVERY STATE HAVE LAWS THAT PURPORTEDLY GIVE THE DEALERS PROTECTION AGAINST WRONGFUL TERMINATION OF THEIR FRANCHISE, CRITICAL ELEMENTS MAY BE MISSING. Congress passed the Dealer Day in Court ("DDCA") back in the 1950's for the express purpose of protecting Dealers' investments from factory overreaching by wrongful termination. The DDCA proved to be ineffective because, in order for the Dealer to prevail, the Dealer had to prove that the manufacturer was illegally "coercing" the Dealer. The "coercion" standard has sometimes required the Dealer to prove actual "malice" on the part of the manufacturer. Needless to say – the DDCA was ineffective for its stated purpose and State legislatures began passing laws to protect the Dealers from wrongful termination.

Most state laws do not include the element of "coercion" — yet many (if not most) remain ineffective. There are two primary reasons for this: 1. there is no "automatic stay," allowing the Dealer Agreement to remain in full force and effect throughout the litigation, including all appeals; and 2. there is no right to sell the dealership throughout the litigation, including all appeals. If your State statute does not provide the Dealers with these rights, then a Dealer under threat of termination cannot risk its entire investment by going to court to find out if the proposed termination is "wrongful."

PROPER LANGUAGE GIVES DEALERS A FIGHTING CHANCE

States like West Virginia (that added these provisions to the termination section of its law in the 2005 legislative session) know how hard it is to get this legislation passed. The manufacturers fought the State Association all the way to the bitter end, trying to prevent Dealers in West Virginia from having an opportunity to have a hearing/trial on whether a proposed termination is wrongful. This issue came to the attention of the State Association because a dealer, who was threatened with termination, could not afford to take the case to trial because, if he lost, he would have nothing to sell. He has other dealerships and has never had a problem with any other manufacturer. It was his belief, and the belief of our firm, that if this case could have gone to trial — the Dealer would have won. But, the risk of loss was too great to get the answer. This unnamed Dealer got active in the Association, and, working with the Executive Director and other dealers, got these important amendments passed.

Even when the statute makes the factory continue the franchise relationship pending the outcome of a trial or an appeal they still try to play games. For example, many years ago we argued a case against GM in Florida where the state law authorized an "automatic stay" during the litigation. In other words, the Dealer Agreement would remain in place throughout the litigation while the Dealer challenged the proposed termination. To make a long story short- the dealer lost at the trial level and appealed the case. While on appeal, the owner of the dealership tried to sell the dealership and the manufacturer took the position that the only thing the dealer had to sell was a "terminated dealership!" That is to say, the factory took the position that only the remaining term of the franchise agreement was transferable. We took them on and won.

In another situation, the dealer received a notice of termination and a petition was filed on its behalf in state court asserting the termination was wrongful. Since that state did not have the protections addressed in this article, an emergency hearing requesting a "stay" was scheduled. Because there was a short time frame before termination became effective, the hearing was scheduled as ex parte (only one side appears), with the purpose of getting a temporary order. Another hearing would follow where both parties would make their arguments regarding a "stay" pending the final hearing. Despite the fact that the hearing was supposed to be ex parte, the manufacturer's attorney came to the hearing and represented it had no objection to the "stay." Relying on that representation, the State Court entered an order "staying" the termination and did not schedule another hearing because the manufacturer represented it had no objection. Shortly thereafter, the manufacturer removed the case to Federal Court.

With the case now in Federal Court the factory pretended not to remember it had agreed to continue the franchise relationship pending the outcome of the trial and on the 90th day shut down the dealer's computer system and closed his parts accounts. They tried to eliminate the dealer's ownership and ultimately his assets by claiming that if the Dealer was terminated and if the termination was wrongful, the dealer could sue for damages. We flew up and camped out in the Federal Judge's chambers and, when allowed to meet her, argued that it would be a travesty if the factory could put the dealer out of business without a day in court. The manufacturer argued that although it had appeared at the State Court hearing, it made no representation regarding whether or not it objected to the "stay." Truth is obviously not important to some factories. No court reporter had been at the state court hearing because it was to be attended by only one side and the notice was too short for the court reporter to get there. In a nutshell, the Federal Judge refused to enforce the State Court's order, saying that notice was too short and there was no evidence that the manufacturer represented that it did not object to the "stay." The Dealer was forced into a settlement while completely under the gun. Shortly after that Myers & Fuller was instrumental in the drafting and implementation of new statutes to insure that nothing like that could ever happen again.

The legislative mantra is to GET INVOLVED with your State Dealer Association, identify changes that need to be made to your statute — you never know when YOU will need it. If the termination section of your State franchise law does not have an automatic stay and right to sell provision then the Dealers do not have sufficient protection from a manufacturer's wrongful termination.

summary

- *Every State should have termination protection*
- *Termination protection must include: 1. an automatic stay of termination throughout litigation, including appeal; 2. being able to sell a dealership throughout litigation, including appeal*
- *Get involved with your State Dealer Association*
- *Identify and push for changes that need to be made to your State franchise law*

Consider Including Arbitration Clause In Your Deals

by Shawn D. Mercer

YOU HAVE A HIGHER PROBABILITY OF PREVENTING CLASS ACTION SUITS. Your dealership may wish to consider including an arbitration agreement as a part of your deal documents. The use of an agreement that only requires one party to elect arbitration, that prohibits class actions and that allows "small claims" types of actions is strongly suggested.

The Federal Arbitration Act was passed by Congress in 1925. The Act was originally intended to apply only to large corporations, but has been expanded to include small businesses and individuals as well. On account of the Federal Arbitration Act, courts tend to favor arbitration over trials in the United States. Most states also have a strong public policy favoring arbitration.

Generally, if a customer signs a contract, the customer is under a duty to read it, and will be bound by its terms, unless the customer can show that he or she was willfully misled or misinformed by the other party. Absent such misrepresentations, the customer will likely be held to have signed the contract with full knowledge of the contents thereof, making an arbitration clause enforceable, so long as the terms are otherwise reasonable.

Some dealers are opposed to including arbitration agreements in their deals for various reasons, including the belief that inclusion of such an agreement suggests from the start that the business relationship with the customer may have problems. Other dealers subscribe to the belief that they should not require consumers to arbitrate disputes when dealers fought so hard to avoid arbitration with their manufacturer or distributor through an exception to the Federal Arbitration Act.

BENEFITS OF ARBITRATION

However, there are various benefits of arbitration for consumers. According to the National Arbitration Forum, independent studies have shown that:

- Arbitration is approximately 36% faster than a lawsuit;
- Arbitration is less expensive for consumers;
- 93% of consumers using arbitration found it to be fair;
- Individuals prevail at least as often in arbitration as in lawsuits.

Arbitration agreements are generally enforceable so long as the existence of the arbitration agreement is clearly disclosed to the customer and provided that the terms are not unreasonable. Examples of unfair provisions which can make arbitration clauses vulnerable include: requiring customers to keep arbitration decisions secret; charging excessive arbitration fees; forcing consumers to use a particular arbitration firm; requiring the loser of an arbitration dispute to pay attorney's fees; and forbidding punitive damages even in cases of egregious misconduct.

Use of an agreement that only requires one party to elect arbitration, that prohibits class actions and that allows "small claims" types of actions is strongly suggested.

Dealers often ask what happens if a customer refuses to sign an arbitration agreement. The concept of "freedom of contract" provides that the dealership cannot force someone to arbitrate. The customer can merely shop elsewhere. If a dealer elects to utilize an arbitration clause, the dealer should uniformly require all customers to sign the arbitration agreement. Failing to use an arbitration clause in all agreements could lead to problems with enforcing other arbitration agreements.

The greatest potential benefit of arbitration for a dealer is the ability to prohibit class action lawsuits. Plaintiff's lawyers are much less inclined to bring a single action against a dealership when there is not the possibility of a class action payday.

PROPER LANGUAGE FOR ARBITRATION CLAUSE

Dealership arbitration agreements should also include a provision that does not prohibit all court litigation. It is suggested that consumers be allowed to bring individual claims against a dealership in a "small claims court" forum. Dealers also wish to reserve their self-help remedies to the extent allowed by law. Further, either party should be able to request arbitration. A choice of more than one arbitration firm should also be offered.

Agreements should provide that arbitration is not mandatory unless one party expressly requests it. Such a provision allows a matter to proceed in court if the parties so choose.

We are operating in an era of class action lawsuits. Though no strategy is guaranteed, consistent use of an enforceable arbitration agreement that purports to prohibit class action participation is a good step in the right direction.

[1] National Arbitration Forum Empirical Studies & Survey Results 2004 (www.arb-forum.com).

[2] For example, the American Arbitration Association limits consumers' fees to $125.00 in cases that involve claims of $10,000.00 or less. When claims exceed $10,000.00, the fee is $350.00.

summary

- *Courts favor arbitration over litigation.*
- *Arbitration is more cost effective than litigation in a consumer lawsuit against the dealership.*
- *Arbitration clauses are generally enforceable unless they include unfair provisions.*
- *Arbitration will help in avoiding class action litigation against your dealership.*

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