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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The Myers & Fuller Report

a newsletter for motor vehicle dealers and associations

Welcome to the third edition of the Myers & Fuller Newsletter. 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.

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 audits which includes reviewing and recommending changes to processes and forms used at the dealership.

Our goal with the Newsletter 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 Newsletter to be a valuable resource. Please do not hesitate to contact us with questions on any topic we cover or with suggestions on how to improve the Newsletter.

Richard N. Sox, Jr.
Managing Partner

News Brief

Florida Dealers Are Enjoying Major New Franchise Protections

AS OF JULY 1, FLORIDA AUTOMOBILE AND TRUCK DEALERS ARE ENJOYING SIGNIFICANT NEW FRANCHISE PROTECTIONS WHICH SERVE TO LEVEL THE PLAYING FIELD BETWEEN THE DEALERS AND THEIR OEMS. Myers & Fuller attorneys drafted, and negotiated with OEM representatives, these new franchise laws on behalf of the Florida Automobile Dealers Association. The new franchise protections include the following:

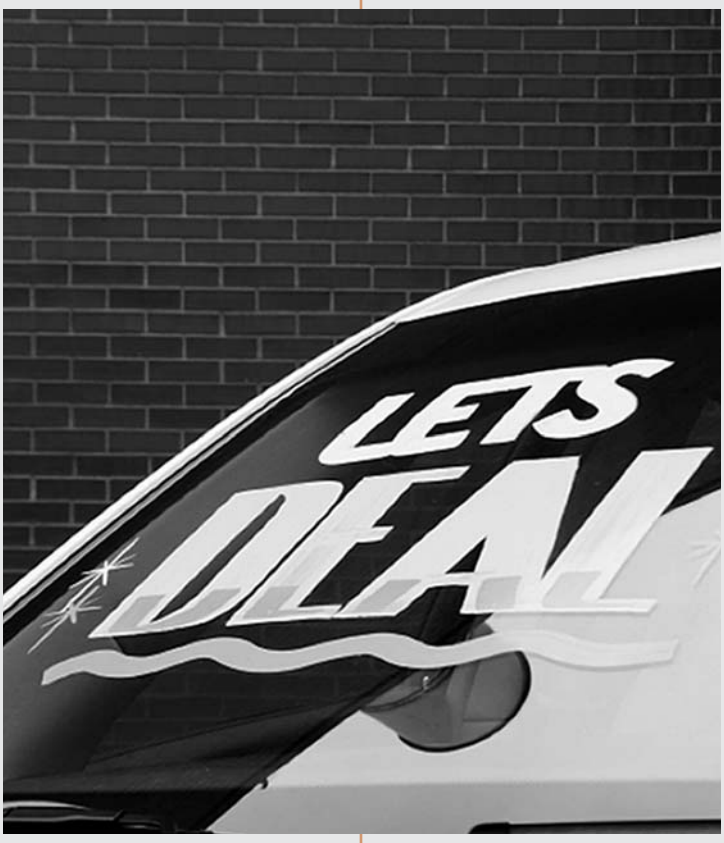
1. A requirement that manufacturers reimburse dealers for parts used in warranty repairs at the same rate as the dealer charges its non-warranty retail customers;
2. A requirement that a manufacturer provide a minimum of 180 days notice of a termination of a franchise to allow the dealer sufficient time to cure the alleged deficiency;
3. A prohibition against a manufacturer denying a dealer the ability to add a non-related franchise to an existing facility unless the manufacturer can demonstrate that, with the addition of another franchise, the dealer will no longer be able to adequately sell or service its vehicles from the facility; and
4. A requirement that before a manufacturer can levy a chargeback (sales incentive or warranty) the manufacturer must review the results of the audit with the dealer, may not change the reasoning for any chargeback and give the dealer a reasonable amount of time to respond before the chargeback can be levied.

Following the lead of a handful of other states, the Florida Automobile Dealer Association was able to overcome intense OEM opposition to obtain the requirement that the OEMs reimburse the dealers at a competitive retail rate for warranty parts. We are now working with FADA to educate dealers throughout the State on the practical effect this provision will have on their submission of warranty claims.

Like the parts bill, the other franchise provisions were initially opposed by the OEM lobbyists. However, once the OEM lobbyists saw that the dealers were behind this legislation, they came to us to discuss minor changes to our draft legislation. These changes were accomplished by dealers getting involved in contacting their legislative representatives and in spending time at the Capitol lobbying for the legislation. In a state with no manufacturer presence, the legislature is typically inclined to listen to the automobile and truck dealers over an OEM lobbyist.

Many Dealers Say It Is Time for the VPA Incentive Program To Go

WE HAVE RECEIVED NUMEROUS PHONE CALLS AND EMAILS FROM CHRYSLER DEALERS FED UP WITH CHRYSLER'S VPA INCENTIVE PROGRAM. THIS MYSTERIOUS PROGRAM SETS A SALES TARGET FOR EACH DEALER LOOSELY BASED UPON THE DEALER'S MINIMUM SALES RESPONSIBILITY OR MSR. Chrysler dealers tell us that in many cases their VPA target is set at an unreasonably high number. As a result, these dealers are losing hundreds of thousands of dollars in incentive monies that, in most situations, other Chrysler dealers in their market are receiving.



The attorneys at Myers & Fuller are gathering information from these Chrysler dealers and are putting together a game plan for challenging the VPA program. We have studied Chrysler's dealer agreement and various state and federal laws to determine the best approach to having the program found to be illegal or, at least, to having the application of the program to certain dealers found to be in violation of the law.

We are investigating whether a class action, national or statewide, would be the best course of action or whether a "mass action" would be better suited to challenge the program. A mass action lawsuit is one where a number of dealers would be named as the plaintiffs against Chrysler and would share equally in the costs and recovery of the lawsuit.

It is clear to us that the VPA program has certain components within the calculation which are discretionary on the part of Chrysler. This is often a recipe for an illegal incentive program. It also appears that a dealer's MSR calculation may be erroneous which would, in turn, cause the VPA target to be set at an unfair level. From representing dealers in past sales performance disputes with Chrysler, we know that the way in which Chrysler assigns a dealers area of responsibility can cause the MSR calculation to be unfairly skewed.

If you have concerns with the Chrysler VPA incentive program and/or have any information you would like to share with us, please do not hesitate to call our office.

Minimum Vehicle Pricing Restrictions May Be Enforceable

ON JUNE 28, 2007 THE UNITED STATES SUPREME COURT OVERRULED CASELAW REACHING BACK TO 1911 WHICH STATED THAT IT WAS PER SE UNLAWFUL FOR A MANUFACTURER TO SET THE MINIMUM PRICE THAT A DISTRIBUTOR CAN CHARGE FOR THE MANUFACTURER'S GOODS. The ruling contains some potentially troubling language for automobile dealers. The Court found that in many cases a manufacturer's control over prices may now be acceptable.

The Supreme Court held that "A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between."

In other words, the Court tacitly endorsed the idea that it may be desirable for a manufacturer to utilize its pricing scheme in order to induce dealers to invest in services or facilities.

Manufacturers may attempt to use this decision to validate employee discount pricing schemes in which a manufacturer can dictate the exact price that a vehicle may be sold to employees of the factory, dealership or other person or entity. It is also possible that manufacturers will be emboldened to expand these types of programs to all consumers.

The decision is a legitimate concern for dealers. For example, a dealership that finds itself lagging in sales at the end of the year may not be able to cut into its margin in order to increase sales to meet a yearly sales incentive quota or minimum sales responsibility target.

Concerns about pricing should be directed to experienced motor vehicle franchise legal counsel.

Venturing Beyond Your State to Buy Dealerships by Robert A. Bass

ARE YOU IN THE DEALERSHIP BUYING MODE? WILL YOU BE SEARCHING FOR STORES IN MORE THAN ONE STATE? Buyers face a variety of issues during the dealership acquisition process. If your search takes you across state lines, there are additional considerations one must address. There are dozens of possible ways state laws may affect a dealership transaction, because the contours of the legal relationship between dealer and manufacturer vary widely from state to state. A careful study of what I like to refer to as "jurisdictional considerations" should be an important part of your pre-purchase preparation.

The smart buyer of a dealership expands the due diligence inquiry to include a review of applicable factory's dealer network initiatives. If you are venturing beyond your backyard and into other states, your due diligence inquiry must also include a careful review of the state law of each of the states in which a prospective target dealership is located.

In some states, for example Florida and North Carolina, the dealership appointment criteria that a manufacturer may apply to a proposed transaction is strictly defined by the state dealership franchise protection statute. Such specific standards for the approval of a proposed purchaser of a dealership are intended to keep the focus on the qualifications of the buyer. As a result, the manufacturer, in theory, cannot condition the approval of the transaction on the buyer constructing new facilities, relocating the dealership, or achieving a particular dealer network initiative. In contrast, other states have statutes that simply provide that a manufacturer cannot "unreasonably withhold consent" to a proposed transaction. If you are shopping for a Nissan dealership or another franchise where the factory is currently pushing unreasonable facility initiatives, in which kind of state would you rather have your transaction?

In addition to looking at a state's dealership transfer statute with respect to the appointment criteria, check to see if the statute sets forth a specific time frame in which the factory must respond to a proposal. Some statutes require that the manufacturer respond within 30-90 days after receiving from the seller a notice of sale. Other states set the clock ticking from the time the manufacturer receives a completed application and all requested information. Still other states don't have any sort of time requirement, so the manufacturer can string out a deal as long as it desires. If the transfer statute provides a timeframe in which the manufacturer must respond from receipt of a notice of sale, the factory usually cannot jerk around with a dealer much when it comes to the application process. If the timeframe runs from receipt of a complete application, the definition of "complete" is in the eyes of the beholder. Where there is no prescribed timeframe, manufacturers often slow walk deals – often in an effort to push the purchaser into agreeing to a particular network initiative.

If you, as a buyer, are striking out beyond your state lines, be sure to expand the due diligence inquiry. Carefully review the transfer statute of neighboring states to determine which statute is most favorable given your specific circumstances. By gathering this information you minimize the occurrence of surprises and maximize your ability to achieve your expansion goals.

summary

- *Dealership buyers looking in different states should, as part of due diligence, compare the dealership transfer protections of the states.*
- *Some state franchise laws set forth specific criteria that limit the factory's scope of review of a proposed transaction.*
- *Look for the time frame provisions under the state statute and use them to your advantage.*

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.

by Richard N. Sox, Jr.

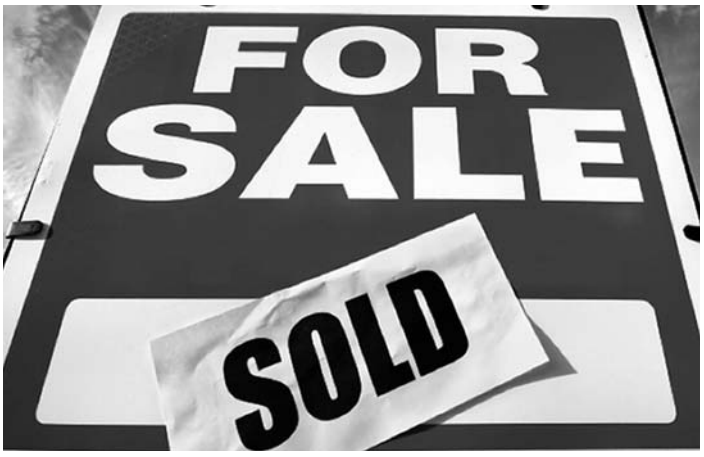
A Dealer's Right to Freely Buy and Sell New Motor Vehicle Dealerships

LAST QUARTER WE BEGAN A DISCUSSION OF VARIOUS HORROR STORIES THAT HAVE HAPPENED TO DEALERS. WE DISCUSSED ATTEMPTED TERMINATIONS AND CONSTRUCTIVE TERMINATIONS. This month we continue with a discussion of the rights of dealers or prospective dealers who are turned down by a manufacturer when they attempt to purchase a dealership or sell a dealership.

Many states have laws that are designed to make sure that a manufacturer can only turn down a proposed buy-sell for legitimate reasons such as experience, good moral character and capitalization. These statutes are very important because many times the manufacturer may have a plan for the dealership such as another dealer that it would like to purchase and operate the dealership.

We have been warning dealers that several of the factories are attempting to eliminate small dealers in rural areas completely. In metro areas, the same factories are attempting to eliminate small dealers by consolidating the smaller dealerships with larger more profitable dealers. Also, the GM Channel Strategy and Chrysler's Project Alpha, by their very nature, require that single line dealers such as a Dodge dealer either buy a Chrysler and Jeep dealership or sell to someone who owns the other two if Chrysler has its way. The same scenario is in effect for GM's Channel Strategy. Therefore, if you attempt to sell your dealership to someone that does not fit within these plans then chances are good that the factory will attempt to turn down the buy-sell.

Increasingly manufacturers also have alternative motives such as closing dealerships that they have designated as non-viable. We recently had a client who received a letter designating his point as non-viable. The letter stated that the dealer could continue to run the dealership but that he could not sell the dealership or even pass the dealership to family members through estate planning. The dealer was understandably upset. Fortunately, the dealer's state law protected him through the termination and turn down provisions of the state franchise laws. The termination provision provided that the dealer could only be terminated for good cause. (Designating a dealership as non-viable and destroying a dealer's life long investment does not constitute good cause.) Also, the state law only allowed the factory to turn down a buyer if he did not meet the requirements of experience, good moral character, and capitalization. We wrote a letter to the manufacturer and informed them that state law prevented the designation of the dealership as non-viable and that the dealer should be able to sell the dealership if he chooses. Once again, knowing the state law and responding to the problem in writing is essential when the manufacturer attempts to enforce a term such as this.



"The bottom line is that you must file a protest to protect your rights."

If you attempt to purchase a dealership and the factory turns you down, you the buyer and/or seller, must learn what protections are available under state law and file a protest within the time prescribed by the statute. If you are turned down and do not file a protest, you have given up the right to have the turn down reviewed by a decision maker. In many states, if you are wrongfully turned down you may be entitled to monetary damages as well.

One area of the turn-down law that varies from state to state is whether the potential purchaser has standing to protest the turn-down. All states that provide protection of a dealer's right to sell obviously give standing to the seller. A much smaller number of states give standing to the proposed purchaser to protest the refusal to approve the buy-sell. Some of these states specifically give the purchaser standing and other states have language that provides that "any person" damaged by a violation of the statute has standing to file suit against the manufacturer and this language includes the purchaser. Also, in states in which the purchaser does not have standing, the factory may have violated other laws that will still allow the scorned buyer to file suit.

The bottom line is that you must file a protest to protect your rights. We have found in many cases where a buyer is turned down because of a reason other than experience, good moral character or capitalization that after the suit is filed the factory is open to negotiating a settlement.

In a recent case, the son of a dealer was operating the store after his father died. The estate plan was to sell the store to the son who would become the dealer operator. The store was not performing well by the manufacturer's standards but there were many reasons other than poor management to blame, not the least of which was the popularity of the linemake in the area. The factory's plan was to force the family to sell the dealership to the factory's "chosen one." After negotiations, the factory was convinced to place the prospective buyer's sister as the dealer operator and allow the son to manage the dealership. After a period of time the son proved his worth and was appointed dealer operator.

Another nightmare occurred recently when a very experienced dealer made application to purchase a dealership and during the application process the zone manager said "welcome aboard." While the application was being processed the zone manger retired and the new zone manager turned down the proposal without ever talking with the purchaser. After a long, drawn-out battle we were able to reach an acceptable settlement.

Now, more than ever, the factories have network plans that are not made with the dealer's best interests in mind. Know the manufacturer's network plan before you attempt to buy or sell a dealership and know your state law. There may be protections that allow contracting parties to buy and sell a dealership regardless of the factory's desires for the market. After all, this is your life-long investment at stake.

Are your F&I Employees Entitled to Overtime?

THE ISSUE OF WHETHER F&I EMPLOYEES AND MANAGERS ARE EXEMPT FROM THE OVERTIME REQUIREMENTS OF THE FAIR LABOR STANDARDS ACT (FLSA) HAS LED TO A LOT OF RECENT CONFUSION AND UNCERTAINTY. The source of confusion lies in the fact that most F&I personnel are paid on a commission basis.

Many employers and human resource managers first look to the exemptions for executive and administrative employees when attempting to determine whether these F&I personnel are exempt from the FLSA. However, the executive and administrative exemptions both require that the employee must be paid on a salary basis at a rate not less than $455.00 per week in order to be subject to exemption.

Nevertheless, most F&I personnel are exempt from the FLSA under a separate section of the Act, namely Section 7(i). That exemption applies to commissioned personnel employed at retail establishments. In order to fall under that exemption three conditions must be met:

- The employee must be employed by a retail or service establishment;
- The employee's regular rate of pay must exceed 1? times the applicable minimum wage; and
- More than half the employee's total earnings in a representative period must consist of commissions on goods or services.

A Department of Labor letter has already stated that it believes automobile dealerships, for Section 7(i) purposes, constitute a "retail or service establishment." Further, it has determined that an F&I salesman's sale of traditional F&I products (e.g.; extended warranties, GAP insurance, credit insurance, vehicle security systems, sealants and protectants and window treatments, as well as compensation for the placement of finance contracts) constitute "goods or services."

Therefore, the dealership's inquiry basically boils down to the following two questions:

1. Does the F&I employee receive over 1? times the federal minimum wage?; and
2. Does half of the F&I employee's total earnings consist of commissions?

If you answer both of those questions affirmatively, then, barring some other exceptional circumstances, the F&I employee will be considered exempt from the overtime requirements of the FLSA. If you answered one of those questions negatively, then you should seek advice from an attorney or another qualified person regarding the exempt status of that employee and whether another exemption may apply.

Complying with the Americans with Disabilities Act of 1990 During the Hiring Process

THE AMERICANS WITH DISABILITIES ACT OF 1990 ("ADA") CAN CREATE LIABILITIES FOR AN EMPLOYER EVEN BEFORE AN EMPLOYEE-RELATIONSHIP IS ESTABLISHED. The ADA not only requires an employer to make reasonable accommodations for current employees, but also places restrictions upon the employer during the hiring process. Many employers are confused about the types of questions that may be asked during the interviewing and hiring process.

PRE-OFFER QUESTIONS

Prior to making an offer of employment to an applicant, the employer is limited to asking only those questions related to the person's qualifications to perform a job. Typical questions that are allowed to be asked under the ADA prior to making a job offer are as follows:

- Are you able to perform the job?
- Can you demonstrate how you would perform the job?
- Can you meet our reasonable attendance requirements?
- What was your attendance record at your prior job?
- What licenses and certifications do you hold?

Some questions that probably cross the line and are disallowed under the ADA prior to extending a conditional job offer include the following:

- Do you need a reasonable accommodation to perform this job?
- How many sick days did you take your last year at your prior employment?
- Questions about an applicant's worker's compensation history are disallowed.
- A non-job related question regarding an applicant's ability to perform major life activities (such as standing, lifting and walking) is disallowed at the pre-offer stage.
- Questions about lawful drug use should be avoided because they are likely to elicit information about a person's disability.

POST-OFFER QUESTIONS

If an employer makes a conditional job offer to an applicant, it may then ask a broader range of questions and also require non-discriminatory medical examinations. During the post-offer stage, an employer may then ask about an applicant's worker's compensation history, prior sick leave, and other disability-related questions.

An employer may also inquire directly about reasonable accommodations that may need to be made for the employee after a conditional job offer is extended. If it is found that no reasonable accommodation can be made or that the safety of co-workers or third parties is jeopardized, the conditional job offer may be revoked. Great care should be taken to ensure that all applicant and employee medical information is kept confidential.

PERSONS WITH OBVIOUS DISABILITIES

The exception to the pre-offer restrictions on disability-related questions is for those persons with obvious handicaps or those individuals who voluntarily divulge a hidden disability. For example, a person who is permanently confined to a wheelchair may be directly asked what type of reasonable accommodations would be necessary to perform the function of the job, if possible. However, questions about reasonable accommodations that may be needed in the distant future, and questions about the applicant's underlying conditions are all still disallowed.

Questions related to the hiring process should be directed to your legal advisor.

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