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 fourth 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

Some Manufacturers are Playing Hardball with Florida's New Franchise Protections

IN THE LAST EDITION OF THE REPORT, WE DISCUSSED FLORIDA'S NEW FRANCHISE PROTECTIONS. ONE OF THESE NEW PROVISIONS REQUIRED THAT MANUFACTURERS REIMBURSE DEALERS FOR PARTS USED IN WARRANTY REPAIRS AT THE SAME RATE AS THE DEALER CHARGES ITS NON-WARRANTY RETAIL CUSTOMERS. Although some manufacturers' have readily complied with this new law, the reaction of other manufacturers has been surprising. For example, General Motors has notified dealers that if they want to be reimbursed at retail for warranty parts then the dealer will be subject to regular warranty and customer-pay repair audits. Nissan and Audi have said that they will agree to pay their MSRP on parts but not the dealer's retail price. Ford, Chrysler and Kia have created onerous procedures for submitted "proof" of the price charged for a given part. The list goes on.

The Florida Automobile Dealer Association, various dealers and the attorneys from Myers & Fuller, P.A. have been meeting to determine how to force manufacturers to comply with the warranty reimbursement law. It looks like the most appropriate route to take will be a claim in Florida's court. The biggest hammer the dealers have in such a lawsuit is that Florida law provides that damages resulting from a manufacturer's violation of the motor vehicle franchise laws are tripled and include a requirement that the manufacturer pay the dealer's attorneys fees. We hope that the threat of tripling the loss of full reimbursement on warranty parts will bring the manufacturers into line.

Putting the Buy-Sell Deal Together by Robert A. Bass

FOR SEVERAL MONTHS NOW, WE'VE REVIEWED WHAT A PROSPECTIVE BUYER OR SELLER OF A MOTOR VEHICLE DEALERSHIP SHOULD DO AS PART OF UNDERTAKING A PLAN FOR SELLING OR ACQUIRING A DEALERSHIP. BUYERS AND SELLERS NEED TO ACQUAINT THEMSELVES WITH POTENTIAL APPLICABLE FACTORY INITIATIVES TO UNDERSTAND THE DYNAMICS AND POTENTIAL ECONOMIC EFFECTS ON THE VALUE OF A PARTICULAR TRANSACTION. Buyers and sellers also need to engage experienced and knowledgeable legal counsel to study and analyze the applicable provisions of the state franchise laws to determine what, if any, leverage will be available to them in the event the manufacturer pushes back on the deal. As part of this legal review process, buyers may want to compare and contrast applicable franchise transfer laws in several states as part of deciding the geography in which a buyer will engage in its search, because some states have more favorable franchise transfer laws than others. Finally, buyers and sellers need to have a mutual understanding as to what each must do to preserve the franchise protections that will cover the transaction.

Once the foregoing tasks and other due diligence activities (i.e., accounting and financial inquiries) are thoroughly completed, it is time to put pencil to paper (or fingers to keys) and work toward preparing a definitive agreement. While many dealers may have in the past scratched out an agreement for the purchase and sale of a dealership on a cocktail napkin, it is foolish to take that approach in today's business environment. Agreements are for allocating the risks between the parties, and today, more than ever, it is critical that those risks are adequately identified, negotiated and allocated in a manner agreed to by the parties.

The definitive agreement must be prepared by experienced and competent counsel. Not every lawyer who has provided services with respect to the sale or purchase of a business is equipped to provide effective counsel when it comes to a motor vehicle dealership transaction. It is important for the parties to have legal and accounting advisors who have experience with the purchase and sale of a dealership – otherwise, money is invariably left on the table to the detriment of one party or the other, or an issue (say, e.g., F&I contract terminations and chargebacks) is not properly addressed. It is these unaddressed issues that often lead to troubles down the road and sometimes the failure of a deal. These transaction disasters will cost you a substantial amount of money and aggravation. No transaction is without its occasional hiccup, but building a team of knowledgeable advisors is critical to minimizing problems.

Now that you have built your legal and accounting team, the question becomes "who is going to draft the document?" Here is a fundamental rule of transactions: The party who advances the documents and initially controls the contract language ultimately controls the deal. While there are those who say it is customary for the purchaser to produce the initial draft of a buy sell transaction document, in my personal opinion nothing is customary when it comes to negotiating and protecting one's client's interests. Whether one is a buyer or seller, it is critical to try to control the deal by initiating the drafting. (There are a few minor exceptions to this rule, but those are best discussed one on one with clients). Don't get caught in the trap of believing that if the other side does the drafting you are going to save money (although you might use that line to get the other side to allow you to initiate the drafting); it takes just as much time to critically review and comment on a proposed asset purchase agreement as it does to draft one. Consequently, legal fees are not saved and, moreover, the dynamics of the transactions often tilt in favor of the other side because as one has his attorney respond by making edits one's weaknesses are often revealed.

In the coming issues, we'll break down the contents of an effective definitive asset purchase agreement (the most common form of transaction for the purchase and sale of a dealership). Along the way, we'll make reference to tips involving stock agreements as well. We'll look at some common errors that those uninitiated in the ways of motor vehicle transactions make. We'll also look at some deal dynamics and see how sellers and buyers are affected.

summary

- *The preparation of a thorough dealership transaction document is critical.*
- *Build an experienced team. Competent and experienced legal counsel will prepare agreements that not only protect your rights but are also likely to result in a successful closing.*
- *The party who advances the documents and initially controls the contract language ultimately controls the deal.*

News Briefs

The Latest Developments on Chrysler's VPA Incentive Program

WE CONTINUE TO RECEIVE 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 have told us that their MSR is set unreasonably high which makes their VPA unattainable. As a result, these dealers are losing 100s of thousands of dollars in incentive monies that, in most situations, other Chrysler dealers in their market are receiving.

As we reported in the last edition of the Report, the attorneys at Myers & Fuller have been gathering information from Chrysler dealers in order to begin to put 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 a violation of the law.

We believe we have determined that the most economical approach to obtaining the millions of dollars that Chrysler dealers have lost under the VPA program is to bring a class action lawsuit against Chrysler. This lawsuit would be based primarily upon a claim that Chrysler's VPA program violates the federal price discrimination laws. We are currently analyzing which Chrysler dealer(s) that has contacted us will be best suited as the "class representative(s)."

Suzuki Motorcycle Franchise Termination Avoided

THE ATTORNEYS AT MYERS & FULLER RECENTLY OBTAINED A DECISION FROM THE NORTH CAROLINA DIVISION OF MOTOR VEHICLES DISALLOWING AMERICAN SUZUKI MOTOR CORPORATION'S ATTEMPT TO TERMINATE A LOCAL MOTORCYCLE FRANCHISE. The franchise is a low-volume, family-run dealership that has existed for more than thirty years.

The alleged grounds for termination were the dealership's insufficient sales and its refusal to accept all product allocation assigned to it by Suzuki. At hearing, Myers & Fuller presented evidence that Suzuki's attempted termination did not comply with the terms of its own franchise agreement; that the sales quotas set by Suzuki were unreasonable; and that Suzuki's allocation system was unlawful. The North Carolina DMV ruled in the dealership's favor and entered an Order prohibiting Suzuki from canceling the dealer's franchise.

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. and Loula M. Fuller

Protection from Unfair Termination

THIS IS THE SECOND PART OF OUR ARTICLE DISCUSSING THE COMPONENTS A STATE LAW FRANCHISE TERMINATION PROVISION MUST HAVE IN ORDER TO BE MEANINGFUL TO DEALERS. In our last article we addressed the need for the termination protection to include an "automatic stay" of the termination pending a "final determination" of the dealer's protest as well as a "right to sell" the dealership during the pendency of the termination protest until a final determination is made. The additional components that are needed in a meaningful termination provision include a specific definition of "unfair" when the decision maker determines the appropriateness of the factory's proposed termination as well as a specific definition for the notice required of the factory. Unfortunately, many state franchise laws merely leave the definition of "unfair", or alternatively "good cause," in the hands of the decision maker.

In providing dealers with the utmost protection under their termination protest rights the statute must provide a detailed definition of what will constitute "unfair" reasons for the proposed termination. This is because many judges, unfortunately, fall prey to the factory's deceitful argument that the termination is for a "fair" reason when in fact that reason involves something that is outside of the dealer's obligations under the dealer agreement. For instance, a judge may believe that if a dealer does not comply with the factory's demands related to new facilities requirements that they are in violation of their franchise agreement and should rightly be terminated. Instead of arguing over whether such a facilities requirement is part of the franchise agreement by virtue of a "facilities addendum," for instance, it behooves the dealers to go ahead and spell out in the franchise law that a termination is unfair if it is based solely upon the dealer's failure to comply with the latest facilities requirement beyond a requirement which would allow a dealer to satisfactorily sell and service the manufacturer's line of vehicles. Another example would be a notice for failure to comply with the manufacturer's sales performance requirements. As we have written about many times, the manufacturers' performance calculations involve voodoo science which regularly convinces judges that if the factory says a particular formula is the standard then that is what the dealer must comply with.

Specifically, we would suggest the following be included in a list of those items which are considered "unfair" reasons for termination of your franchise:

- Dealer's failure to comply with unreasonable sales standards;
- Dealer's failure to comply with unreasonable service standards;
- Dealer's failure to comply with any specific preowned vehicle sales requirement;
- Dealer's failure to comply with any specific facilities requirement. However, it shall constitute "good cause" for termination if a dealer does not provide adequate facilities to permit the dealer to properly sell and service the manufacturer's new vehicles;
- Dealer's failure to comply with unreasonable capital standards;
- Dealer's failure to comply with any unreasonable requirement of the franchise.

In addition to specifically defining "unfair" reasons for a termination, a strong termination provision must include specific timeframes for notice to the dealer. We suggest that the dealer be given up to 180 days written notice of an alleged default under the franchise agreement during which time the dealer shall be given the opportunity to cure the deficiency. If the dealer does not cure the alleged default, then the dealer should be given up to 90 days written notice of the proposed termination of the franchise. The dealer should then have this 90 day period in which to file a protest.

Within this provision, it should be specifically provided that if the termination is based upon a failure to perform in the area of sales or service, the decision maker "must" consider the dealership's performance up through the time of the final hearing. We have run into several judges that have decided that a dealership's improving performance is not admissible into evidence beyond the date of the termination. This, of course, could lead to the absurd result of terminating a dealer that, at the time of the final hearing, is performing at or above the standard set by the factory.

Lastly, within the notice provision, it is critical that language be included which provides that a manufacturer will be considered to have proposed a termination of the dealer if the manufacturer does not give formal notice to the dealer but instead takes some action(s) which results in an effective termination of the dealer. We learned in our Oldsmobile termination litigation, that the manufacturers will argue that the judge has no right to hear a termination case until the manufacturer decides it is going to provide the dealer a formal notice of termination of the franchise or nonrenewal of the franchise agreement. Although every judge ruled in our favor saying that the circumstances surrounding the manufacturer's actions, and not a formal written notice from the manufacturer, will determine if a termination or proposed termination has occurred, codifying these rulings within your termination provision will short circuit any attempt the manufacturers make to avoid giving formal notice of a termination when its actions demonstrate the contrary.

summary

- *Strong termination protection must include a specific definition of those reasons which shall be considered "unfair" reasons for a manufacturer's proposed termination.*
- *Strong termination protection must include specific timeframes in which a dealer receives notice of an alleged default and is allowed time to cure the alleged default.*
- *Strong termination protection must include specific timeframes in which a dealer has to protest a termination following the opportunity to cure.*
- *Strong termination protection must include a provision requiring the decision maker to take into consideration the dealership's performance following the date of the notice of termination.*
- *Strong termination protection must include a provision allowing a dealer to protest actions taken by a manufacturer which have the effect of terminating the franchise.*

F&I Corner by Shawn D. Mercer and Frank X. Trainor, III

Making Firm Offers of Credit to Consumers — Be Mindful of Potential Pitfalls

GENERALLY SPEAKING, CONSUMER REPORTS MAY NOT BE ACCESSED WITHOUT THE PRIOR CONSENT OF THE CONSUMER. HOWEVER, ONE OF THE FEW EXCEPTIONS TO THAT RULE IS WHEN A FINANCE SOURCE OFFERS A "FIRM OFFER OF CREDIT" TO THE CONSUMER. Prior to making such firm offers of credit, a finance source is allowed to prescreen prospective borrowers based upon information contained in their consumer reports. When done correctly, prescreening can provide a benefit to lenders, retailers and consumers. However, if the rules are not followed, the main beneficiaries are plaintiff's attorneys.

Automobile dealerships have found it effective to offer consumers firm credit terms through direct mail offers. When sending out a direct mail piece or other similar information, a dealership must adhere to all of the following guidelines in order to avoid liability.

1. Make Sure That The Financing Is There

In order for there to be a "firm offer of credit" there necessarily must be a lending institution that is willing to give the consumer financing. For most motor vehicle dealerships, that means that an agreement must already be in place with a lending institution whereby the consumers are guaranteed a loan subject to the limited exceptions set forth below. As for buy-here pay-here dealerships, the dealer must stand ready to provide financing on exactly the same terms offered in its mailers. It is unacceptable for a dealership to merely assume that a customer will be able to obtain certain financing terms based upon the criteria specified by the dealership.

2. Make All Credit Determinations Prior To The Access Of Consumer Reports

The Fair Credit Reporting Act (FCRA) expressly allows for prescreening of consumers prior to making firm offers of credit. However, dealers should be mindful that offers must be "firm" offers of credit and not conditional offers. Once the criteria have been set under which a consumer will be offered credit, further conditions may not be placed upon that offer. For example, the Federal Deposit Insurance Corporation ("FDIC") has deemed it unacceptable to place an additional requirement, such as minimum income, upon a consumer following the prescreening process. In other words, the dealer must make a firm offer of credit to all consumers who appear on the prescreened list of consumers that is received from the credit reporting agency, subject to the permissible conditions further discussed below.

3. Record Your Chosen Criteria

The FCRA expressly requires that all prescreening criteria be recorded and kept on file for a minimum of three years following the offer of credit to consumers. Dealerships should retain documentation not only to comply with the statute, but also in order to provide a defense to potential future litigation.

4. Provide Terms

Most mailers from dealerships premise credit upon purchase of a vehicle from the dealership. Therefore, the courts will look skeptically at any credit offers made from the dealership and will liberally impose liability where it believes the credit offer to be a mere sham. For that reason, any offer of credit should provide the most precise terms possible. At the very least, the terms must include a minimum loan amount and a maximum interest rate. Although lenders in the past have successfully provided ranges on the loan amounts and rates, a dealership should seek to narrow that range as much as possible. The best practice is to avoid providing a range entirely, if possible. Additionally, other specific terms such as the method of computing interest, and the length of the repayment period should be disclosed in the offer.

5. Provide Value To The Customer

A "firm offer of credit" must provide sufficient value for the consumers in order to fall within the narrow exception to the general prohibition against accessing credit reports without consumer consent. If the guaranteed amount of the loan is so low that it does not provide a consumer with enough funds to purchase a vehicle or if the ranges provided within the offer of credit are so broad as to not provide the consumer with reasonably good deal on financing, then some courts have disregarded the offers and have found that they are merely a "guise for solicitation," or "a sham offer to pitch a product rather than extend credit."

6. Do Not Withdraw The Offer

Once a mailer has been sent out, there are only a few circumstances in which the dealership may withdraw the offer of credit. Those circumstances include: foreclosure, attachment, garnishment, repossession, charge-offs, filing of bankruptcy, or entry of liens or judgments. The disqualifying event must have occurred between the dates of the prescreening and the consumer's acceptance of credit and must have been a part of the original prescreening in order to qualify as a valid reason for withdrawing the offer of credit.

A couple of other small exceptions that would allow for withdrawal include a later determination that the consumer is below the age required to create a valid contract; that the consumer has moved beyond the service area for the product offered; or discovery that the consumer has fraudulently offered information in his or her credit report.

7. Clear And Conspicuous Notification

The FCRA requires firm offers of credit to be accompanied by certain notifications. The dealership and the lender must together provide a clear and conspicuous statement that: (1) the consumer's consumer report was used in making the firm offer of credit; (2) the consumer received the offer of credit because he or she satisfied the criteria for creditworthiness set by the dealership and the lender; (3) failure to meet the criteria bearing on creditworthiness may cause the dealer and the lender to rescind the offer; (4) the consumer has a right to prohibit his or her credit report from being used in connection with any credit transaction that he or she did not initiate; and (5) the consumer may exercise a right to "opt out" of such credit transactions by contacting a specified toll-free number or by sending a written request to the credit agency at a given address.

The Federal Trade Commission (FTC) has also imposed regulations regarding the prescreening opt-out notice. The FTC regulations contain specific criteria that need to be included in a short notice and a long notice informing consumers of their right to opt-out of receiving offers of credit. Both the short notice and the long notice contain specific language and font sizes required in order to comply with the FTC rules.

In conclusion, access to consumer reports without prior consumer consent is only allowed under narrow circumstances whereby a consumer is guaranteed credit if the lender's pre-determined criteria are fulfilled. If a dealer wishes to participate in the making of these offers, it should associate itself with a reputable lending institution and further familiarize itself with the legal requirements of the jurisdiction in which it is extending firm offers of credit because the law (and how it is interpreted) can vary from locale to locale.

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