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 sixth 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

Myers & Fuller, P.A. Assists in Crafting Major Changes to New York Franchise Protections

For over a year now, Myers & Fuller has been working with the Greater New York Automobile Dealers Association to draft major changes to the New York franchise laws. After months of drafting, redrafting and adding provisions to combat the latest manufacturer initiatives, the proposed new motor vehicle laws were filed this spring in the 2008 session of the New York legislature.

The extensively revised franchise protections include (i) adding a relevant market area provision which protects dealers from unfair relocations or new points; (ii) strengthening the termination provision to take into account the discontinuance of a linemake or change in manufacturer or distributor of a linemake; (iii) creating protections from discriminatory sales incentive programs; (iv) adding a provision which limits a manufacturers ability to coerce a dealer to relocate or renovate his or her facility; (v) creating new protections against unreasonable sales performance requirements; (vi) prohibiting unreasonable denials of requests for relocation; (vii) limiting the reasons which a manufacturer can use to deny the transfer of franchise to criteria related to the qualifications of the buyer; and (viii) clarifying the means by which a dealer may submit warranty parts and labor claims to obtain reimbursement at retail rates.

If all or the majority of the proposed revisions to the New York motor vehicle statute are passed into law, New York motor vehicle dealers will enjoy some of the strongest franchise protections in the country. Of course, the GNYADA expects a fight from the manufacturers but has also done a good job of laying the groundwork for obtaining support for this legislation. Myers & Fuller expects to be called on to assist the Association's lobbyist in providing testimony to legislative committees which will provide real life examples of unfair manufacturer initiatives which necessitate the passing of the proposed new franchise protections. We will report back in the next edition of The Report on the legislation's progress.

That "Bird" Dog May Not Hunt In Your State

by Shawn D. Mercer and Frank X. Trainor, Esq.

IN CERTAIN PARTS OF THE COUNTRY, THE PRACTICE OF PROVIDING MONEY TO PERSONS WHO REFER A CUSTOMER TO A DEALERSHIP IS PREVALENT. THE FEES PAID ARE OFTEN CALLED "BIRD DOGS" BUT OTHER TERMINOLOGY IS ALSO USED. In some markets the failure to provide a bird dog can even place a dealership at a significant competitive disadvantage.

Bird dogs come in different forms. Some dealers choose to provide a bird dog fee to anybody who refers a customer who winds up purchasing a vehicle. In other markets it is more common for dealers to provide bird dogs only to customers who have already purchased a vehicle.

Some states have statutes or regulations that provide an outright prohibition of referral sales. A referral sale is generally defined as a sale to a consumer in which the consumer is induced to purchase an item based upon the promise of future compensation in the event that the consumer forwards additional customers to the seller. If your state has such a statute, and your referral program only provides bird dogs to existing customers, then you may find yourself in violation of this type of law. For example, if your dealership becomes known as one that provides bird dogs to existing customers, a consumer may decide to purchase a vehicle from you based upon the expectation that they will receive compensation from future referrals. Even if the bird dog is never discussed during vehicle purchase negotiations, a technical violation of the statute may have occurred and could result in civil actions or State Attorney General enforcement activity.

In most states, dealers who offer bird dogs to anyone, regardless of whether or not they are a customer themselves, generally do not need to fear referral sale regulations. However, some states actually prohibit payment for a referral regardless of whether the referral payment was made to a past or prospective customer.

State dealer and salesperson licensing may provide other road blocks to offering referral fees. The majority of states have some sort of licensing requirement for motor vehicle dealers and their salesmen. In some states, the definition of "salesmen" is actually broad enough to cover people who are compensated for referring a sale to the dealership, even if the referring person did not participate in the actual transaction. In those states, the person receiving the referral fee could possibly be found to have acted as a salesman without possessing a license. The dealership could also be on the hook because they may have utilized an unlicensed salesman.

Factory incentive programs can raise additional issues. Certain manufacturers have attempted to chargeback incentive payments on deals where the dealership paid a bird dog to a third party. It is not abundantly clear why the manufacturers have chosen to place such a restriction on a dealer's ability to sell vehicles. Nevertheless, your manufacturer's sales incentive program guidelines should be carefully reviewed prior to paying a bird dog fee on a vehicle for which you plan to claim an incentive.

The advisability of providing a bird dog fee can vary substantially from state to state and from manufacturer to manufacturer. Do not assume just because you were able to provide bird dogs at one dealership in one state, that it will be allowed for a different dealership in another state. A dealer will be taking a great risk by basing a decision to provide bird dog fees on one or more of your competitors doing so. Industry customs and practices are trumped by state statutes and regulations. It is prudent for any dealership to consult with their legal advisor prior to offering bird dog fees for referrals.

summary

- *Review franchise agreement and sales incentive program guidelines for prohibitions.*
- *Don't assume bird dogs are allowed merely because others pay them.*
- *Check state licensing statutes and regulations to ensure referral sources are not considered to be salespeople or brokers.*
- *Not all states treat bird dogs the same.*

Myers & Fuller, P.A. Assists in Crafting Changes to Florida Franchise Protections

On a much smaller scale than our work in New York, yet very significant, Myers & Fuller has been working with the Florida Automobile Dealers Association and large dealer groups in the State of Florida to craft additional franchise protections. These provisions have passed the 2008 Florida legislative session and are awaiting the Governor's signature.

The proposed franchise law amendments amount to four very important items: (i) clarifying the formula that dealers must use and manufacturers must accept in establishing retail rates for reimbursement of warranty parts and labor costs; (ii) requiring that the dealer have actual knowledge of false warranty or sales incentive claims made to the manufacturer by dealership employees before dealer may be terminated; (iii) shifting the burden of proof to the manufacturer to prove the dealer had knowledge a vehicle would be exported before the manufacturer may levy a penalty; and (iv) prohibiting a manufacturer from coercing a dealer to participate in a facility upgrade program by, among other things, use of a vehicle-based bonus program.

Myers & Fuller attorneys have provided legislative committee testimony in support of these franchise changes along with extensive lobbying support consisting of preparation of "talking points" for legislators along with one on one meetings with bill sponsors and other key legislators. We will know by the time of the next edition of The Report whether the Governor approved this very important legislation.

Jaguar and Land Rover's Replacement Agreement From Tata Motors is Out

After much anticipation on the part of Jaguar and Land Rover dealers as well as those of us that represent them, Tata has sent out its proposed Replacement Dealer Agreement for the Jaguar Dealer Agreement. The news is good. The Replacement Agreement simply adopts the Jaguar agreement and includes adoption of any side agreement the dealer has with Jaguar. It also appears that the Replacement Agreement has been sent to ALL Jaguar and Land Rover dealers. There is always the chance that a new distributor or manufacturer could simply not offer a new dealer agreement to some dealers. If you are a Jaguar or Land Rover dealer and didn't receive an offer to continue as a dealer, then contact your friendly franchise lawyer to assist you in understanding your rights under applicable franchise laws.

In addition to the Replacement Dealer Agreement, the package sent to dealers includes a notice of termination and Voluntary Termination Agreement which together have the effect of causing the old Jaguar Dealer Agreement to terminate at the closing of the sale of Jaguar and Land Rover to Tata. At that time, and only if there is a successful closing, the Replacement Dealer Agreement will take effect.

We strongly recommend that as Jaguar and Land Rover dealers review the terms of the Replacement Dealer Agreement that you make note of any outdated ownership or other information contained in the Agreement. You should use this opportunity to notify your Jaguar Cars representative of the correct information and request it be included in a revised Jaguar Cars Dealer Agreement as soon as possible.

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 Robert C. Byerts

Arbitration Agreements Cannot Waive Class Actions In Florida

MANY DEALERS USE ARBITRATION AGREEMENTS AS PART OF SALES TRANSACTIONS IN ORDER TO LIMIT LITIGATION AND THE RELATED TIME AND EXPENSE. ONE OF THE MAIN REASONS FOR USING AN ARBITRATION AGREEMENT IS TO PROVIDE AN EFFECTIVE INITIAL DEFENSE AGAINST CLASS ACTION LAWSUITS. In order for an arbitration agreement to prevent class actions, most arbitration agreements used by dealers expressly state that no class actions will be arbitrated and that no class relief will be granted. An appellate court in Florida recently determined that such language cannot preclude class action lawsuits asserting unfair and deceptive trade practice claims.

Plaintiffs, lessees of vehicles from a Lexus dealership and a Mercedes dealership, amended class action complaints allege that the two dealers charged each plaintiff a $379.70 "administrative fee" in connection with each vehicle and violated the Florida Deceptive and Unfair Trade Practice Act (FDUTPA) by failing to disclose the true nature of the fee as required by sections 501.976(11) and 501.976(18), Florida Statutes. The statutes require a specific disclosure to accompany such fees and place a limit on the type of fees that may be added to a vehicle's cash price. Both leases provided for binding arbitration of all disputes concerning the lease or any related transaction, at the election of either party to the agreement, and contain express class action waivers. Plaintiffs sought certification of a class consisting of all those who paid the fee "in connection with the purchase or lease of a motor vehicle." Dealer defendants moved to dismiss the amended complaints in part on the ground that putative class members who had leased vehicles from them had signed leases containing arbitration provisions, arguing that the lessees could proceed no further in court, once the dealers demanded arbitration. The trial court disagreed, denying the motion to dismiss and, later, certifying a class of plaintiffs. The trial court ruled the arbitration provisions of various leases unenforceable, on grounds they were unconscionable, contrary to Florida's public policy, and unsupported by mutual assent and consideration.

On appeal, the District Court concluded that the class action waivers in the two leases violated public policy by hampering important remedial purposes of FDUTPA, because they are designed to prevent individuals with small claims, arising out of a motor vehicle dealer's alleged violation of section 501.976, Florida Statutes (2005), from seeking remedies as a class. Normally, arbitration agreements benefit from a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. Arbitration, even of a statutory cause of action like an FDUTPA claim, is usually required, as long as arbitration does not impair a statute's remedial function or render it ineffective as a deterrent. In this case, the court found that the purpose of the FDUTPA claim would be defeated by requiring arbitration. An arbitration agreement that "defeat[s] the remedial purpose of the statute upon which an action is based," or "deprive[s] the plaintiff of the ability to obtain meaningful relief for alleged statutory violations," is unenforceable for public policy reasons.

The appellate court found that where the amount of an individual consumer's actual damages is small and attorney's fees are limited as a result, FDUTPA's private enforcement scheme cannot effectively deter violations of section 501.976, Florida Statutes (2005), if consumers are prevented from seeking relief as a class, noting that the class action device was designed to provide a procedure for vindicating just these types of claims. Although the District Court recognized that courts in other jurisdictions had not invalidated every arbitration provision precluding consumers from seeking class-wide vindication of every statutory claim, it found that Florida precedent requires nothing less in the case of numerous, small claims brought against motor vehicle dealers under section 501.976, Florida Statutes (2005).

The District Court stated held that disallowing class relief effectively prevents consumers with small, individual claims based upon motor vehicle dealers' violations of section 501.976, Florida Statutes (2005), from vindicating their statutory rights under FDUTPA. According to the appellate court, precluding class representation for holders of small claims whose attorney's fees are limited by the amount of their individual damages dramatically undermines FDUTPA's private enforcement mechanisms. Given the restrictions on individual attorney's fee awards under section 501.976, the District Court found that to preclude class treatment of consumers' claims would distort the statutory scheme, undermine FDUTPA's private enforcement mechanisms and often make relief the statute contemplates unavailable, as a practical matter. The court ruled that regardless of forum, FDUTPA plaintiffs may not be precluded from seeking class relief under section 501.976, Florida Statutes (2005).

This case is not yet final. It could be reconsidered, or appealed. However, for the moment, do not count on that waiver of class actions found in your arbitration agreement to protect you.

summary

- *An appellate court in Florida recently determined that arbitration agreement language cannot preclude class action lawsuits asserting unfair and deceptive trade practice claims;*
- *Class action waivers in two leases violated public policy by hampering important remedial purposes of FDUTPA;*
- *Court found that the purpose of the FDUTPA claim would be defeated by requiring arbitration;*
- *Do not count on that waiver of class actions found in your arbitration agreement to protect you from unfair and deceptive trade practice claims.*

Protect The Value of Your Dealership

SELLING YOUR DEALERSHIP? HOW DO YOU GET THE BEST PRICE? THE ONLY SURE-FIRE WAY TO PROTECT THE VALUE OF YOUR INVESTMENT IS TO HAVE STRONG LEGISLATIVE PROTECTION.

There are three key issues that should be in your statute:

First - the statute should identify the objective criteria that a factory can rely on to turn down a transfer.

Second - the statute should prohibit the factory from exercising a right of first refusal.

Third - the state statute should give the BUYER the right to bring a lawsuit for damages if the factory wrongfully turns down the transfer.

Every dealer knows that the factory has programs and people it wants to shove down the dealers' throats. Our firm has been involved in a number of cases where the factory has turned down a very qualified buyer on trumped-up criteria or by exercising a right of first refusal. The factory has, on several occasions, turned down several buyers for one location who by most objective standards were qualified. The factory turned down the buyers in order to get the "person" the factory wanted to purchase the dealership. The end result is the selling dealer got a lower price.

We represented one dealer who was determined to be qualified by the lower tribunal, but the appellate court determined that the factory could use "subjective" criteria to turn down the transfer. That ruling rendered the statute ineffective in protecting dealers, both the seller and the buyer. That same transaction cost the selling dealer over a million dollars in purchase price. To cure this problem, every franchise statute should limit the manufacturer to 3 criteria when examining a proposed transfer. Those 3 criteria are (1) the proposed transferee's moral character (convicted of any serious crime?); (2) the proposed transferee's financial ability (can capital requirements and floor plan requirements be met?); and (3) the proposed transferee's general business experience (any bankruptcies in the past?). The franchise statute should make it clear that a turndown of a proposed transfer can be based only on one or more of these 3 objective criteria. This provision will take away the manufacturer's ability to trump up reasons for a turndown because they have another dealer in mind for the franchise. Finally, the reason to include only "general" business experience in the list of objective criteria is so that the manufacturer can't get into whether the proposed buyer has successfully operate automobile dealerships in the past. The highest and best price for your franchise often comes from an individual or group from outside the industry.

When a factory exercises a right of first refusal the initial selling dealer generally gets a fair price. However, after the first exercise of that right of first refusal, the pool of buyers becomes smaller for the next dealers who want to sell. Why does that happen? Because the factory has put the world on notice of "who" or "why" it will assign the dealership. For example, GM's "Channel Strategy" or Chrysler's "Genesis Program. If a

GMC truck dealer wanted to sell its store to a Kia dealer but GM wanted GMC dualled with Buick and Pontiac in that market, GM would exercise a right of first refusal and only the Buick/Pontiac dealer could get the GMC store. Once GM relied on the right of first refusal to enforce its Channel Strategy the world was on notice of how GM would use that right. With only one potential buyer, there is no competitive bidding.

Most dealers who want to sell their dealership keep that desire confidential, for obvious reasons. Once the sale is proposed to the factory, most sellers need to close as soon as possible. If a sale is turned down and word gets out that the dealership is up for sale, employees leave, customers go to competitors, and the value of the dealership decreases. In addition, if the seller attempts to sue the factory, it has a problem getting the next buyer approved. The only way to protect the value of the Seller's assets is to provide the Buyer the right to sue for "damages." You do NOT want the Buyer to sue to get the dealership because that could delay a closing with another buyer, which often will put a Seller into bankruptcy.

summary

Your state should protect the value of a selling dealer's assets. The statute should include three issues:

- *Prohibit a right of first refusal.*
- *A wrongfully turned down BUYER should have a suit for damages.*
- *The statute should identify objective criteria that a factory can rely on to turn down a proposed transfer.*

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