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The Myers & Fuller Report

a newsletter for motor vehicle dealers and associations

Welcome to the seventh 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 turn downs, 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 New York In Passing New Franchise Protections

The attorneys of Myers & Fuller, P.A., led by Richard Sox, were pleased to be a part of the efforts by the Greater New York Automobile Dealers Association and New York State Automobile Dealers Association in drafting and obtaining passage of major new franchise protections for New York motor vehicle dealers. M & F was retained by the GNYADA to analyze and recommend updated protections for New York motor vehicle franchise laws. After negotiation with the Alliance of Automobile Manufacturers and a strong lobbying effort by the dealers and their Association, the New York legislature unanimously passed the changes to the New York motor vehicle franchise laws.

The changes to the New York law are significant and will be of immediate assistance to New York dealers in these difficult times in the automobile business. These new protections include (i) adding a relevant market area provision which protects dealers from unfair relocations or new points; (ii) strengthening the termination provisions to take into account the discontinuance of a linemake or change in manufacturer/distributor; (iii) creating new protections against unreasonable sales performance requirements; (iv) enhancing the discriminatory sales incentive program prohibition; (v) adding a provision which sets out a time limit for a transfer to be approved by the manufacturer and requiring reasonableness if the transfer is denied; (vi) adding a provision prohibiting unreasonable denials of relocation requests; (vii) adding a provision requiring manufacturer reimbursement for loaner vehicles; (viii) creating a prohibition on any material and unreasonable modification of the franchise; (ix) requiring reimbursement for parts and labor warranty work at the dealer's retail rates; and (x) strengthening the warranty and sales incentive audit provision to include a strict prohibition on unreasonable chargebacks and providing a right to protest any chargeback.

The New York Governor signed the law on August 7, 2008 and it will become effective on January 1, 2009.

Red Flags Rule Due Date Is Almost Here

FOR MORE THAN A YEAR NOW YOU HAVE BEEN HEARING ABOUT THE IMPENDING RED FLAGS RULE. THE RULE BECAME EFFECTIVE JANUARY 1, 2008. YOUR RISK ASSESSMENT AND IDENTITY THEFT PREVENTION PLAN IS DUE BY NOVEMBER 1, 2008. SO, HAVE YOU CONSIDERED YOUR DEALERSHIP'S RED FLAGS?

The Federal Trade Commission identified twenty-six red flags as potential indicators of identity theft. For dealers, the list is probably shorter, given the types of situations a dealer is likely to encounter. Your Risk Assessment must consider the potential indicators listed below as you develop your Identity Theft Detection and Prevention Plan and Program.

INFORMATION FROM A CONSUMER REPORTING AGENCY

1. A consumer report includes a fraud or active duty alert.
2. A consumer reporting agency provides a notice of address discrepancy.
3. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.
4. A consumer report indicates a pattern of activity inconsistent with the history and usual pattern of activity of an applicant or customer, for example:
 - a. A recent and significant increase in the volume of inquiries.
 - b. An unusual number of recently established credit relationships.
 - c. A material change in the use of credit, especially with respect to recently established credit relationships.
 - d. An account was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

DOCUMENTS AND IDENTIFICATION

5. Documents provided for identification appear to have been altered or forged.
6. The appearance of the applicant or customer presenting the identification is inconsistent with the photograph or physical description on the identification.
7. Information provided by the person opening a new account or customer presenting the identification is inconsistent with other information on the identification.
8. Information on file, e.g.- a signature card, is inconsistent with other information on the identification.
9. An application appears to have been altered or forged, or appears to have been destroyed and reassembled.

PERSONAL INFORMATION

10. Personal information provided by the customer presenting the identification is inconsistent when compared against external information sources. For example:
 - a. The address does not match any address in the consumer report.
 - b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.
11. Personal information provided is internally inconsistent. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal information provided is associated with known fraudulent activity. For example:
 - a. The address on an application is the same as the address provided on a fraudulent application.
 - b. The phone number on an application is the same as the number provided on a fraudulent application.
13. Personal information provided is of a type commonly associated with fraudulent activity. For example:
 - a. The address on an application is fictitious, a mail drop, or prison.
 - b. The phone number is invalid, or is associated with a pager or answering service.
14. The address, SSN, or home or cell phone number provided is the same as that submitted by other persons opening an account or other customers.
15. The customer cannot provide all required information on an application after notice the application is incomplete.
16. Personal information provided is not consistent with information that is on file.
17. The customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

NOTICE FROM CUSTOMERS OR OTHERS REGARDING CUSTOMER ACCOUNTS

18. The dealer receives notice of unauthorized charges in connection with a customer's account.
19. The dealer receives notice that it has opened a fraudulent account for a person engaged in identity theft.
20. The dealer detects or is informed of unauthorized access to a customer's personal information.

These items should be part of your dealership checklist and should trigger a response to the consumer, the credit reporting agency and/or law enforcement when encountered.

Beyond implementing the written program, dealerships will also need to designate an individual (typically someone at the senior management level) to oversee the program's development, implementation and administration. Do this first. The designated individual will serve as a reference for others whenever a situation related to the program arises. This person will make the final call. He or she will also collect reports from staff about all matters related to the dealership's identity-theft program. He or she will also be responsible for maintaining and updating the program and plan. Make sure you pick wisely, because November 1st is almost here and your program coordinator has lots to do before then.

summary

- Risk Assessment and Identity Theft Prevention Plan is due by November 1, 2008.
- Designate Sr. Manager to oversee program development, implementation and administration.
- Perform a Risk Assessment considering the listed Identity Theft indicators.

Suit Brought Against Chrysler For Faulty MSR And Resulting VPA Incentive Losses

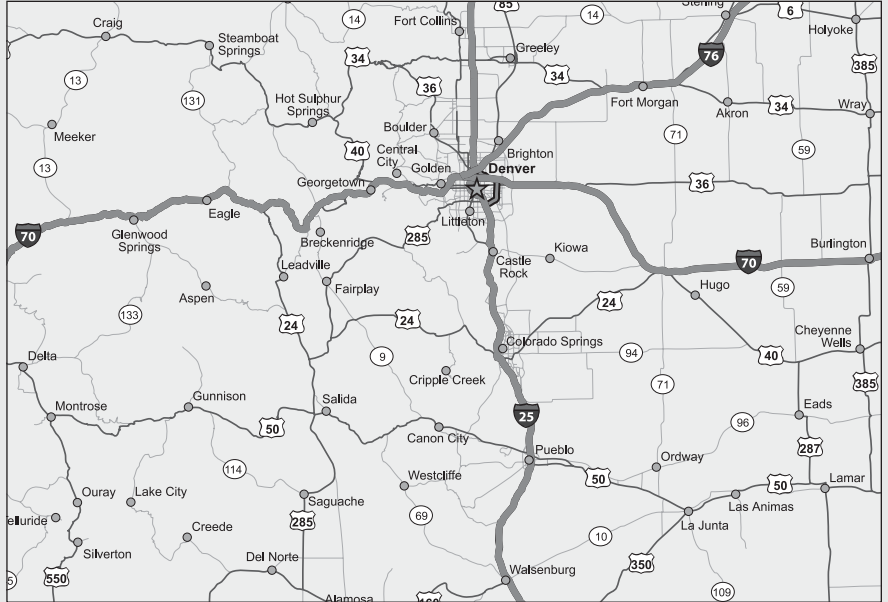
MYERS & FULLER HAS RECENTLY BROUGHT SUIT AGAINST CHRYSLER ON BEHALF OF A WEST COAST DEALER ALLEGING THAT THE DEALER'S MINIMUM SALES RESPONSIBILITY WAS UNFAIRLY CALCULATED WHICH RESULTED IN LOSSES OF HUNDREDS OF THOUSANDS OF DOLLARS IN VPA INCENTIVE MONIES.

The litigation focuses on various faults in Chrysler's MSR formula which include the way in which a dealer is assigned territory (known as "Trade Zone"), the way in which a dealer is assigned its "Fair Share" of a multi-point market, the failure to take into consideration unique circumstances which may impact a given dealer's market and the use of an "average" in comparing Chrysler dealers to other Chrysler dealers in the Business Center (other manufacturer's equivalent of "region"). Failing to meet MSR will not only put a dealer in jeopardy of being in breach of its Dealer Agreement but up until January 1, 2008 caused a dealer not to qualify for significant per vehicle bonuses under Chrysler's sales incentive program known as the "VPA Program." Without VPA bonus monies dealers cannot fairly compete against other Chrysler dealers in the market who are receiving the bonus and, as a result, can't sell cars which places the dealer further away from reaching its MSR. This vicious cycle has impacted numerous Chrysler dealers around the country and we hope this litigation will be the beginning of holding Chrysler accountable for those losses.

Currently, the parties are engaged in discovery of documents and depositions on the issues raised in the Complaint. As usual, Chrysler like all manufacturers, is attempting to thwart our attempt to obtain internal company documents which will provide the evidence we need to show that our dealer's MSR was faulty and that the VPA program was known to be a discriminatory program which caused our dealer to lose significant revenues. Nevertheless, with the Judge's assistance we will overcome Chrysler's delay tactics and proceed with proving our case.

Colorado Dealers Receive F & I/ Advertising Compliance Seminars

WAVE IF YOU SEE OUR PARTNER, SHAWN MERCER, ROLLING DOWN I -70 IN COLORADO AS HE DOES A WHIRLWIND TOUR OF THE STATE. MR. MERCER IS IN COLORADO AT THE REQUEST OF THE COLORADO AUTOMOBILE DEALER ASSOCIATION GIVING A HALF DAY SEMINAR ON



FINANCE & INSURANCE AND ADVERTISING COMPLIANCE IN 4 DIFFERENT CITIES ACROSS THE STATE OVER 3 DAYS. The seminar covers timely issues such as internet advertising, proper disclosure of dealer fees on the buyer's order, Red Flag – Identity Verification rules and numerous other issues falling under Federal and state laws.

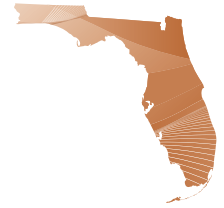
We feel that the M & F finance & insurance/advertising compliance seminar is a step above those offered by independent compliance companies in that our attorneys are in the trenches everyday responding on behalf of our dealer clients to state's attorney general subpoenas on advertising and marketing, unfair and deceptive claims brought by dealership customers as well as federal investigations. This hands-on experience gives us the ability to provide more than theoretical advice on critical compliance issues.

Florida Governor Signs New Franchise Protections

IN OUR LAST M & F REPORT, WE DESCRIBED THE NEW FRANCHISE PROTECTIONS WE DRAFTED ON BEHALF OF THE FLORIDA AUTOMOBILE DEALERS ASSOCIATION WHICH WERE PASSED BY THE FLORIDA LEGISLATURE IN MARCH OF THIS YEAR. We reported at that time that the bill was awaiting Florida Governor Crist's signature.

The Governor has now signed the legislation into law which became effective May 28, 2008.

For our Florida dealers receiving the Myers & Fuller Report, please see the insert which explains the new franchise provisions in detail and the practical uses for each with regard to various manufacturer initiatives.



Summary Of New Florida Franchise Protections

FOR THE BENEFIT OF OUR FLORIDA DEALER CLIENTS, WE ENCLOSE THE FOLLOWING SUMMARY OF THE NEW FRANCHISE PROTECTIONS PASSED IN THE 2008 FLORIDA LEGISLATURE WHICH BECAME EFFECTIVE ON MAY 28, 2008, WITH GOVERNOR CRIST'S SIGNATURE.

Facility Changes

Notwithstanding any franchise agreement, the manufacturer may not require a dealer to make "substantial changes, alterations, or remodeling to, or to replace a dealer's sales or service facilities" unless:

- the manufacturer's requirements are reasonable; and
- justifiable in light of the current and reasonably foreseeable projections of economic conditions in the dealer's market.

The manufacturer may, however, provide a dealer a commitment to allocate additional vehicles or a loan or grant of money as an inducement for the dealer to relocate, expand or renovate its facilities.

If the dealer agrees to upgrade its facility, the manufacturer must provide the dealer with a promise to supply to the dealer a sufficient quantity of new motor vehicles which will economically justify the upgrade. The commitment to increase vehicle allocation, loan or grant funds, and the basis for the actions, must be contained in a written agreement voluntarily entered into by the dealer and must be made available, on substantially similar terms, to any of the manufacturer's other same line-make dealers in this state.

A manufacturer may not withhold a bonus, incentive, or other benefit that is available to its other same line-make franchise dealers in this state, or take or threaten to take any action that is unfair or adverse to a dealer who does not enter into an agreement with the manufacturer to upgrade its facilities.

Similarly, a manufacturer may not refuse to offer a program, incentive or other benefit to a dealer in Florida which it offers to its other same line-make dealers nationally or in the same zone or region as their Florida dealers. Neither may it discriminate against a Florida dealer with respect to any such program. Any portion of a manufacturer-offered program for a bonus, incentive, or other benefit that, in whole or in part, is based upon or aimed at inducing a dealer's relocation, expansion, improvement, remodeling, renovation, or alteration of the dealer's sales or service facility, or both, is void and the dealer shall be eligible for the entire amount of the bonuses, incentives, or benefits offered in the program.

Existing agreements (as of May 28, 2008) between dealers and manufacturers regarding relocation, expansion, improvement, remodeling, renovation, or alteration are not affected.

Manufacturers may set and uniformly apply reasonable standards for a dealer's sales and service facilities which are related to upkeep, repair, and cleanliness.

Allocation

The new law clarifies that "unfair" allocation includes, without limitation, the refusal or failure to offer to any dealer an equitable supply of new vehicles under its franchise, by model, mix, or colors as the licensee offers or allocates to its other same line-make dealers in the state.

Termination based on Fraud

The new law specifically prohibits manufacturers from terminating franchise agreements on the basis of fraud and misrepresentation by dealer employees, or the filing of false or fraudulent claims, unless:

- the manufacturer can demonstrate that the dealership majority owner or dealer operator had actual knowledge of the fraudulent acts; or
- the manufacturer gave notice to the dealership of the alleged acts and the dealership majority owner or dealer operator did not, within a reasonable time, take corrective action.

Warranty Reimbursement

Dealers are to be reimbursed for warranty work on both parts and labor at the dealer's retail rate. Retail rate can be arrived at by choosing one of the following options:

Parts:

1. voluntary agreement with the manufacturer as to parts markup (NOT mandatory but if choose this option then the manufacturer and dealer have 30 days to arrive at an agreement);
2. manufacturer's MSRP for parts;
3. a markup equivalent to the dealership's gross profit on parts as indicated on the dealership's financial statement; or
4. average markup on parts based upon 50 repair orders, excluding certain discounted and low-priced items.

Labor:

1. voluntary agreement with the manufacturer as to labor rate (NOT mandatory but if choose this option then the manufacturer and dealer have 30 days to arrive at an agreement);
2. a rate equivalent to the dealership's gross profit on labor as indicated on the dealership's financial statement; or
3. average labor rate calculated using prior month's repair orders, excluding certain discounted and low-priced items.

Once the manufacturer has been put on notice of which option the dealers selects for seeking an increased reimbursement, the manufacturer is required to pay the increase amount on all claims submitted 30 days from the date of the initial notice letter.

If option 4 under parts is chosen, then the dealer must give the manufacturer notice of its intent to do so and give manufacturer 10 days to select the first repair order which will be used in the series of 50 repair orders.

In calculating reimbursement based upon repair orders under parts and labor, the repair order is to be included in the calculation as long as there is one qualifying item on the repair order. The repair order doesn't get kicked out of the calculation because it contains one or more excluded items.

The new law provides that the manufacturer may not take ANY ADVERSE ACTION against a dealer who seeks reimbursement under the new law. "Adverse action" includes:

- creating obstacles to reimbursement,
- creating a process inconsistent with options set out above;
- delaying proper and timely payment;
- establishing any policy, program or incentive which discriminates against a dealer seeking reimbursement under the new law;
- conducting or threatening to conduct an audit more than once a year; or
- charging back a warranty claim because of a dealer's failure to comply with the manufacturer's requirements for describing or processing a claim.

Dealers may seek an increase in warranty reimbursement no more than twice annually.

A manufacturer is prohibited from continuing a reimbursement program (i.e. automatic labor rate increase program) which is inconsistent with the reimbursement called for under the new law.

Exports

The new law prohibits a manufacturer from taking or threatening to take adverse action against a dealer including charge backs, reducing vehicle allocations, or terminating or threatening to terminate a franchise because the dealer sold or leased a motor vehicle to a customer who

exported the vehicle to a foreign country or who resold the vehicle, *unless the licensee proves that the dealer had actual knowledge that the customer intended to export or resell the motor vehicle.* **Most importantly, the new law establishes a "conclusive presumption that the dealer had no actual knowledge if the vehicle is titled or registered in any state in this country."**

Myers & Fuller recommends that you have all customers execute an acknowledgment they have been advised that the manufacturer's policies prohibit sale to an individual or entity that plans to export the vehicle, that the customer has no plans to export the vehicle and that the customer agrees not to export the vehicle. Myers & Fuller also recommends that if the dealer has any suspicion that the customer may export then the dealer should decline to make the sale without the dealer titling the vehicle in Florida. Titling the vehicle in Florida will provide the "conclusive presumption" that the dealer had no actual knowledge that the customer intended to export or resell the vehicle. That "conclusive presumption" plus the customer acknowledgment and agreement should, in all but the most egregious instances, prevent a manufacturer from taking adverse actions against a Florida dealer based on the Florida dealer's sale or lease to a customer who exports or resells the vehicle.

PLEASE FEEL FREE TO CONTACT OUR OFFICE WITH ANY QUESTIONS YOU HAVE REGARDING THESE NEW PROTECTIONS.

the
Myers & Fuller, P.A.
report

Suzuki Motorcycle Dealer Saved From Unreasonable Termination

RECENTLY, MYERS & FULLER ATTORNEYS OBTAINED A FAVORABLE RULING FROM THE NORTH CAROLINA COMMISSIONER OF MOTOR VEHICLES AND THE NORTH CAROLINA COURTS. At issue was American Suzuki Motor Corporation's ("Suzuki") attempt to terminate a franchised dealer for purported sales deficiencies. After targeting the dealer for termination, Suzuki issued a cure letter which required the dealer not only to meet its aggregate sales numbers, but also sales targets for each model of motorcycle. M & F successfully argued that this type of termination formula was unfair. Although the aggregate number of sales targets may have been reasonable, it was unreasonable to ask the dealership to achieve each and every sub-target within that aggregate number. For example, the dealership's inability to sell a certain type of scooter would have constituted a breach, even though its sales of street bikes were more than adequate.

A sub-issue in the case was Suzuki's attempt to cancel the dealer's franchise for failure to effectively sell dirt bikes and other vehicles which did not qualify as "motor vehicles" for the purposes of state licensure. The North Carolina Commissioner of Motor Vehicles heard evidence on that issue and ultimately ruled in the dealership's favor.

Finally, the Commissioner also heard evidence regarding Suzuki's unfair system of allocation. That system places dealers at a disadvantage unless they made an order for a six month supply of motorcycles in the quantity and types dictated by Suzuki. Dealers that do not abide by Suzuki's strict allocation formula, are penalized by restrictions on the type and number of high-demand motorcycles which they may order, restrictions on the amount of floor plan assistance provided by Suzuki; and other monetary consideration. Although it was not necessary for the Commissioner to rule on this point, that allocation system was not viewed favorably by the Commissioner and could likely constitute the basis for relief to dealers in the future.

In November of 2007, Suzuki appealed the Commissioner's ruling to the Wake County Court System. By May 1, 2008, Myers & Fuller had obtained an Order dismissing that appeal and thereby finalizing the ruling of the Commissioner.

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.

The Truth About Factory Performance Evaluations

IMPROPERLY ASSIGNED MARKET AREAS GUARANTEE YOUR DEALERSHIP WILL FAIL!

Do you know what area of geography the factory has assigned to your dealership? If you do know what your AGSSA/PMA/ADI/AOR/APR/Sales Locality is, do you think it is too large? Too small? Do you care? Should you care? The answer is a resounding YES!

The size of your assigned market directly controls the market share you are capable of achieving. Many of you concentrate on the number of new cars and trucks you sell in relation to your other same line dealers (your rank). Every month we get calls from dealers who tell us they are ranked in the top 10 in new car/truck volume in their zone, region or district and are getting hammered by the factory over low market share.

Volume is real world, market share is fiction. Volume tells you if you can stay in business for another month and market share tells you how pleasant your relationship is going to be with the factory during that month. The factory controls the area assigned to you and therefore your market share. Some manufacturers, including Ford and Honda, have recently completed a massive change in market assignments and coincidentally are leading the pack on dealer improvement programs (NOD and stair-step programs) and terminations. Here is how it works.

Scenario One: Dealer A sells 1,000 new units in a market area that has 10,000 competitive industry retail registrations (all other competitive line-makes). The dealer's market share is 10 percent. The regions average is 9.75 percent and Dealer A is 103 percent sales effective, in the President's Club and treated like a superstar.

If the factory decides to change the dealer's market area (make it larger or smaller), there will immediately be a change in the dealer's market share. If the geography/area is increased, the number of retail registrations will automatically go up and the market share will automatically go down.

If, for example, the increase in geography were to result in an increase of 4,000 retail registrations (from 10,000 units to 14,000) Dealer A's market share will decrease to 7.4 percent. In the real world, nothing has changed. Dealer A is still Dealer A; he/she still spends the same amount in advertising, has the same size sales force and the same mix of inventory, only now the dealer is achieving a market share of only 7.4 percent compared to the region average of 9.75 percent. That will result in the dealer having a sales efficiency of only 76 percent when compared to the region. That will get you in the Improvement Program of that factory.

Most factories have a minimum threshold of 80 percent of region (or whatever standard they employ) and if you fall below that threshold bad things begin to happen. In this scenario a dealer went from the President's Club to the stair-step program with the click of a manufacturer's mouse.

Sometimes the dealer is his/her own worst enemy. We have seen situations where a dealer thought more was better. Example: When approached by the factory, Dealer A (we will use BMW as an example) was all too eager to go along with a plan to have him/her buy out a BMW dealer (Dealer B), whose dealership was about 30 miles away. The hope was for Dealer A to inherit that dealer's market area. The idea was to have less competition (one fewer dealer) and more sales opportunity (additional market area). Sounds logical, doesn't it? Wrong!

While Dealer A had one less BMW dealer to compete with, he/she now had significantly more territory to be responsible for penetrating. The trade off, less competition versus more territory, turned out to be an uneven trade. The distance the dealer had to cover was just too large an area. Customers of Dealer B (who sold out) went to a closer interbrand (think Mercedes, Audi, Lexus or Infiniti) and the sale was lost to Dealer A. What seemed like such a good idea turned into a nightmare when BMW put Dealer A on the Improvement Plan, offered a term sales and service agreement and placed the dealership's future in jeopardy.

The size and make up of your market area is crucial to being able to stay out of the factory dog house. If you don't know what your assigned market area is, find out. Don't just look at the census tracts, get a census tract map and plot the area out. If the area doesn't make sense to you, you must notify the factory in writing and explain the problem. This is not just for large, urban dealers, it's for everyone.

It is even more important for small dealers to do the analysis. Over the last few years, smaller dealers have been targeted for elimination by all the domestic factories and have been set up for a new dealership in the market by some of the imports. It would appear that some of the factories have decided that smaller dealers are not cost-effective. The latest love affair of the factories is the larger dealers or dealer groups. They are favoring them with more allocation, higher incentive money and new dealership points. State laws are blind to the size of the dealership. All are protected the same under the law. If the factory changes your market area, and you sit silently back and allow it to happen and your performance goes down, they have accomplished their mission. Your dealership will then be in the Improvement Program cross-hairs and subjected to threats and intimidation.

Any change to the game plan used by the factory affects how you look in the fictional world of performance. When you see a change and it doesn't make sense to you, write to the factory (no calls) and point out why the assigned area or change is inappropriate and what the consequences will be to you. Ask for a market study and the opportunity to provide relevant information to be used in the market study. In short, put the factory on notice of the problem and give them a chance to correct the problem. Chances are they will do nothing but you will have created a written record of your concerns and your request to have the problem corrected. The day you are hammered with poor performance you can point to the correspondence and be able to say "I told you this would happen."

Next quarter we will talk about the various standards of review (region, state, national, district) and how they control the rest of the Performance Evaluation equation.

summary

- *Assigned markets – bigger is not better.*
- *Identify your assigned market.*
- *Analyze your ability to penetrate the assigned market.*
- *If factory standard is unreasonable, let them know in writing.*
- *Domestic factories target small dealers for elimination.*

NOTHING CONTAINED IN THIS NEWSLETTER IS TO BE CONSIDERED AS THE RENDERING OF LEGAL ADVICE. READERS ARE RESPONSIBLE FOR OBTAINING SUCH ADVICE FROM THEIR OWN LEGAL COUNSEL. THE CONTENT OF THIS NEWSLETTER IS INTENDED FOR EDUCATIONAL AND INFORMATIONAL PURPOSES ONLY.

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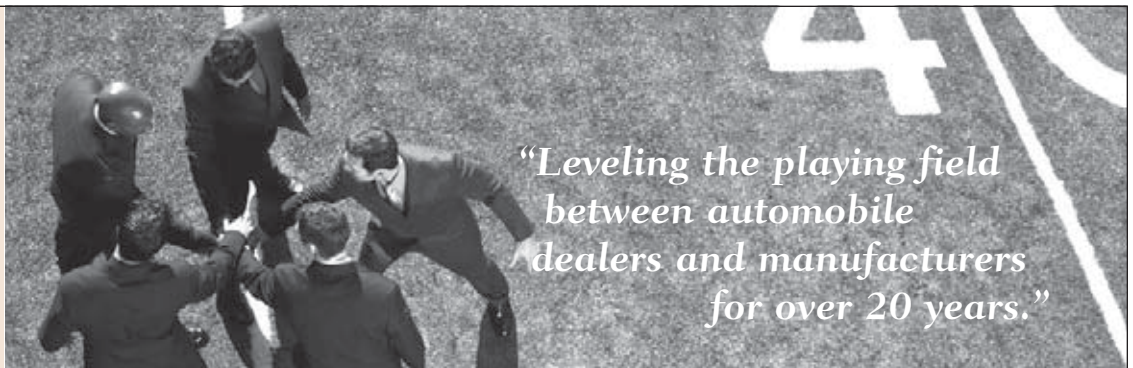
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- Automobile/Truck/Motorcycle Franchise Law
- Dealership Mergers & Acquisitions
- Transfer of Ownership/
Change of Management Turndown
- Finance and Insurance Compliance

- Dealership Successions
- Terminations
- Franchise and Consumer Related Litigation
- Add Points
- Warranty and Incentive Audits/Chargebacks

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