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 eighth 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

Infiniti Lawsuit Going to Trial

MYERS & FULLER HAS OBTAINED A FAVORABLE RULING ON INFINITI'S MOTION FOR SUMMARY JUDGMENT ON OUR CLIENT'S CLAIMS FOR BREACH OF GOOD FAITH AND FAIR DEALING AND DECEPTIVE TRADE PRACTICES ACT. The case involves the unfair addition of a new Infiniti dealership next to our client's recently purchased and relocated Infiniti dealership. Our client contended that Infiniti promised it would assign the dealership's prior territory, except one portion, to our client in its new location such that an "open point" would not be established at the dealership's prior location. Instead, not long after our client's purchase and relocation of the Infiniti dealership, Infiniti purported to conduct a market study which concluded that a new point should be added to our client's dealership's prior location and be assigned most of its prior territory. Of course, the result of Infiniti's action was to cause our client's dealership to lose significant sales it rightly expected to derive from the dealership's prior territory.

The court ruled that there was sufficient evidence elicited through months of document production and depositions to warrant a trial on our client's claims. The court found the evidence showed that, at the time of approving the purchase and relocation of our client's Infiniti dealership, Infiniti representatives made promises that the majority of the dealership's prior territory would be assigned to our client.

Now that the court has confirmed the validity of our client's claims, the case will be set for trial some time later this year. We expect the court will order the parties to attend a final mediation. Most litigation matters will reach a settlement before trial begins but we will be prepared to present our case before a judge and jury if it does not.

Incentive Program Price Discrimination Matter Settles Favorably

DUE TO CONFIDENTIALITY PROVISIONS WE CANNOT TELL YOU THE NAME OF OUR CLIENT OR THE MANUFACTURER BUT WE CAN REPORT THAT THE MYERS & FULLER ATTORNEYS HAVE RECENTLY SETTLED A MAJOR PRICE DISCRIMINATION LAWSUIT.

The manufacturer's "stair step" sales incentive program included arbitrary sales target levels which each paid progressively higher incentives per car. These payments were retroactive to the first car sold for the month. Our client's dealership was in a market which, by its sheer size, didn't allow the dealer to qualify for the higher bonus tiers. Most critically, our client's dealership was competing against a same linemake dealer which, by the size of its market, was regularly selling enough vehicles to qualify for the higher bonus levels. As a result, our client was placed at a competitive disadvantage each time a customer shopped both stores for a vehicle.

We believe that this type of stair-step incentive program is illegal under the Federal price discrimination laws as well as some state franchise laws and should be discontinued by any manufacturer continuing to enforce such a sales incentive program.

Dealer Successfully Challenges Mercedes' Denial of Transfer Request

BECK AUTOMOTIVE, A MERCEDES DEALER LOCATED IN CHARLOTTE, NORTH CAROLINA, HAS SOUGHT TO TRANSFER ITS MERCEDES AND MAYBACH LINES TO SONIC AUTOMOTIVE. MERCEDES REJECTED THE TRANSFER REQUEST CITING ALLEGED "PERFORMANCE ISSUES" AT OTHER SONIC OWNED MERCEDES DEALERSHIPS.

Myers & Fuller attorneys filed a Protest with the North Carolina Division of Motor Vehicles, arguing that Mercedes' reason for turning down the transfer is unlawful and infringes upon Beck's rights under applicable law.

The Firm filed a Motion for Judgment on the Pleadings on Beck's behalf, arguing that Mercedes' rejection letter was unlawful and was not adequate to preserve Mercedes' right to object to the transfer. Specifically, the Firm argued that Sonic's purported "performance issues" at dealerships located in other states were not a viable reason to infringe upon Beck's rights to transfer its dealership to Sonic. On October 23, 2008, the Commissioner rendered a ruling in Beck's favor, finding that MBUSA could not block the sale. Mercedes has indicated that it intends to appeal the ruling.

Consolidating Unrelated Franchises as a Cost-Saving Measure

During this current economic climate, many dealers are closely examining their business operations and looking for ways to trim expenses. The elimination of duplicative employee positions or cost centers can help to improve the bottom line. In the case of dealers with multiple franchises, some may consider the consolidation or dualling of those franchises.

Most franchise agreements contain language that prohibits dualling or changing the use of the dealership facility without the prior consent of the manufacturer, which the manufacturers contend they may withhold in their sole and absolute discretion. However, some state franchise protection acts contain provisions that require the manufacturer to act reasonably while others expressly prohibit denying a dealer's request to dual franchises at one facility.

Dealers who are considering dualling should not rely solely on the terms of their franchise agreement, but should consult their legal counsel to discuss what protections there might be under their particular state franchise laws.

Myers & Fuller, P.A. Dealership Seminar Opportunities

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

DEALERSHIP MERGERS & ACQUISITIONS/ SUCCESSION ISSUES

DEALERSHIP MERGERS AND ACQUISITIONS/SUCCESSION

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

A WALK THROUGH THE MANUFACTURER FRANCHISE APPLICATION PROCESS

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

FRANCHISE LAW ISSUES

MAJOR TOPIC REVIEW

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

FRANCHISE BY FRANCHISE REVIEW

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

LEGISLATIVE REVIEW

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

STATE OF THE INDUSTRY

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

FINANCE AND INSURANCE ISSUES

INTRO TO KEY F&I CONCEPTS

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

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

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

COMPREHENSIVE ON-SITE F&I REVIEW

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

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

Are Dealer Trade Drivers Employees or Independent Contractors?

DEALERS HAVE HISTORICALLY USED DRIVERS FOR PICKING UP MOTOR VEHICLES AT ONE DEALERSHIP AND DELIVERING THEM FOR TRADE TO ANOTHER DEALERSHIP. THESE DRIVERS, GENERALLY REFERRED TO AS "DT DRIVERS," HAVE TRADITIONALLY BEEN TREATED AS INDEPENDENT CONTRACTORS IN MANY REGIONS IN THE UNITED STATES. However, other areas have predominantly treated DT drivers as employees of the dealership.

The line between employee and independent contractor has always been blurry and subject to interpretation. Unfortunately, the consequences of misclassifying a DT driver can be severe in the event of a tax audit. The obvious advantage of classifying a DT driver as an independent contractor is that the dealership is not obligated to pay Social Security, Medicare or unemployment taxes. Additionally, liability to third parties in the event of an accident can sometimes be mitigated if the person driving the vehicle is an independent contractor rather than an employee. Conversely, if the DT driver ever gets injured while transporting a vehicle, it is generally better for the dealership if the injured driver is an employee and thereby restricted to receiving worker's compensation payments.

Generally speaking, if a dealership does not take proper precautions, its DT drivers will be treated by governmental entities as being employees. There are certain steps that dealers can take to enhance the possibility that its DT drivers may be treated as independent contractors. However, absent a letter of opinion from your State's Employment Security Commission or similar taxing entity, there are no guarantees that a DT driver will be treated as an independent contractor by those entities.

Dealers that desire to treat DT drivers as independent contractors must first have an independent contractor agreement signed by the DT driver. One of the main factors that is looked at when determining whether a person is an employee or a contractor is the expressed intent of the parties. Without an independent contractor agreement, it is difficult for a dealership to make a legitimate claim that its DT drivers are not employees. A signed independent contractor agreement makes it clear that both parties intend to enter into a independent contract relationship. If one is signed, the DT drivers cannot later claim that they thought they were an employee.

The independent contractor agreement should recite that the dealership exerts no control over the DT driver's performance of his or her duties. For example, the dealership should refrain from prescribing the route to be taken. Dealership employees should not shuttle DT drivers to the locations where the dealer trade vehicles are being picked up or dropped off. Any activity by the dealership which serves to restrict the DT driver's independent ability to perform his or her services can serve to demonstrate that the DT driver is really an employee.

It is not sufficient for the independent contractor agreement to be merely kept on file. The terms of agreement must actually be enforced. If the dealer and DT driver act contrary to that agreement, it will likely be rendered unenforceable.

A dealer may also protect itself by utilizing the services of an outside company that offers driving services. DT drivers will almost certainly be deemed employees of the outside company. Similarly, dealerships can obtain drivers from temporary agencies. Temporary workers do not count as employees, rather they are independent contractors.

If your dealership desires to treat its DT drivers as independent contractors, it is highly recommended that you contact your legal advisor. An employment attorney or dealership attorney can provide you with an independent contractor agreement to present to your DT drivers that addresses necessary aspects of the business relationship. All DT drivers should sign the agreement and be made aware that the dealership intends to enforce its provisions. The attorney can also advise you about the laws specific to your state and the opinions of employment agencies in your state with regard to DT drivers.

Additional questions should be directed to your legal advisor.

summary

- *If a dealership does not take proper precautions, its DT drivers will be treated by governmental entities as being employees.*
- *Dealers that desire to treat DT drivers as independent contractors must first have an independent contractor agreement signed by DT driver.*
- *Dealers may protect themselves by utilizing services of outside company offering driving services.*

By Robert C. Byerts

FTC Announces Forbearance on Red Flags Rule Enforcement Until May 1, 2009

ON OCTOBER 22, 2008, THE FEDERAL TRADE COMMISSION ANNOUNCED THAT IT WOULD SUSPEND ENFORCEMENT OF THE RED FLAGS RULE UNTIL MAY 1, 2009. FTC Press Release Announcing Forbearance on Enforcement: http://www.ftc.gov/opa/2008/10/redflags.shtm:

"The federal banking agencies and the FTC announced the Red Flags Rule on November 9, 2007. At that time, the agencies established a mandatory compliance date of November 1, 2008. The October 22 announcement gives financial institutions- dealers are included in this term- and creditors subject to the FTC's jurisdiction an additional six months to comply. The FTC's announcement makes clear that it applies only to entities subject to its jurisdiction. It is not clear whether other agencies responsible for enforcing this rule - the Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and the National Credit Union Administration - will announce a similar forbearance in enforcement. We will provide updates with respect to these agencies as they become available."

The Red Flags Rule resulted from the Fair and Accurate Credit Transactions Act of 2003, which amended the Fair Credit Reporting Act, and requires covered entities to develop and implement a written Identity Theft Prevention Program designed to detect, prevent, and mitigate identity theft. Two other rules announced in conjunction with the Red Flags Rule, covering notices of consumer address discrepancies and special requirements for credit and debit card issuers regarding changes in customers' addresses, still take effect on November 1, 2008.

Although the FTC has delayed compliance deadline, dealers remain required to have policies in place by Nov. 1 to address another rule effective on that date. That rule addresses notices of address discrepancies observed by a dealer when it pulls a credit bureau. Under the rule, a dealer, as a user of consumer report info, must take action when the dealer receives a notice of address discrepancy from a credit bureau. Dealers must have procedures in place to try and resolve the discrepancy, e.g.- looking at the identity information on file for the consumer, reviewing other records, or using a third-party source in order to attempt to resolve the discrepancy. The address discrepancy rule also requires dealers to provide information to credit bureaus when the dealer is able to resolve the discrepancy and do business with the customer. The dealer must report the verified result to the credit bureau. The rule should be of particular

interest to buy-here-pay-here dealers because those dealers, in particular, have a continuing relationship with a customer and are likely to furnish information to the credit bureau.

Penalties for non-compliance include fines of up to $2,500 per violation.

summary

- *FTC Will Suspend Red Flag Rule Enforcement Until May 1, 2009; But Dealers Should Proceed With Program*
- *Other Federal Agencies Responsible for Enforcement Have Not Suspended November 1, 2008 Effective Date*
- *Two other rules, covering notices of consumer address discrepancies and special requirements for credit and debit card issuers regarding changes in customers' addresses, still take effect on November 1, 2008.*
- *When dealer receives a notice of address discrepancy from a credit bureau, dealers must have procedures in place to try and resolve the discrepancy.*

In These Difficult Days Dealers Need to Understand Their Termination Rights

by Richard N. Sox, Jr.

IN THESE NEW AND CHALLENGING TIMES IN THE AUTO INDUSTRY, MORE AND MORE DEALERS ARE MAKING THE DECISION TO TURN THEIR FRANCHISE INTO THE MANUFACTURER. FOR DEALERS THAT MAKE THIS DECISION, IT IS VERY IMPORTANT THAT YOU UNDERSTAND YOUR TERMINATION RIGHTS. Termination rights are found in both the dealer sales and service agreement and in most state franchise motor vehicle laws.

The dealer sales and service agreement will typically contain a section which states that if the franchise is terminated the manufacturer will buy back certain vehicles, parts and pay for special tools. Special attention must be paid to determine if these benefits are paid in all termination situations, both termination by the manufacturer and by the dealer.

The termination benefits customarily found in state franchise laws range from the required purchase of new model vehicles to a required payment of one year's worth of lease payments on the dealership facility to a required payment of fair market value for the franchise itself. Benefits vary widely among states but for the most part, the benefits under state franchise laws are more enhanced than what is offered under the dealer agreement. State franchise laws will almost always trump the terms of the dealer agreement and in many cases the state franchise laws will provide that the dealer is to receive any benefits called for under the dealer agreement *in addition to* the benefits required under state law.

Under state franchise laws it is also important to determine whether the benefits are available whether the manufacturer or the dealer terminates the franchise. If the state law provides only for benefits to be paid upon a manufacturer's termination then the dealer should consider causing the manufacturer to issue a notice of termination either by request or by closing the dealership for a time period prohibited under the dealer agreement.

In a termination situation it is also very important for dealers to closely review any documents the manufacturer asked the dealer to sign upon termination. The manufacturers have a nasty habit of including a release in the material sent to the dealer for signature. That release waives any liability the manufacturer may have related to any action or inaction taken by the manufacturer against the dealer even if the dealer isn't aware of the wrong-doing until after signing the release. In most cases, the dealer should not have to sign any documents when the dealer is simply voluntarily terminating his or her dealership. If for some reason, the manufacturer insists that documents be signed to accomplish the termination, we strongly recommend a dealer lawyer review those documents before signing.

Before making the decision to terminate your franchise, it is critical to understand your rights under both the dealer agreement and your state franchise laws.

summary

- *Termination benefits found in both the dealer agreement and state franchise law.*
- *Determine if benefits are available in a "voluntary" termination.*
- *Don't sign any documents without legal review.*

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