

Leveling the playing field between automobile dealers and manufacturers for over 20 years.

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The Myers & Fuller Report

a newsletter for motor vehicle dealers and associations

Welcome to the ninth 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 Protects VW Dealer From Termination

MYERS & FULLER WAS RECENTLY SUCCESSFUL IN OBTAINING A TEMPORARY RESTRAINING ORDER TO STOP VW FROM TERMINATING A DEALER FOR THE DEALER'S ALLEGED FAILURE TO COMPLY WITH A PRIOR AGREEMENT TO RENOVATE THE DEALERSHIP FACILITY.

Over 2 years ago, VW and our dealer client entered into an agreement whereby the dealer would construct a "B" Marketplace facility at its current VW dealership. While working through architectural plans and obtaining city permits, vehicle sales nationally began to plummet. As a result, our client began to attempt to negotiate a reduction in the scope of the proposed facility renovations. VW and our dealer could not come to agreement on a revision to those facility renovations.

Without an agreement on revising the previously agreed to facility renovations, our client refused to go forward with those renovations. The existing facility was more than adequate and the dealer was meeting sales performance requirements. In response, VW sent the dealer a letter stating he would be terminated for failure to make the renovations previously agreed to.

Myers & Fuller was able to stop the termination by obtaining a Temporary Restraining Order. As a result, the dealer's negotiating position was strengthened and the parties are attempting to work out a compromise.

New York Automobile Dealers Enjoy New Dealer Protections

New dealer protection amendments to New York franchise law went into effect January 1, 2009. You may recall that Myers & Fuller was heavily involved with drafting and negotiating the new dealer protections in New York on behalf of the Greater New York Automobile Dealers Association.

New York automobile dealers now enjoy the right to:

- Receive warranty reimbursement in an amount equivalent to their retail charges;
- Protest the addition or relocation of a dealer within their newly defined relevant market area;
- Require the manufacturer to provide detailed sales projections which support facility demands before the dealer commits to constructing/renovating his or her facility;
- Require a manufacturer or distributor acquiring an existing brand to offer dealers a continuing franchise agreement;
- Receive from the manufacturer the details of any formula used to establish the dealers sales performance;
- Avoid compliance with any unreasonable sales performance standard;

- Protest and obtain a “stay” on a warranty or sales incentive audit chargeback; and
- Protest and obtain a “stay” on any action to terminate the franchise.

New York automobile dealers now have some of the strongest laws in the United States and it is critical that dealers understand and take advantage of these new protections.

FTC Increases Civil Monetary Penalty Amounts

The FTC has announced an increase in civil monetary penalty amounts effective Feb. 9, 2009. The adjustments are based on the increase in the Consumer Price Index (CPI), and include an increase in the maximum penalties per knowing violation of the Fair Credit Reporting Act (examples of which would include the Red Flags, Address Discrepancy, and Affiliate Sharing Rules) from \$2,500 to \$3,500. In addition, the maximum statutory penalty per violation for certain FTC rules that are enforced under the FTC Act will also increase from \$11,000 to \$16,000. Under the FTC Act, when a rule (such as the GLB Safeguards Rule, Privacy Rule, or the Red Flags and Address Discrepancy Rules) continues to be violated despite an order to comply with a rule, the FTC can file a lawsuit in federal court seeking \$16,000 for each violation of that rule as well as equitable relief.

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 linemakers.

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 Dangers of Failing to Promptly Title Vehicles Following Sale

GENERALLY SPEAKING, DEALERS PROMPTLY SUBMIT VEHICLE TITLE WORK TO THEIR DMV OR SIMILAR AGENCY FOLLOWING A SALE. HOWEVER, THERE ARE TIMES WHEN A DEALER MAY BE TEMPTED TO DELAY SUBMISSION OF TITLE WORK WHILE AWAITING RECEIPT OF THE VEHICLE TITLE, A DOWNPAYMENT OR PRODUCTION OF DOCUMENTATION TO SUPPORT A CUSTOMER'S CREDIT APPLICATION. A delay can lead to serious trouble for the dealer down the road in the event of a customer default or bankruptcy.

Title work must be promptly processed in order to ensure compliance with the terms of any master agreement between the dealership and the finance company. Most finance companies include a clause mandating submission of title work within 20 days or so following the sale. Failure to abide by such contractual obligations could result in a repurchase demand from the finance company.

It is also important to title a vehicle promptly because the lender's security interest is perfected only by the DMV's notation of the lender's interest on the title in most states. In general, the lender's lien will be effective as of the date of the sale and will be superior to all other liens. However, if the lien is not timely perfected, another creditor could theoretically perfect its lien and obtain rights to the collateral superior to those of the lender. Many states have a provision disallowing priority jumping so long as the dealership submits the title work within 15-30 days (depending on the state) following the date of sale. If the dealership fails to timely perfect the lender's lien, the lender will undoubtedly demand a repurchase of the contract in the event that another creditor successfully claims a priority in the collateral.

Bankruptcy poses yet another hazard. A bankruptcy trustee acts as lien creditor. **If a vehicle lien is not properly perfected, the bankruptcy trustee may claim the collateral from the bankruptcy estate and the lender will be relegated to unsecured creditor status.** Additionally, a failure to timely perfect the lien could enhance the odds of the contract being "avoided" entirely by the bankruptcy estate and an "avoided contract will result in an unraveling of the contract and could leave the dealer holding the bag."

A dealer must make sure that it can properly title the vehicle at the time of the sale. If the downpayment paperwork has



not yet been received, the consummation of the sale should be delayed until the required information has been collected. Likewise, a dealer should not sell a vehicle until it has the title in hand. State laws and regulations generally require a dealer to have the title in hand prior to selling the vehicle anyway.

A dealer can avoid costly headaches by simply delaying a sale when all required information and documentation necessary to process the sale has not yet been received. A dealership should consult with its legal advisor if it ever finds itself in a position where a creditor, lender or trustee is demanding compensation or the repurchase of a vehicle due to untimely title work.

summary

- *Title work must be promptly processed in order to ensure compliance with the terms of any master agreement between the dealership and the finance company.*
- *If the downpayment paperwork has not yet been received, the consummation of the sale should be delayed until the required information has been collected.*

Why You Must Review Your F&I Business Practices

MY HAT IS OFF TO THOSE DEALERSHIPS WHO WERE REPRESENTED AT ONE OF OUR F&I SEMINARS CONDUCTED ACROSS THE COUNTRY DURING 2008. FOR THOSE OF YOU WHO COULD NOT ATTEND, TALK TO A DEALER WHO DID AND YOU WILL LEARN THAT NO MATTER HOW GOOD YOU BELIEVE YOUR PROCESSES TO BE, THERE ARE LEGAL PITFALLS THAT YOU MAY HAVE NEVER DREAMED OF THAT COULD COST YOU DEARLY. Even though the seminars were designed to provide only an overview of certain areas of the law, I firmly believe every attendee learned one or more lessons that could save their dealerships huge sums of money by helping them to avoid consumer lawsuits or governmental investigations.

I continue to read about more class actions that have been successfully prosecuted against both large and small dealers all across the country. The damage to an individual customer is usually relatively minuscule. However, multiplying that small amount of damage by a large number of customers can easily add up to a huge sum of money. With attorney fees, costs and potential punitive damages thrown in, the damage award can be large enough to put even the most financially successful dealer out of business. **In the current economic climate it may not take a particularly large verdict or settlement to force you to close your doors.**

To make matters worse, a single plaintiff can often represent the interests of a large number of customers who will usually have no idea there is even a lawsuit until the process is well underway. More often than not, these legal actions come about as a result of an honest mistake on the part of a dealership. However, the “we didn’t mean to break that law” defense is rarely successful.

How do you attempt to avoid such misfortune? You may wish to consider a comprehensive third-party review of your business practices. Such a review should include, at a minimum, an examination of the dealership’s sales techniques, F&I procedures, forms and signage. A more complete review may also include an education program for dealership employees, as well as a review of advertising, employment practices and key dealership service provider contracts. Correction of a single deficiency can avoid costly litigation while at the same time increase customer satisfaction and ultimately dealership profitability.



Dealers are fast becoming a target of choice for plaintiff's lawyers. The most effective means of avoiding attack is to conduct a thorough examination of how your dealership conducts business and to alter your business practices as necessary to comply with the law. F&I procedures reviews cannot guarantee absolute compliance. However, minimizing exposure can certainly help a dealer-principal sleep better at night.

summary

- *Consumer lawsuits and government investigations continue despite economic downturn*
- *Class action lawsuits can cause substantial loss to dealership*
- *Consider a comprehensive review of dealership business practices*

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, current 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.

Another issue which should be considered by a dealer ready to turn-in or sell his or her franchise is what impact the closure of the franchise will have on any existing agreements. In particular, the concern is whether a penalty clause is triggered by the closure of the franchise. Some agreements which may contain such a penalty clause include DMS contracts and exclusive use agreements with the manufacturer. It is critical to understand the costs associated with these types of agreements before notifying anyone of your intent to terminate your ownership of the franchise.

In a termination situation it is also very important for dealers to closely review any documents the manufacturer asks 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 over the course of the entire franchise relationship 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.

Lastly, don't give up on the idea of selling your franchise to another dealer or back to the manufacturer. As of the writing of this article, Myers & Fuller lawyers are working on transactions which include money being paid for domestic franchises. Some of these transactions involve manufacturer financial participation. It is important not to confide in your manufacturer representative that you are ready to go out of business. Instead, that first communication should be along the lines of "I am considering moving on to other ventures if I can receive a decent price for the franchise" and see if the manufacturer bites. You may find that you fit within the manufacturer's dealer network consolidation plans which can result in a buy-back of the franchise.

In any case, 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 vary widely among states.*
- *State franchise laws will almost always trump the terms of the dealer agreement.*
- *Consider what impact the closure of the franchise will have on any existing agreements.*
- *Review any documents the manufacturer asks the dealer to sign upon termination.*
- *Don't give up on the idea of selling your franchise to another dealer or back to the manufacturer.*

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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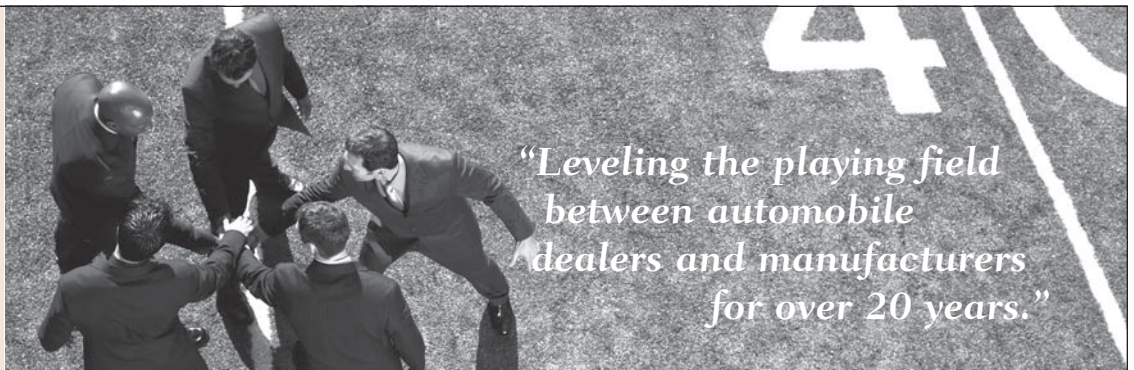
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- Finance and Insurance Compliance

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