

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 tenth 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

Audi and BMW's Sales Incentive Programs Challenged

Myers & Fuller, P.A. has filed lawsuits on behalf of an Audi dealer client and BMW dealer client in separate states related to the manufacturers' respective sales incentive programs.

Our Audi dealer has suffered substantial losses as result of not qualifying for Audi's Margin Bonus Program which pays dealers significant incentives on the sale of new Audi vehicles. Audi's margin holdback program requires that a dealer have the latest image facility including the required square footage for each department and total acreage. Our client in this litigation could not meet these requirements due to being located in a metro area with no contiguous or nearby land available. The result of not receiving the Margin Bonus monies has not only caused our client to lose profits but also to lose customers to his competing Audi dealers. The Audi dealers adjacent to our client are both relatively new with facilities, including acreage, which meets the Margin Bonus Program requirements. As a result, our client has been placed at a pricing disadvantage when competing for the same customer.

Like Audi, BMW has had for some time a sales incentive program known as the Added Value Program which is primarily used to coerce dealers to construct hugely expensive dealership facilities, whether or not warranted by market conditions. Our BMW dealer was promised Added Value Program monies if he were to build the required facility or, failing to do so, sold the franchise to a dealer that would. After several months of attempting to locate land to construct the required facility, our client ultimately sold the franchise to another dealer who had land and facilities which could be renovated to meet BMW's requirements. Subsequent to the sale, BMW failed to pay our dealer client Added Value incentive monies that our client understood was being escrowed pending compliance with the "build or sell" ultimatum.

We are seeking full payment of the Added Value incentive monies, interest and attorneys fees for our former-BMW dealer client.

Chrysler Bankruptcy

Myers & Fuller, P.A., with the assistance of New York bankruptcy counsel, represented a number of dealers in both the General Motors and Chrysler bankruptcy proceedings. We had a small victory in the Chrysler proceedings wherein the bankruptcy judge reserved dealers' rights to seek "preferred status" for monies owed to Chrysler dealers by Old Chrysler as versus being relegated to "unsecured status." You can read more about Chrysler dealers' opportunity to seek administrative claim status for certain state law termination benefits on page 5 in the article entitled *The Post Mortem on Chrysler and GM Dealers - Some Hope*.

Myers & Fuller, P.A. Brings a Lawsuit Against Jaguar

The Firm has brought a lawsuit against Jaguar on behalf of one of our clients seeking damages resulting from Jaguar's drastic change in its business model while the brand was operated by Ford. Our client was persuaded by Ford – Premier Division representatives to construct a multi-million dollar facility. Our client built his facility based upon promises that Ford had

drastically changed Jaguar's business model from a low-volume, high margin luxury vehicle to a high-volume linemake.

General Motors Bankruptcy

We had more than a small victory in the GM bankruptcy proceedings. As a result of our arguments that state franchise laws should not be ignored (for both terminated dealers and retained dealers), the bankruptcy judge ruled that as it relates to the Participation Agreements with retained dealers, those dealers will be able to challenge any provision of the Participation Agreement that is inconsistent with state franchise laws. Importantly, the judge also ruled that those challenges would not be brought before the bankruptcy court as GM had hoped but, instead, would be brought in the forum called for under state franchise laws (either an administrative or trial court forum). To learn more about challenging provisions of the Participation Agreement as unenforceable under state franchise law, turn to page 5 for the article entitled *The Post Mortem on Chrysler and GM Dealers - Some Hope*.

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.

Red Flags Rule Effective Date Postponed Again

THE FTC JUST ANNOUNCED THAT IT IS AGAIN DELAYING ENFORCEMENT OF THE RED FLAGS RULE – THIS TIME UNTIL NOVEMBER 1, 2009. THE RED FLAGS RULE REQUIRES DEALERS TO DEVELOP COMPREHENSIVE PROCEDURES TO PREVENT IDENTITY THEFT, INCLUDING THE DEVELOPMENT, IMPLEMENTATION, AND ADMINISTRATION OF A WRITTEN IDENTITY THEFT PREVENTION PROGRAM.

To assist small businesses and other entities, the Federal Trade Commission staff will redouble its efforts to educate them about compliance with the “Red Flags” Rule and ease compliance by providing additional resources and guidance to clarify whether businesses are covered by the Rule and what they must do to comply. To give creditors and financial institutions more time to review this guidance and develop and implement written Identity Theft Prevention Programs, the FTC will further delay enforcement of the Rule until November 1, 2009.

The Red Flags Rule is an anti-fraud regulation, requiring “creditors” and “financial institutions” with covered accounts to implement programs to identify, detect, and respond to the warning signs, or “red flags,” that could indicate identity theft. The financial regulatory agencies, including the FTC, developed the Rule, which was mandated by the Fair and Accurate Credit Transactions Act of 2003 (FACTA). FACTA’s definition of “creditor” includes any entity that regularly extends or renews credit – or arranges for others to do so – and includes motor vehicle dealers who finance sales.

The three-month extension, coupled with this new guidance, should enable businesses to gain a better understanding of the Rule and any obligations that they may have under it.

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 if you have not yet implemented your Red Flags comprehensive procedures

to prevent identity theft, your program coordinator has lots to do before then.

PROCRASTINATORS ALERT: Do not further delay. Although the FTC does not yet conduct routine compliance audits, the FTC can conduct investigations to determine if a business within its jurisdiction has taken appropriate steps to develop and implement a written Program, as required by the Rule. A consumer complaint can trigger such an investigation. The FTC may ask the target of the investigation to produce copies of its Program and other materials related to compliance. The FTC also may interview officers, employees, or others who are familiar with the company’s practices. If the FTC has reason to believe the Rule has been violated, it can bring an enforcement action.

The FTC can seek both monetary civil penalties and injunctive relief for violations of the Red Flags Rule. Where the complaint seeks civil penalties, the U.S. Department of Justice typically files the lawsuit in federal court, on behalf of the FTC. Currently, the law sets \$3,500 as the maximum civil penalty per violation. Each instance in which the company has violated the Rule is a separate violation. Injunctive relief in cases like this often requires the parties being sued to comply with the law in the future, as well as provide reports, retain documents, and take other steps to ensure compliance with both the Rule and the court order. Failure to comply with the court order could subject the parties to further penalties and injunctive relief.

If you have any questions or concerns regarding the creation or implementation of your Red Flags comprehensive procedures to prevent identity theft, contact an experienced motor vehicle dealer attorney. The FTC is unlikely to further extend the deadline for compliance.

summary

- *FTC announced it is delaying enforcement of the Red Flags Rule until November 1, 2009*
- *FTC staff will redouble efforts to educate small businesses and other entities about compliance with the “Red Flags” Rule and ease compliance by providing additional resources and guidance to clarify whether businesses are covered by the Rule and what they must do to comply.*

Training Repayment Agreements as an Alternative to Covenants Not to Compete

THE PROPER TRAINING OF TECHNICIANS IS A KEY COMPONENT TO THE OPERATION OF ANY SERVICE DEPARTMENT IN TODAY'S MARKET. AS MOTOR VEHICLES BECOME INCREASINGLY MORE COMPLEX, MANUFACTURERS ARE REQUIRING NEW AND ADDITIONAL LEVELS AND TYPES OF CERTIFICATIONS FOR SERVICE TECHNICIANS. Manufacturers often tie various incentive programs to the dealership's attainment of certification levels. Customers expect to have their warranty and other repairs performed by an experienced and qualified technician. Unhappy service customers, of course, can lead to poor service scores and reduced service profitability.



Dealers expend considerable time and expense in assisting its service technicians with achieving manufacturer certifications. Unfortunately, after achieving certification, many technicians choose to leave the dealership for greener pastures elsewhere. The dealership is then faced with the prospect of finding a new technician and starting the process all over again.

Historically, covenants not to compete have been the primary contractual means for employers to retain employees and thereby protect their investment in training. However, covenants not to compete in employment relationships are generally not favored by the law or by the courts. Such covenants are often struck down as being unenforceable because they violate public policy or unduly restrict an otherwise able-bodied person from engaging in their chosen profession.

In recent years, it has become more common for employers to enter into training repayment agreements with their employees. Those agreements do not restrict the ability of an employee to work. Rather, they merely require the employee (or the employee's new employer) to repay the reasonable costs associated with training the employee. Courts have been more receptive to these types of agreements than they have been to covenants not to compete. As long as the training repayment contract is reasonably related to those costs actually incurred by the employer for training the employee, they will generally be upheld.

The enforceability of these contracts turns on several criteria including: whether the agreement penalizes the employee for working for a competitor; the reasonableness of the amount to be repaid; and whether the agreement credits the employee for service to the employer after training or certifications were received. Due to the fact that different states may treat and enforce training repayment contracts differently, it is highly advised that you consult with your dealer lawyer prior to presenting such an agreement to your dealership's service technicians.

summary

- *Training repayment agreements can serve to help train and retain qualified employees.*
- *Training repayment agreements are a way to protect dealers while still allowing employees the flexibility to seek employment elsewhere.*
- *These agreements are generally more enforceable than covenants not to compete.*

The Post-Mortem on Chrysler and GM Dealers – Some Hope



NOW THAT NEW CHRYSLER AND NEW GM ARE UP AND RUNNING AND THE DUST IS SETTLING ON OLD CHRYSLER AND OLD GM, WHAT IS THE STATUS OF DEALERS' FRANCHISE RIGHTS?

Chrysler Dealers Going Forward

Chrysler dealers who were chosen to go forward with Chrysler were issued a "standard" Dealer Sales and Service Agreement which did not, in and of itself, interfere with the dealer's state franchise law rights. For a going-forward Chrysler dealer offered one of the missing Chrysler brands, however, that dealer was presented with a 30 year site control agreement full of onerous terms. One such term is the restriction on adding another franchise to the Chrysler facility, which is in direct conflict with many states' franchise laws.

Chrysler dealers forced to agree to the 30 year site control agreement, which have the opportunity and need to bring in an additional franchise to remain viable, may have a claim that their state franchise law is being violated when Chrysler moves to enforce the site control agreement.

Chrysler Dealers Rejected in Bankruptcy Proceedings

Chrysler dealers who have had their Dealer Agreement rejected in the Chrysler bankruptcy proceeding will not have an opportunity to challenge that rejection under state franchise laws. Instead, these dealers have their best hope in the federal legislation (H.R. 2743) which proposes to restore the rights of all Chrysler and GM dealers who had franchises in place at the time those companies filed for bankruptcy protection. H.R. 2743 recently passed the House Appropriations Committee (July 7, 2009).

However, even in the absence of the proposed legislation, rejected dealers may assert claims against Old Chrysler in the bankruptcy court by filing a "proof of claim." *The deadline to file a "proof of claim" against Old Chrysler is September 28, 2009. This option is obviously not as exciting as having your franchise restored, but it does provide the dealer with an opportunity to seek priority administrative claim status for those termination benefits which are provided under state franchise laws.* These benefits range from net cost of vehicle inventory to the fair market value of the franchise.

General Motors Dealers Receiving a Wind-Down Agreement

All Pontiac dealers and many Buick, GMC, Chevrolet and Cadillac dealers received a Wind-Down Agreement from GM which offered a relatively small payment of money in exchange for the dealer's agreement to give up the franchise no later than October 31, 2010. With the Wind-Down Agreement, GM purports to provide dealers with a soft landing by providing the dealer with time to sell off vehicle and parts inventory in a more controlled fashion. The dealer agrees to waive all rights to order new vehicles, to receive termination benefits and to protest the addition or relocation of a same-linemake dealership into the dealer's market area.

The Wind-Down Agreement remains a part of your "franchise agreement." As such, the Wind-Down Agreement conflicts with many state franchise laws in a number of respects including the dealer's waiver of a right to order vehicles, the dealer's waiver of termination benefits and the dealer's waiver of protest rights. Dealers have a strong argument that in any conflict between the terms of the Wind-Down Agreement and State franchise protections, the State law will prevail.

GM included one additional provision in the Wind-Down Agreement which will add a potential hurdle to bringing a claim and that is an agreement by the dealer that the bankruptcy court will continue to have jurisdiction over any dispute which arises out of the Wind-Down Agreement. Under most state franchise laws, dealers aggrieved by a violation of their franchise law may bring a claim before an Administrative Hearings judge or a state court. Thus, by attempting to keep jurisdiction in the bankruptcy court, GM is trying to short circuit state law protections through a procedural roadblock.

General Motors Dealers Receiving a Participation Agreement

GM dealers who were retained by GM received a Participation Agreement (which was slightly amended by a subsequent Letter Agreement). The Participation Agreement purports to be a supplement to the standard Dealer Sales and Service Agreement and contains a number of restrictions which are contrary to many state franchise laws. These provisions include an agreement to accept the delivery of whatever number of new vehicles GM deems appropriate for your dealership, an agreement to provide exclusively-GM facilities, an agreement to not protest certain add points or relocations and a waiver of the right to protest a termination for failure to meet any term of the Participation Agreement or Dealer Sales and Service Agreement.

The GM bankruptcy court made rulings in its Order approving the sale of the assets to New GM which have a direct bearing on a challenge to the Participation Agreement. On the one hand, the court ruled that the Participation Agreements were not entered into by coercion. On the other hand, the bankruptcy court ruled that it was not going to make any determination of the validity of any provision within the Participation Agreement and a challenge as to the validity of any provision would be ruled on in a court other than the bankruptcy court (i.e. state courts). **The bankruptcy court's order opens the door to challenge any attempt by New GM to enforce the numerous terms of the Participation Agreement which are in conflict with your state's franchise laws.**

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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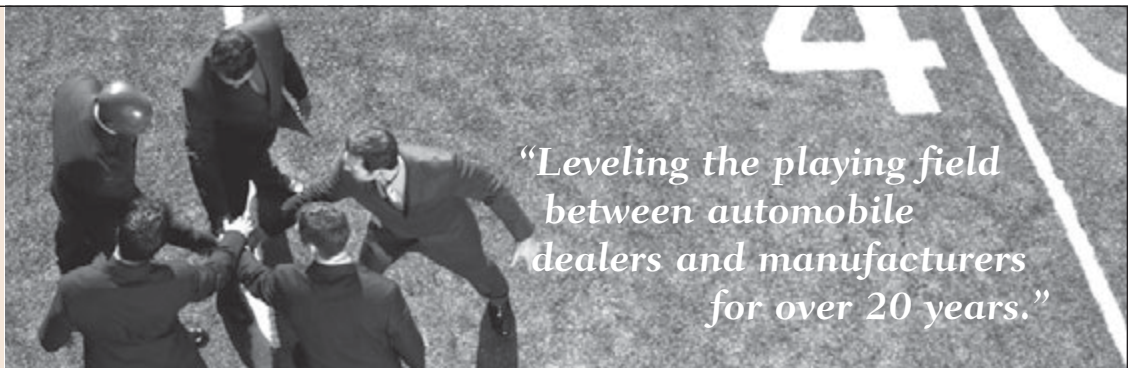
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