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

The BSM *Report*
a newsletter for motor vehicle dealers and associations

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"SAME FIRM, SAME ATTORNEYS... NEW NAME."

WE ARE PLEASED TO ANNOUNCE that effective January 1, 2010 our firm has changed its name to "Bass Sox Mercer." The firm name has been updated to reflect the names of the attorneys who have been serving the firm's dealer clients over the last several years. The Firm's founders, Dan Myers and Loula Fuller, who retired from the day-to-day practice of law several years ago, will continue to serve the Firm in an "of counsel" capacity. BSM continues to maintain offices in Tallahassee, Florida and Raleigh, North Carolina, staffed with the same core group of attorneys who have served you for years. We look forward to continuing to assist automobile, truck and motorcycle dealers throughout the United States in disputes with manufacturers and consumers, the sale or purchase of dealerships and your other legal needs. ■

Robert Bass
Partner

Richard Sox
Partner

Shawn Mercer
Partner

Robert C. Byerts
Partner

Welcome

Welcome to the eleventh edition of the BSM 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.

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 a broad range of 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. ■

Hawaii Automobile Dealers Seek Significant Franchise Law Upgrades

A few months ago, the Hawaii Automobile Dealers Association (HADA) retained Firm partner, Richard Sox, to assist the Association with crafting updates to Hawaii's franchise law protections. **After recommending a number of changes to the Hawaii law, Mr. Sox worked with the Association and its dealers to prioritize new franchise law protections most needed by the Hawaii dealers.**

On January 27, 2010, the HADA introduced proposed updates to Hawaii's motor vehicle franchise law protections. The protections sought by Hawaii dealers include:

- Expansion of agreement covered by franchise protections to include side agreements with the manufacturer (i.e. facility, exclusive-use and performance agreements)
- Termination protections and repurchase obligations
- Prohibition against unfair incentive programs
- Requirement of warranty reimbursement at retail
- Audit chargeback protections
- Prohibition against unreasonable refusal to permit relocation
- Prohibition against unreasonable facility upgrade requirements
- Exclusivity and site control prohibition
- Establishment of relevant market area and new point/relocation protest rights
- Prohibition against unreasonably granting franchise transfer/succession rights
- Requirement of reasonable sales and CSI performance measurement
- Requirement of fair and equitable allocation of vehicles/prohibition against unwanted allocation

If the HADA is successful in obtaining passage of these franchise law revisions, Hawaii dealers will enjoy some of the strongest franchise protections in the United States.

Many state automobile dealer associations have been active over the last 24 months in updating their franchise protections in light of new manufacturer initiatives and the fallout from the GM and Chrysler bankruptcy proceedings. **In the last 24 months alone, BSM has assisted Colorado, Connecticut, Florida, Hawaii, New York, and North Carolina with strengthening their motor vehicle dealer franchise laws.** ■

Bass Sox Mercer 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.

Chrysler Challenges Dealer Statutes in Four States

Chrysler Group LLC has filed suit against state officials from North Carolina, Maine, Illinois and Oregon over legislation recently enacted in those states which require a manufacturer to offer a right of first refusal to certain former dealers. The named defendants are state officials responsible for licensing new vehicle dealers or enforcing the respective dealer laws in those states.

Chrysler claims the new state dealer amendments conflict with orders of the bankruptcy court and that they also violate the contracts clause of the United States Constitution. Among other arguments, the affected states will likely seek to demonstrate that the statutory amendments constitute a valid exercise of police powers for the purpose of protecting the welfare of its citizens.

Bass Sox Mercer attorneys were actively involved in the legislative process in North Carolina and are currently working with other states to draft legislation that could include similar provisions. Though the individual states are charged with defending the lawsuit, firm partner Shawn Mercer is collaborating with the dealer association executives and their counsel to discuss strategy and to offer assistance to the Attorney Generals of the affected states. ■

BSM Represents Over 70 GM and Chrysler Dealers in Arbitration

The attorneys at BSM are busy preparing to seek **reinstatement of over 70 GM and Chrysler dealerships wrongfully terminated in the manufacturer bankruptcy proceedings of both manufacturers.** Pursuant to federal legislation signed into law on by the President in December, some 1,500 GM and Chrysler dealers filed for reinstatement with the American Arbitration Association (AAA).

The AAA was designated in the federal legislation as the decision-maker as to whether a terminated dealer's franchise should be reinstated. Through binding arbitration, dealers will either be granted reinstatement which involves receipt of a Letter of Intent for the franchise or will not be reinstated. **There is no opportunity under the federal legislation for a dealer to seek monetary damages resulting from the loss of their franchise, but a volunteer settlement with GM & Chrysler is possible.**

Under the arbitration process, the arbitrator is required to balance the interests of the dealer, the manufacturer and the public in determining whether the franchise should be reinstated. Congress provided the arbitrator with seven factors to be considered, including

1. 2006-2009 dealership profitability;
2. Manufacturer's overall business plan;
3. Dealership's economic viability;
4. Dealership's satisfaction of franchise agreement performance requirements;
5. Demographic and geographic characteristics of dealership market;
6. Dealership's performance as compared to manufacturer's termination criteria; and
7. Length of experience of dealership.

Based upon these criteria, **GM and Chrysler dealers who performed well, but simply didn't fit within the manufacturer's dealer network and franchise alignment plans, have a very good opportunity to obtain reinstatement of their franchise.** All arbitrations must be completed no later than June 14, 2010. ■

Pay Attention To Manufacturer Recalls

By know everyone knows about the Toyota recall and its impact. Indeed, most dealers have already started to perform the retrofit, software correction or other fix to the problem. But advice regarding actions a dealer should take to address a recall should be memorialized and saved for future reference. In case you did not get it from us recently, we provide it here again. Toyota dealers, like any dealer for a vehicle subject to a recall, should carefully review all communications from Toyota/the manufacturer on this subject and should obey any sales suspension requirement. Sales of new or used cars subject to recall should NOT continue unless and until the defect is remedied. We do not believe the issue(s) can be addressed by any waiver, disclosure or other document.

Sale of affected New and Used Vehicles. It is a violation of federal law to sell a new motor vehicle subject to a safety recall unless and until replacements and repairs have been done. It is not sufficient to deliver a vehicle with a promise to repair it when the customer can return. No waiver, disclosure or other document can be expected to protect a dealer from a lawsuit in the event of failure of the equipment. A new or used vehicle in inventory and subject to recall, but not yet sold to a consumer, should be removed from display, and should not be subject to sale, as quickly as possible. Federal law makes clear that a recalled product cannot be sold until remedied.

Parts. Replacement motor vehicle equipment in a dealer's parts inventory fall under the same rule as vehicles. If there is a recall affecting parts in the inventory of a dealer, those parts must not be sold.

Recalls are serious matters. They are well publicized. The impact on sales cannot be understated but the impact from selling a recalled vehicle would be even worse. Take the proper steps to address any Safety Campaign or recall notice you received. The consequences of failing to do so could mean the loss of the dealership. ■

Jury Verdict Against Infinity

In March of 2009 Bass Sox Mercer attorneys prevailed in a three-week long jury trial against Infiniti on behalf of a Connecticut dealer. Following the jury's verdict, Infiniti made a motion asking the Judge to overturn the verdict. Simultaneously, the dealer made a motion to recover its attorney fees and costs. In December of 2009, the Judge rendered a ruling on both of those motions. First, he determined that the jury's verdict was proper and entered a judgment for the full amount awarded by the jury. Additionally, he determined that the dealer was entitled to its attorney fees and costs for those claims upon which it prevailed, namely claims made pursuant to the Connecticut Unfair Trade Practices Act. Infiniti has appealed. We applaud the Judge's ruling because the reward of costs and fees against franchisors is a vital component to assuring that dealers are able to utilize the court system in order to protect their statutory rights. ■

Risk Based Pricing Rule Finalized; Dealers Must Provide Notice By Robert C. Byerts

Beginning January 1, 2011, dealerships must comply with heightened and more extensive disclosure requirements in extending certain financing to car buyers, as a result of new Risk-Based Pricing Rules finalized by the Federal Trade Commission on Dec. 22, 2009. The final rules implement section 311 of the Fair and Accurate Credit Transactions Act of 2003, which amends the Fair Credit Reporting Act.

The disclosure requirement is designed to educate consumers on the cost of financing, which is based largely on the customer's credit history. The rules apply to any lender that bases credit terms on a customer's credit score, including dealerships that arrange financing for customers. Generally, the rules require a creditor to provide a risk-based pricing notice to a consumer when the creditor uses a consumer report in connection with a credit application and, based on information in the report, grants credit to the consumer on "material terms" that are "materially less favorable" than the most favorable terms obtained by "a substantial portion" of the creditors consumers. The notice must inform the consumer that the credit terms offered were based on information in a consumer report. It also must include certain other information, such as a statement that such credit terms may be less favorable than the terms offered to consumers with better credit histories. The rule will require dealerships to give their finance customers a written report showing their current credit score, the name of the credit reporting agency providing the score and either a bar graph or clearly worded statement telling customers how their scores rank against those of other U.S. consumers.

The rules do not define what constitutes "a substantial portion" of consumers. While that determination is to be made by creditors based on their own circumstances, the FTC expects creditors will consider "a substantial portion" to constitute more than a de minimus percentage but not necessarily a majority.

To determine which consumers must receive a risk-based pricing notice, a creditor can use a case-by-case method in which it compares the material terms offered to a particular consumer to the material terms offered to other consumers. It also may use one of the alternate methods detailed in the rules. For creditors that use credit scores to set material terms, the rules provide a credit proxy method under which the creditor must determine a cutoff score tied to the percentage of consumers who have historically received credit on the most favorable terms and then send a notice to any consumer with a credit score below the cutoff. For a creditor that sets material terms by assigning consumers to pricing tiers, the rules contain a tiered-pricing method under which the creditor must provide a notice to any consumer not in the top tier or tiers.

An offer of credit made to a consumer in a prescreened solicitation does not trigger the risk-based pricing notice requirement even if the material terms offered to that consumer are less favorable than those offered to others. A notice is also not required when a consumer will receive an adverse action notice or, in response to a prescreened solicitation that offers specific material terms, applies for and receives those terms even if other consumers have received more favorable terms. However, if a prescreened solicitation offers a range of possible material terms, a notice must be sent when a consumer applies and does not receive the most favorable terms offered, such as the lowest APR. **The risk-based pricing notice must be provided before consummation of the deal.**

According to the FTC, the rule also fills a gap created by the advent of risk-based pricing, a practice of setting or adjusting the price and other terms of credit provided to a consumer based on his or her credit worthiness. "With the adverse action requirement, people are told that things in their credit report probably caused their denial of credit," FTC representatives said. "However, what had been occurring was that people were not getting denied credit, but were getting much worse material terms and weren't being informed of that fact. This rule is supposed to fill that gap."

As an alternative to providing risk-based pricing notices, the final rules permit creditors to provide consumers who apply for credit with a free credit score and information about their score. Consumers who receive this "risk-based pricing" notice will be able to obtain a free credit report to check the accuracy of the report. ■

FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule By Robert C. Byerts

At the request of Members of Congress, **the Federal Trade Commission is delaying enforcement of the "Red Flags" Rule until June 1, 2010,** for financial institutions and creditors subject to enforcement by the FTC. The Commission previously delayed the enforcement of the Rule for entities under its jurisdiction until November 1, 2009.

The Red Flag regulations are based on Sections 114 and 315 of the Fair and Accurate Credit Transactions Act (FACTA), which was signed into law in 2003. These two sections of the FACTA amend Sections 615 and 605, respectively, of the Fair Credit reporting Act (FCRA). The regulations apply to "financial institutions and creditors," which includes automobile dealerships. ■

Department of Labor Issues New FMLA Rules

By Frank X. Trainor

On January 16, 2009, the Department of Labor implemented new rules for the Family and Medical Leave Act ("FMLA") went into effect. The rules are lengthy and contain many procedural and other technical amendments. However, substantive changes were made to those rules as well. Those substantive changes are set forth below.

Military Caregiver Leave The FMLA already provided 12 weeks of FMLA leave to certain relatives of wounded veterans so that they could act as caregiver. The new regulations expand the amount of FMLA leave for those caregivers from 12 weeks to 26 weeks.

Qualifying Exigency Leave Formerly, the FMLA provided 12 weeks of unpaid leave to certain relatives of persons in the National Guard or Reserves in order to help those families manage their affairs while the person was on active duty in support of a contingency operation. Those rules have now been expanded so that they cover all branches of the armed forces. Additionally, the term "contingency operation" has been shed for a broad number of categories which can trigger FMLA leave, including (1) short notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post deployment activities; and (8) additional activities not encompassed in the other categories, but agreed to by the employer and employee.

Light Duty In certain jurisdictions, employers had been able to place employees on "light duty" while utilizing his or her FLMA leave. The final rule disallows that practice. Now, time spent by the employee performing "light duty" work does not count against the employee's FMLA leave entitlement.

Substitution of Paid Leave Prior to the revised rule, there were some ambiguities regarding an employer's ability to force an employee to utilize his or her paid leave time concurrently with any FMLA leave. The final rule removes those ambiguities and verifies that all forms of paid leave offered by an employer can run concurrently with FMLA leave. The employer, however, must follow the same terms and conditions of the employer's policy that apply to other employees.

Perfect Attendance Awards The new rule clarifies that an employer may deny or withhold a perfect attendance award to an employee who has utilized FMLA leave.

Notification Requirements and Medical Certification The new rules change the procedure for providing the required employee notices pursuant to FMLA. In general, the employers have been granted additional days in which to provide employees with their statutory rights pursuant to the FMLA. Additionally, many of the rules regarding the employer's request for medical certification from the employee have been changed slightly. Employers were already required to provide employees with prior notice of their FMLA rights. That notification is often times accomplished through a poster or employee handbook. Employers should review their employee handbooks or other notification mechanisms to ensure compliance with these new notification and certification requirements. ■

By Robert A. Bass

Letters of Intent - A Refresher

During the last half of last year, there was steady chatter among dealers and their lawyers and accountants about acquisition (and conversely sale) opportunities in the market. We heard dealers who were well-positioned for growth (i.e., with money in the bank) speak of searching for low-hanging fruit. These dealers, mindful of the history of our capitalist society, recognized that great empires have been built during the worst of economic times.

However, although there was great desire to begin putting deals together, impediments existed. Banks and lenders apparently were not as bullish as dealers about many acquisition opportunities. Moreover, floorplan lenders continued to be very selective about issuing credit for new flooring lines. Consequently, many dealers went back to running their existing stores rather than searching out acquisitions for expansion.

Lately, though, there appears to have been a subtle shift, if the volume of calls from dealers about dealership buy-sells is any indication. We may be turning the corner (it sure has been one long curve) and dealers may once again turn to selling or buying dealerships. As such, it is fitting that dealers **consider the use of letters of intent (LOI), often the first paper signed between a buyer and seller.**

As an initial matter, it is important to realize that no dealership buy-sell transaction has a twin. Every transaction is different from the previous. Not every deal will begin with the negotiation and drafting of a LOI. But, it is important for buyers and sellers to understand when a LOI may be useful given their respective and unique circumstances.

Consider the enforceability of a LOI. Generally speaking, a LOI is described as an agreement to agree; neither party may force the other to a closing. *Sloppy drafting of a LOI, however, can create ambiguities over the issue of a binding versus non-binding agreement.* **Care must be taken to ensure that the effect of the LOI is not to bind the parties in a legal contract, if that is the intent of the parties.** That said, buyer and seller may, and should, include certain provisions in the LOI that are enforceable in a court of law. Consequently, most of the time a LOI contains both binding and non-binding terms. Careful, clear, and precise drafting to distinguish the two is critical. It is best to separate non-binding terms from binding terms, setting out the latter in a separate and distinct section of the LOI.

If the parties desire that all the contents of a particular writing be fully non-binding, the drafting and use of a document sometimes referred to as "term-sheet," "acquisition proposal," or "memorandum of understanding" is often the best approach to take. Essentially, the parties discuss, negotiate and set down the essential economic terms of the transaction in bullet-point fashion with no words of agreement exchanged. The lawyers then use the "bullets" to draft the definitive transaction agreement. This approach is often useful in a transaction where the parties are very familiar with each other and there is a great degree of trust.

So, why would a seller insist on a LOI? Sellers often use them to flesh out prospective buyers. The theory is a buyer is not going to go to the time and expense of negotiating a LOI unless the buyer is serious about working in good faith toward entering into a definitive agreement. In that case, a LOI serves as a screening tool.

Aside from summarizing the economic terms of a transaction, **a seller may also use a LOI to provide protection against the improper use of confidential information exchanged between the parties during a due diligence phase prior to execution of a definitive agreement.** This is especially useful when the parties have not entered into a stand-alone confidentiality or non-disclosure agreement. Sellers also may use a LOI to protect their employees. A binding term may be included in the LOI that prevents a buyer from soliciting the seller's employees. Consequently, a LOI may protect a seller from a competitor posing as a buyer only to obtain confidential information and poach on the seller's talented employees. It is important that a LOI expressly state that such protections are binding provisions to which the parties are agreeing.

Sellers may also use a LOI to set limits on the warranties and representations that will be set forth in the definitive agreement. Non-compete, employment or consulting, and earn-out agreements are often described in detail in a LOI.

Buyers have different reasons for entering into a LOI. *Buyers may insist that a LOI contain a binding term providing the buyer exclusive rights to negotiate with the seller.* That is, the seller is prohibited from continuing to shop the dealership to other prospective buyers. Taking the deal off the market prevents a bidding war from occurring and is perhaps the number one reason why a buyer would insist on using a LOI instead of a mere term sheet. To add teeth to the no-shop provision, a buyer might insist on adding language imposing a break-up fee. Such a term would require the seller to pay to the buyer a pre-determined sum as liquidated damages should the seller violate the no-shop provisions of the LOI.

A buyer might also insist on the drafting and execution of an LOI as evidence of a prospective transaction to use while shopping for financing. In such a case, the confidentiality provision needs to be specially tailored to allow for interaction with lenders. Buyers also often use a LOI to communicate a structured request for obtaining due diligence information and documents about the target dealership.

As seller and buyer begin discussing and negotiating a transaction, the parties should decide early on how they wish to begin putting the deal on paper. While the parties may choose between a term sheet or a LOI, neither is requirement. A buyer will often skip the LOI or term sheet step and communicate its offer by presenting a proposed definitive agreement. *Regardless of the approach, it is important to discuss the pro-cons with your lawyer and determine which approach to take in light of the circumstances of the prospective transaction.* ■

summary

- LOI's have limited enforceability
- Be careful drafting binding and non-binding terms
- Seller's should pay attention to confidentiality
- Buyers should pay attention to exclusivity

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- Automobile/Truck/Motorcycle Franchise Law
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