BASS SOX MERCER
ATTORNEYS AT LAW

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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

Inside

"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. 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 twelfth 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. ■

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GM and Chrysler Arbitrators Rule in Favor of BSM Clients

By Richard Sox

BSM attorneys have prevailed in their first two dealer arbitrations to go to hearing. Our GM client, located in Missouri will have its Buick, Cadillac and Chevrolet franchises reinstated within a few days. In that case GM had eliminated the dealer arguing that the dealer was not sales effective and the small town in which the dealership is located did not generate a sufficient number of new car sales to make it a viable market for a GM dealer. To the contrary, BSM attorneys demonstrated that there was no real harm to GM in maintaining a dealership in the town considering GM would not enjoy any material savings in cost with the termination of the dealership and, in fact, GM would lose customers to the local Ford dealership. BSM attorneys argued that the dealer's financial statement showed the dealer to be profitable and maintaining the dealership in the town of 14,000 people was a significant benefit to community.

In our first Chrysler arbitration, BSM attorneys along with the client's expert, the Fontana Group, were able to show that Chrysler had mis-assigned the dealership's Chrysler Jeep sales territory which resulted in the false appearance of poor sales performance. The Arbitrator agreed that Chrysler had failed to reassign census tracts after making changes to the dealer network within the market such that BSM's client was at a distinct disadvantage in meeting its minimum sales responsibility. BSM attorneys were also able to show that maintaining Chrysler representation in the dealer's area was not contrary to Chrysler's stated business plan of retaining well-capitalized dealers operating out of modern facilities. It will be very interesting to see now if Chrysler offers this dealer the Dodge franchise in order for Chrysler to be consistent with its repeated testimony that Chrysler's business plan involved making sure that each dealer has all three franchises under one roof.

We have had two other arbitrations hearings on behalf of terminated dealers and are awaiting the results. Out of the 75 GM and Chrysler dealers we began with, all but 7 have either settled or voluntarily dismissed their cases. ■

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 line makes.
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.

Dealers and Employee Lawsuits

By Robert C. Byerts

Despite years of experience as employers, some car dealers seem to miss the lessons learned about employee lawsuits. Car dealers continue to be sued by employees for a variety of mistakes that could have been avoided.

In October a car dealer in Washington state was ordered to pay more than $2.5 million to its employees for back pay. Another in Utah agreed the same month to pay $455,000.00 to settle a sexual harassment lawsuit brought by ex-female employees. The settlement also requires the car dealer to apologize to the women and provide employee education about sexual harassment, retaliation and employee rights. Last year the Equal Employment Opportunity Commission (EEOC) sued a dealer in Georgia charging racial discrimination based upon treatment of an African American sales manager. The dealer failed to prevent the racially hostile work environment and failed to take prompt action designed to stop the harassment when the sales manager complained. In 2008, EEOC race discrimination filings went up11% while racial harassment charges went up 23%. The EEOC also sued a Pennsylvania dealer for alleged sexual harassment and retaliation, based upon a service manager's sexually explicit actions, the dealer's failure to stop the harassment, and the dealer's termination of one woman who complained. The dealer settled last year for $244,000 and agreed to provide annual training to managers and supervisors on Civil Rights Act legal requirements.

Ex-employees of car dealerships often seek to obtain back pay from dealers based upon the Fair Labor Standards Act requirements for overtime pay. One former dealership office manager recently claimed to have been underpaid as a clerk, despite receiving an annual salary above $50,000.00. Bass Sox Mercer's response to the claim squelched the matter before any lawsuit.

According to one labor and employment law firm, the top five preventable lawsuits involve:

1. Wage and Hour Claims
2. Discrimination Claims
3. Wrongful Termination Claims and Whistle Blowing Claims
4. Leaves of Absence Related Claims
5. Harassment Claims

Does your dealership have employee policies and procedures in place, and up to date? When was the last time you reviewed and updated your employee handbook? Have you conducted annual training, or any training at all, for your managers and employees, regarding the proper handling of discrimination complaints? Are you familiar with the recent revisions to the Family and Medical Leave Act requirements? If the answer to any of the questions is not an unqualified "yes" then you should take steps now to protect your dealership.

Bass Sox Mercer can help you: (1) review your employee job descriptions for classification errors that can drive FLSA lawsuits for overtime and back pay; (2) review your employee policies and procedures to update and supplement them and protect your dealership; (3) review and update your employee handbook, and related procedures, to establish the dealership's standards for employee conduct; (4) provide training to your employees on personnel procedures, discrimination and harassment complaints, and workplace conduct; and (5) educate and update your managers on recent changes to the law. While such steps are not foolproof, addressing these matters now can help prevent and mitigate future lawsuits. ■

summary

- **Dealers are often targets of employment based lawsuits**
- **Employment based lawsuits can be quite costly**
- **Dealers need to have: accurate descriptions; current policies, procedures, and employee handbooks; provide regular training; and regularly educate and update managers**

News Briefs *Continued*

Elimination of Mercury Brand

By Richard Sox

Ford Motor Company has officially announced that it intends to discontinue the Mercury brand and has sent Mercury dealers a settlement offer to close the franchise. Beginning on June 2, 2010, Mercury dealers began receiving settlement packages from Ford. Within these packages, Ford gives the dealer notice that the franchise will be terminated no later than December 31, 2010. However, Ford also provides a Settlement Agreement which calculates a settlement payment based upon average new Mercury sales over the last 3 years combined with a payment based upon the dealer's Mercury parts inventory. In exchange for accepting the settlement offer, Mercury dealers agree to a broad release of any right the dealer has to any other benefits or damages associated with the termination of the Mercury franchise.

Mercury dealers should be very careful not to agree to Ford's settlement offer without first determining the value of the termination payments required under their state franchise laws. Dealers should consider calculating the value of these items and, if higher than the settlement offer, utilize that number as the basis for a settlement counteroffer.

CAUTION: *If a dealer ultimately reaches a settlement with Ford, it is critical to understand that signing the Settlement Agreement as currently written will cause a termination of the dealer's Mercury franchise upon Ford's countersignature on the Agreement. At that point in time, under most state laws dealers will not be able to sell any remaining new Mercury vehicles in their inventory. Thus, dealers should time the execution of the Settlement Agreement such that the dealer has had the opportunity to take advantage of any additional incentives placed upon Mercury vehicles and has sold as many Mercury vehicles as possible.* ■

There is More to a Dealer Agreement than a Signature Line

By Shawn D. Mercer

Every dealer knows he or she should have new dealer agreements reviewed by a knowledgeable dealer lawyer prior to signing. There are a host of issues tied to new dealer agreements that go beyond the standard terms about which dealers must give careful consideration.

MARKET AREA: Carefully review your primary market area, area of primary responsibility or whatever terminology your manufacturer applies to your assigned market. You are theoretically supposed to have a competitive advantage in your assigned market. If this is not the case, you should request a change to your market area if it is in any way inaccurate or unfair. Such requests should be in writing and a copy retained for your records. Requests for change could prove beneficial in the event a manufacturer were to later seek to terminate your franchise agreement based upon alleged poor sales performance. Further, the manufacturer may actually agree with you and adjust your market area to better reflect those areas where you in fact have (or should have) a competitive advantage.

FACILITY ADDENDUM: You should attempt to minimize the coverage of any facility or premises addendum to your dealer agreement. Manufacturers and distributors often will seek to include all land and buildings that are in any way related to your automotive business. They also often seek to include exclusivity provisions within the dealer agreement. Even if exclusivity is prohibited under applicable franchise law, dealer agreements also typically contain the requirement that the manufacturer approve any change to the dealership premises. This issue often arises when the dealer desires to acquire an additional franchise or to sell adjoining land. If you have excess land, or an extra building, body shop, etc. that is not required to meet the minimum facility requirements of your manufacturer, you should seek to exclude the additional land and buildings from the premises addendum to your franchise agreement. If such land is not subject to your dealer agreement, you are not required to obtain approval from the manufacturer for a change in the use of such land or buildings. You may ultimately avoid a time consuming and expensive protest to a change of use turn-down by the manufacturer.

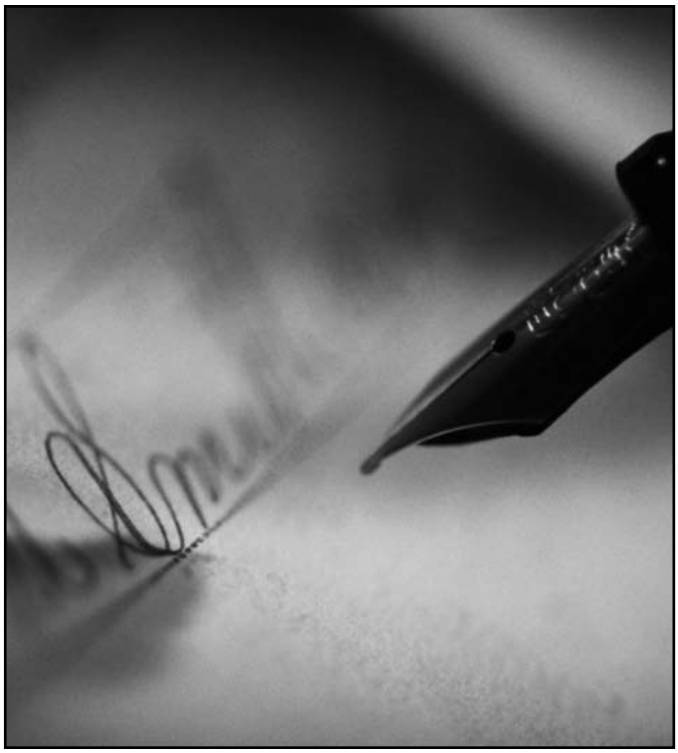
SALES EXPECTATIONS: Carefully review your assigned sales expectancy or minimum sales responsibility when you receive new numbers. If you believe your sales requirements to be artificially high, you may wish to take some time to obtain assistance with reviewing your market. This goes hand-in-hand with examining your market area to determine whether parts of the market are better assigned to another dealer. Further, there may be unique characteristics to your market that would make consumers in your market less inclined to purchase your brand of vehicles than is the case in other parts of your state. It may be a competing manufacturer's assembly plant, or you may be located in an area that is significantly more or less affluent than other areas of your state. These factors can have a significant impact on your ability to meet the sales requirements of the manufacturer.

WORKING CAPITAL: Carefully review stated working capital requirements. Adjustments to sales requirements typically impact working capital requirements. The GM and Chrysler bankruptcies have taught us that often ignored requirements like maintaining guide levels of working capital may be later used as the basis for an attempted franchise termination.

SUCCESSION PLANNING: You should determine whether you have a successor addendum in place, and if so, whether it continues to reflect your wishes. It is the perfect time to examine your estate and succession planning when you execute a new dealer agreement.

summary

- **Review key dealership documents annually.**
- **Promptly seek necessary changes.**
- **Consult with your legal or financial advisor if you have questions.**



Buyer's Remorse – Your Rights as a Dealer

By Shawn D. Mercer

You've seen it happen from time to time. A customer comes into the dealership and drives out with a vehicle. And then, sometime later, the customer parks the car at the dealership and demands a refund. Maybe the air conditioning isn't working quite right. Maybe there is a ding on the door. Maybe the car stalled once or twice. These types of situations can often be summed up in two words – "buyer's remorse".

Contrary to what many dealers believe, the law itself does not hold that the customer is always right. The law actually places significant limitations on the circumstances under which a buyer of "goods" (which includes motor vehicles) can revoke acceptance of merchandise that has been delivered to the buyer.

There are four requirements which all must be met in order for a buyer to revoke acceptance:

1. The goods contain a nonconformity that substantially impairs their value to the buyer;
2. The buyer either accepted the goods knowing of a nonconformity by reasonably assuming it would be cured, or he accepted the goods not knowing of the nonconformity due to the difficulty of the discovery or reasonable assurances from the seller that the goods were conforming;
3. The revocation occurred within a reasonable time after the buyer discovered or should have discovered the defects; and
4. The buyer notifies the seller of the revocation.

Viewed in the context of the sale of motor vehicles, the legal requirements for revocation of acceptance are formidable to buyers. There must be a problem with the vehicle that substantially impairs its value to the purchaser. Cosmetic defects or minor mechanical problems rarely suffice. By way of example, one appeals court has held that a vehicle's malfunctioning speedometer, odometer and broken fan belt were insufficient to allow revocation of acceptance.

If the buyer is aware of defects in a vehicle, but purchases the car anyway, he cannot later revoke acceptance of the vehicle on the basis of the known defects (unless the dealer promised to repair the problems and failed to do so). Nor can a buyer wait an unreasonable period of time with knowledge of a problem before attempting to revoke acceptance. A buyer who seeks to revoke his acceptance of a vehicle must promptly return it to the dealership and notify the dealer that he is revoking his acceptance.

The most difficult situations for a dealer to defend are those where a vehicle has one or more significant mechanical defects or where it is dangerous to drive. Also troubling for a dealer to defend, are situations where the customer has returned the vehicle to the dealership on numerous occasions in order to have a significant problem or series of problems corrected.

A dealer who desires to contest the revocation of the sale of a motor vehicle by a buyer is advised to immediately write the buyer a certified letter demanding that the customer retrieve the vehicle and further stating why the revocation of acceptance is unjustified. Delay on the part of the dealer in sending a written objection to the purported revocation could be deemed by a court to be a ratification of the buyer's revocation.

If the vehicle is new or is still covered by the manufacturer's warranty, the dealer should promptly notify the manufacturer in writing and also demand that the manufacturer indemnify the dealer. State laws and the dealer agreement generally provide broad support for dealers faced with the revocation of acceptance of a new vehicle due to product related problems. In such instances, the manufacturer is typically required to indemnify the dealer and to pay the dealer's defense costs, including attorney's fees.

Not withstanding the fact that a dealer may have the legal right to fight a purchaser's revocation of acceptance, most dealers continue to adhere to the old saying that, "the customer is always right." Indeed, a dealer who resists a customer's attempted revocation could subject itself to adverse publicity and large defense costs, even when the customer is not right. However, it remains important that dealers realize that they often do have a choice. A purchaser has no automatic legal right to revoke acceptance of a vehicle. In many circumstances the dealer really can confidently and lawfully say "NO!"■

summary

- **Buyer's remorse is not always a ground for revocation of a sale.**
- **Significant mechanical defects and safety issues may allow revocation.**
- **Vehicle defects are generally the responsibility of the manufacturer if the vehicle is under warranty.**
- **Dealerships are often entitled to indemnification from the manufacturer.**

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