

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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Welcome

Welcome to the thirteenth 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. ■

News Briefs

By Jason T. Allen

Hawaii Franchise Law Upgrades

In our first quarter 2010 newsletter we provided a preliminary report on the Hawaii Automobile Dealer's Association's (HADA) efforts to amend their motor vehicle franchise laws and BSM's involvement. We are pleased to report that HADA was successful in passing numerous franchise law modifications and we were honored to be a part of the process. The franchise law bill (S.B. No. 2859) passed with unanimous support and was signed into law on June 3, 2010. Hawaii now has some of the strongest franchise laws protections in the United States. Some of the protections contained within the bill include:

- Providing an administrative remedy for aggrieved dealers
- Termination protections and repurchase obligations
- Expansion of the definition of "Franchise Agreement" to include other agreements such as facility, exclusive-use, and performance agreements
- Prohibition against unfair incentive programs
- Audit chargeback protections
- Protest rights upon the establishment/relocation of a new point
- Prohibition against unreasonable denial of relocation request
- Prohibition against unreasonable facility upgrade requirements
- Exclusivity and site control prohibition
- Prohibition against unreasonable denial of franchise transfer/succession rights
- Requirement to allocate vehicles in a fair and equitable manner
- Prohibition on the use of unfair sales and CSI performance measures

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Choose Your Repossession Company Carefully By Shawn D. Mercer

All 50 states have now adopted some version of Article 9 of the Uniform Commercial Code (UCC). Article 9 governs sales transactions that are secured by personal property. Although lien recordation for vehicles is generally subject to various state titling laws, nearly every state's laws refer to the UCC when it comes to repossession of motor vehicles. The UCC generally allows a secured creditor to repossess collateral (i.e., the vehicle) upon the default of a debtor so long as the collateral can be obtained without a "breach of the peace." If the vehicle cannot be obtained without a breach of the peace, a court order is required.

Great care must be taken when selecting a company to repossess motor vehicles. Nearly every court to have decided the issue has held that the secured creditor is liable for the actions of any independent contractor utilized to repossess their collateral. In other words, if a repossession company engages in abusive or otherwise questionable tactics in reclaiming vehicles from debtors, the dealership or other secured creditor may be held jointly responsible for those actions.

The selection of a qualified repossession company is critical because it is easy to run afoul of the law. For example, in some jurisdictions a breach of peace has likely occurred if the debtor is present at the time and place of repossession and politely, but firmly says "no" to the repossession. Other states may allow a

repossession to progress over the debtor's protest so long as it can be accomplished without injury to persons or property.

The potential liability associated with a breach of the peace can be substantial and has eclipsed the amount of the underlying debt in some cases. In addition to liability under the UCC, debtors have brought claims for trespass and other state law causes of action. In situations where the creditor has obtained the assistance of police officers, there have even been suits brought by debtors claiming a violation of their civil rights. Further, if a repossession company gets particularly abusive and assaults a debtor or otherwise commits a crime, dealership personnel could potentially be deemed aiders or abettors of the crime.

Notwithstanding the risks associated with repossessing motor vehicles, there are also clear benefits. By avoiding the time delays and costs associated with obtaining a court order, the creditor can drastically reduce the losses incurred in the event of a default. Dealers must merely be careful and choose their repossession companies wisely. Questions concerning rights of repossession should be directed to your dealer lawyer.

- All states have laws governing vehicle repossessions
- Dealers can be sued for actions of repo companies in some states
- Dealers must understand their rights and responsibilities

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.

BSM Seeks Ford Policy Board Hearings for Mercury Dealers

When Ford Motor Company announced its discontinuance of Mercury in early July, Ford notified dealers that it had the right to seek relief from the Ford Policy Board if dealers were not satisfied with Ford's settlement offer. BSM attorneys have been before the Ford Policy Board on a number of occasions over the years with good results. The advantage of the Policy Board is that the decision of the Board is binding upon Ford but is *not* binding upon the dealer.

We are scheduling hearings before the Policy Board on behalf of several of our Mercury dealer clients. Unless your state franchise laws require you to file a protest prior to the actual

termination of the franchise at the end of 2010 (see related article below), we believe the best strategy is to first argue for additional compensation before the Policy Board.

Those dealers that will have the best opportunity to succeed before the Policy Board are those that have state franchise laws which require fair market value to be paid in the case of a franchise discontinuance, have recently purchased the Mercury franchise or recently upgraded their Mercury dealership facility. Properly quantifying the value of the franchise will be critical to presenting a strong case. ■

Honda Continues to Issue Sales Performance Warnings

After a flurry of Notices of Default at the end of 2009, Honda doesn't appear to be done threatening its dealers with termination if sales performance doesn't improve. We have been contacted by one of our longtime Honda dealer clients who has recently received a threatening letter from Honda addressing sales performance. This is not a dealership that is at rock bottom in its performance. Instead, the dealership's sales performance is greater than 70% of its supposed required sales volume.

As you have repeatedly heard BSM attorneys recommend, any letter from your manufacturer addressing alleged poor sales performance must be met with an immediate and strong written response. As we have done for our Honda dealers, the response should include a detailed discussion of all circumstances which are out of your control yet are directly impacting your dealership's sales performance calculation. These circumstances can involve things like road construction, loss of a major employer in the community, a faulty assignment of sales territory by your manufacturer or a faulty comparison of your market to other same-linemake dealer's markets within the state or region. ■



BSM Files Wrongful Termination Protest in Texas for Mercury Dealer

BSM has filed a protest of the termination of the Mercury franchise pursuant to Texas motor vehicle franchise laws. Texas franchise law provides sixty days in which a dealer must protest the termination of a franchise. As the law is unclear whether the notice of the termination or the date of the actual termination starts that sixty day clock, in an abundance of caution, we went ahead and filed the wrongful termination claim.

We expect, as with our other Mercury dealer clients, the next step will be to present our case before the Ford Policy Board. Most judges and hearing officers expect a dealer to exhaust all alternate dispute resolution processes before seeking judicial relief. Thus, we plan to place the Texas protest in abeyance pending the result of the Policy Board hearing. ■

Are You Prepared For the Next Disaster? By Robert C. Byerts

Hurricane Season is half over in the Southeast. Tornadoes and floods are a threat in the Midwest. An earthquake is always a threat out West. The terrorist alert level is up. *Are you prepared for the next disaster that could impact your dealership?* If you are not, then take the time now to evaluate the risks your dealership faces, plan for managing those risks and the disasters they pose, and for responding when one of those risks actually impacts your dealership. **If you do not take the time, your ability to respond to an emergency, recover your business operations, and continue in business, will suffer.**

Business continuity planning must account for all hazards (both natural and man-made) which could impact your dealership. **You should plan in advance to manage any emergency situation.** Common risks facing dealerships include: fire, windstorm (hurricanes and tornadoes), earthquake, flood, hazardous materials release, mass casualty (e.g.- employee shooting, aircraft crash), and pandemic. As I write this a client reminded me that hailstorms impact dealerships. Consider the impact of each of these risks, as well as the likelihood of occurrence, at your dealership. If you are located in California, you better plan for earthquake as well as flood, fire and mass casualty. On the Gulf Coast, windstorms should be included while earthquakes can be omitted. While the risks may vary, the impacts may be quite similar. No matter the origin of the disaster, your plan better address the impacts of too much water, too much wind, and/or fire on your operations. The impacts, loss of inventory, loss of viable location, and loss of personnel, are common to multiple risks. Identify the impacts, and the resources you will need to address them.

For any dealership, insurance should be in place for all risks and hazards that could impact your business. Read your insurance policy. Do you have flood insurance? Are you really at risk for flood? Even though you may not be required to have it is there a realistic risk of flood happening at your location? If so, get flood insurance. Make sure you know whether windstorm/earthquake/hazardous materials releases coverage is provided. Consult your insurance professional and evaluate your situation now, before the disaster happens. Review policies to make sure that coverage limits has kept pace with exposure. Make sure your business interruption coverage will provide the resources you need to weather the storm.

Identify resources to assist in the preparedness process and in the response and recovery efforts. Fortify the property, if appropriate. Obtain back-up systems for computers and understand how that process works. Make hard copies of essential documents (insurance policies, corporate documents, accounting documents, client records and contact lists) that should be available to you at an

alternate location. If warranted, obtain generators or agreements to supply generators and other equipment you may need to respond and get back up and running. Plan for extended power outages.

Write a Crisis Communication Plan. Detail how you will be in contact with employees, customers and others during and after a disaster. Establish an employee communications plan and system so that you can account for your people and communicate with them. You will need help to respond and recover. Involve your employees in your assessment and planning process, so that they can implement the plan.

Prepare a financial recovery plan that includes access to a line of credit. Insurance payments can be delayed. Identify tax issues that arise when a disaster occurs: what will you need to claim tax benefits, avoid tax payments and otherwise account for taxable income when the hurricane hits? **Talk to your accountant about methods to preserve essential accounting information, recreate what might be lost, and discovery problems that can and will arise when disasters hit.**

Exercise the plan. You play like you practice, as an old coach often told me. Conduct a dry run to back up computer files, implement a communication plan, test your systems and ensure you have the necessary tools in place. Take note of deficiencies and take corrective action.

Planning and preparedness will not only help you survive, it can help you thrive and profit. After hurricanes in 2005, dealerships that had prepared for disasters were able to get back up and running, and sell cars to all those customers who lost theirs in the storms. Market shares improved and new customer relationships were formed that lasted well after recovery was completed. Dealerships that plan and are prepared for disasters can be survivors and out perform the competition after the winds die down or the flood waters recede. Take proactive steps today to help make sure your dealership is ready to perform.

- Your dealership is at risk from a variety of hazards
- Your dealership requires a plan to identify the risks, their impacts, and the resources you will need to address them
- Insurance should be in place for all risks and hazards that could impact your business
- Identify resources to assist in the preparedness, response and recovery efforts
- Include a financial recovery plan
- Exercise and test the plan once a year
- Take proactive steps today to help make sure your dealership is ready to address the hazards, recover from disasters, and perform when the time comes

Recent Developments - Fair Labor Standards Act By Frank X. Trainor, III



Motor vehicle dealers are subject to the provisions of the federal Fair Labor Standards Act ("FLSA") which, among other things, guarantees certain workers a minimum wage and

overtime benefits. The FLSA also regulates employee break times. In March of 2010, the FLSA was amended in connection with the sweeping healthcare reform legislation enacted by the United States Congress. According to that amendment, employers must now provide "a reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk." The nursing mother must be provided a private space at reasonable intervals in order to accomplish this task. The legislation expressly states that a bathroom does not constitute an adequate area to fulfill this requirement.

Congress has taken some steps to mitigate the effects that this legislation may have upon employers. First, it is specified that any such breaks are to be unpaid. Additionally, some small employers with fewer than 50 employees are not subject to the new statute.

Employers need to be aware of this new requirement because violations of the FLSA can, at times, be severe.

The U.S. Department of Labor ("DOL") is the government agency charged with enforcing the provisions of the FLSA. In a recent enforcement action, a Florida motor vehicle dealer was forced to pay \$71,129.00 to its employees due to infractions of the FLSA. In that case the DOL determined that the dealership had failed to pay some of its employees for all of the hours that the employees actually worked. In addition, some employees worked over 40 hours in a week without receiving overtime compensation. That case stands as a warning to employers that they must keep apprised of the changes in the FLSA and must be vigilant in their compliance efforts.

Dealers have some specialized provisions dealing specifically with their salesmen, partsmen, and service technicians. If your HR Department is not already intimately familiar with the general rules of the FLSA and the specific exceptions carved out for automobile dealerships, then the dealership should consult with its legal counsel promptly.

- There are new federal protections for nursing mothers
- The Department of Labor has recently prosecuted FLSA claims against dealerships

Computer Fraud and Abuse Act By Shawn D. Mercer

Dealers should be aware that there is a federal Computer Fraud and Abuse Act ("CFAA") which may provide for civil and criminal penalties against persons who access "protected computers" (such as a dealership DMS) without permission. The CFAA can be a valuable tool for protecting against dishonest employees who may attempt to gain access to confidential and other customer business information stored on the DMS to use for their own benefit.

The CFAA includes federal criminal sanctions against not only outsiders who trespass into a computer, but also authorized persons such as employees who venture beyond the scope of their authorization. Some courts have held that employees who otherwise have valid authorization to access computer files, but begin to access those files for their own purposes, may be in violation of the CFAA. For example, if a dealership employee downloads a customer list from the dealership DMS with the intent of sharing the list with a competitor, the CFAA may have been violated.

Dealers must also be wary of new hires who show up at the dealership with a prospect list of their own. There are cases where

an employer has been sued civilly by an employee's former employer when it discovered that the employee had copied trade secrets from his former employer's computers. The employee and the new employer both faced civil liability because the trade secrets had been obtained outside of the scope of the employee's prior employment and was therefore deemed to have been accessed (and copied) without authorization. Such cases should stand as a warning to employers when making hiring decisions. BSM attorneys have already been involved in a similar action brought against a former dealership employee earlier this year.

At the very least, when discussing employment with someone who is currently working at another dealership, you should make it clear that the potential employee should not bring the former employer's confidential information with them when they change jobs. The risk of suit is simply too great.

- Current and former employees may be held accountable for unauthorized access of dealership data in many instances
- The CFAA can be an effective tool to combat theft of consumer lists and other sensitive dealership data by a current or former employee

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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- Transfer of Ownership/
Change of Management Turndown
- Finance and Insurance Compliance

- Dealership Successions
- Terminations
- Franchise and Consumer Related Litigation
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