

The Monthly Dealer Legal Newsletter compiled by "The Dealer's Law Firm", Myers & Fuller

Manufacturer Initiatives

Hi, I'm from the factory and I'm here to help you!

What do you think is the real "purpose" of the latest factories' initiatives? Each factory seems to have at least one, some of them have several. Chrysler is inviting non-Chrysler dealers to Michigan to participate in talks about becoming Chrysler/Jeep/Dodge dealers; Nissan has sent out a huge batch of NODs (Notice of Default) and is rapidly turning them into NOTs (Notice of Termination); Kia has come out with an incentive plan that creates a caste system and a colossal competitive advantage for larger dealers over smaller dealers. Honda has just notified its dealers that it is changing the formula it uses to evaluate performance and Toyota is requiring its dealers to build exclusive facilities (failure to build results in a term sales and service agreement that can be measured in days or months and not years) based on sales forecasts they hope will occur years into the future. BMW, like Toyota, has also come up

with a facility plan based on future sales predictions, called the OFP (Operational Facility Plan), and is holding its Added Value Program (incentive money) hostage to a dealer's willingness to build. Each of these factory initiatives are based on a "bet on they come" attitude and are designed to give the factory more control over your dealership. Oldsmobile, Plymouth and Daewoo undertook these kinds of strategies. Kind of makes you nervous, doesn't it?

Lately it seems that every new sales and service agreement offered by a factory contains "special conditions" that create new and previously unheard of burdens for the dealers. In addition to the "special conditions" clauses in the agreements, we are now seeing "side agreements" (lately the rule and no longer the exception). As if facility size, performance requirements and onerous sales and service agreements are not enough, some of the factories are making it impossible to be competitive if

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Legislative Initiatives

Updating your state law regularly

Every month we seem to get a call from a dealer or a state association asking us to take a look at their state law and give an opinion as to how effective it is. We always begin our review by looking to see what specific areas of protection are contained in the law. Every state law should have sections dealing with definitions, termination, termination assistance, sale and/or transfer, additional dealership locations, warranty and incentive audit procedures, exclusivity, site control, renovations, image programs, succession upon death or incapacity, allocation/distribution of vehicles,

modification of sales and service agreements and much, much more. How well do you know your state law? Are all of these issues addressed in the law? If not, they should be. If yes, do they make sense?

How does your state law define sales and service agreements, new motor vehicle dealer, new motor vehicle, used motor vehicles, brokers, relevant market areas, manufacturer/distributor/importer, sell, selling, sold, exchange, retail sale or lease, purchaser or ultimate purchaser and service? If you don't know, you should. Does your law include side

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Updating your state law regularly

The Truth About Factory Performance Evaluations

Improperly assigned market areas guarantee your dealership will fail!

Dealership Compliance Do's and Don'ts

Failure to follow directions will cost you money

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The Truth About Factory Performance Evaluations

Improperly assigned market areas guarantee your dealership will fail!

Do you know what area of geography the factory has assigned to your dealership? If you do know what your AGSSA/PMA/ADI/AOR/APR/Dealer Locality is do you think it is too large? Too small? Do you care? Should you care? The answer to all is a resounding YES!

The size of your assigned market directly controls the market share you are capable of achieving. Many of you concentrate on the number of new cars and trucks you sell in relation to your other same line dealers (your

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The Truth About Factory Performance Evaluations, continued from page 1

rank). Every month we get calls from dealers who tell us they are ranked in the top 10 in new car/truck volume in their zone, region or district and are getting hammered by the factory over low market share.

Volume is real world, market share is fiction. Volume tells you if you can stay in business for another month and market share tells you how pleasant your relationship is going to be with the factory during that month. The factory controls the area assigned to you and therefore your market share. Nissan and Ford just completed a massive change in market assignments and coincidentally

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are leading the pack on dealer improvement programs (NOD and stair-step programs) and terminations. Here is how it works.

Scenario One: Dealer A sells 1,000 new units in a market area that has 10,000 competitive industry retail registrations (all other competitive line-makes). The dealer's market share is 10 percent. The region average is 9.75 percent and Dealer A is 103 percent sales effective, in the President's Club and treated like a superstar.

If the factory decides to change the dealer's market area (make it larger or smaller), there will immediately be a change in the dealer's market share. If the geography/area is increased, the number of retail registrations will automatically go up and the market share will automatically go down.

If, for example, the increase in geography were to result in an increase of 4,000 retail registrations (from 10,000 new units to 14,000) Dealer A's market share will decrease to 7.4 percent. In the real world, nothing has changed. Dealer A is still Dealer A; he/she still spends the same amount on advertising, has the same size sales force and the same mix of inventory, only now the dealer is achieving a market share of only 7.4 percent compared to the region average of 9.75

percent. That will result in the dealer having a sales efficiency of only 76 percent when compared to the region. That will get you in the Improvement Program of that factory.

Most factories have a minimum threshold of 80 percent of region (or whatever standard they employ) and if you fall below that threshold bad things begin to happen. In this scenario a dealer went from the President's Club to the stair-step program with the click of a manufacturer's mouse.

Sometimes the dealer is his/her own worst enemy. I have seen situations where a dealer thought more was better. Example: When approached by the factory, Dealer A (we will use BMW as an example) was all too eager to go along with a plan to have him/her buy out a BMW dealer (Dealer B), whose dealership was about 30 miles away. The hope was for Dealer A to inherit that dealer's market area. The idea was to have less competition (one fewer dealer) and more sales opportunity (additional market area). Sounds logical, doesn't it? Wrong!

While Dealer A had one less BMW dealer to compete with, he/she now had significantly more territory to be responsible for penetrating. The trade off, less competition versus more territory, turned out to be an uneven trade. The distance the dealer had to cover was just too large an area. Customers of Dealer B (who sold out) went to a closer inter-brand (think Mercedes, Audi, Lexus or Infinity) and the sale was lost to Dealer A. What seemed like such a good idea turned into a nightmare when BMW put Dealer A on the Improvement Plan, offered a term sales and service agreement and placed the dealership's future in jeopardy.

The size and make up of your market area is crucial to being able to stay out of the factory dog house. If you don't know what your assigned market area is, find out. Don't just look at the census tracts, get a census tract map and plot the area out. If the area doesn't make sense to you, you must notify the factory in writing and explain the problem. This is not just for large, urban dealers, it's for everyone.

It is even more important for small dealers to do the analysis. **Over the last few years, smaller dealers have been targeted for elimination by all the domestic factories and a substantial portion of the imports.** It would appear that the facto-

ries have decided that smaller dealers are not cost-effective. The latest love affair of the factories is the larger dealers or dealer groups. They are favoring them more allocation, higher incentive money and new dealership points. State laws are blind to the size of the dealership. All are protected the same under the law. If the factory changes your market area, and you sit silently back and allow it to happen and your performance goes down, they have accomplished their mission. Your dealership will then be in the Improvement Program cross-hairs and subjected to threats and intimidation.

Any change to the game plan used by the factory affects how you look in the fictional world of performance. When you see a change and it doesn't make sense to you, write to the factory (no calls) and point out why the assigned area or change is inappropriate and what the consequences will be to you. Ask for a market study and the opportunity to provide relevant information to be used in the market study. **In short, put the factory on notice of the problem and give them a chance to correct the problem.** Chances are they will do nothing but you will have created a written record of your concerns and your request to have the problem corrected. The day you are hammered with poor performance you can point to the correspondence and be able to say, "I told you this would happen."

Next month we will talk about the various standards of review (region, state, national, district) and how they control the rest of the Performance Evaluation Equation.

*By Daniel E. Myers
& Martin Hayes*

Article summary

- Assigned markets – bigger is not better
- Identify your assigned market
- Analyze your ability to penetrate the assigned market
- If factory standard is unreasonable, let them know in writing
- Domestic factories target small dealers for elimination

Legislative Initiatives, continued from page 1

agreements under the definition of regulated agreements? Is a demo considered a new motor vehicle? Can a credit union be a new motor vehicle dealer? How about an Internet sales site? Are program cars considered used motor vehicles and what, if any, lemon law rights are attached. Can a factory sell new motor vehicles directly to customers if there are no dealers selling their products in the state, in the market or in the area? Can brokers sell and/or display new motor vehicles in your state and, if so, under what circumstances? Does the law contain a definition of a relevant market area, and if so, is it a reasonable definition (i.e., does it offer enough protection against unneeded additional dealerships)?

Does your state law mandate that in a termination case the franchise relationship remains in full force and effect until all appeals have been exhausted by the dealer and that at any time during the termination process the dealer may sell the franchise? If your law does not require the factory to stay in business with you through litigation, including all appeals, you run the risk of losing the case at the trial level and having nothing left to sell to another dealer during the appeal. If that is the case, you may not really have a termination section.

Does your termination law tell the factory what vehicles, parts and signs it must repurchased? Mitsubishi's sales and service agreement leaves it up to the factory to decide what, if anything, it is required to repurchase. Do you trust the factory to be fair or would you rather know that the law protects you on this issue?

If you want to sell your dealership does your law require a factory to review the buyer's qualifications within a specific time period (30-60 days), does it require the factory to act uniformly in applying their qualification standards (ever seen a factory do anything uniformly?) and does it set out what review criteria are acceptable under the law? Who can contest a turn down of a buy sell (seller; buyer; either?)

Do you have a protected Relevant Market Area (RMA)? Do you know what a RMA is? How far back in time (one year, two years or longer) can a factory go when doing an incentive or warranty audit? Does your law define false or fraudulent? Does your law pro-

hibit a factory from requiring exclusive/stand alone dealerships, site control or renovation/image programs regardless of the economic conditions in the area? If not, don't you think it should? If the person listed as dealer operator/dealer principal retires, dies or becomes incapacitated, do the heirs have any rights or protections under the law? Can the factory unilaterally change the terms of your sales and service agreement with an addendum or by offering you a new sales and service agreement? Can a factory threaten to terminate the dealership if the dealer does not sign the new or modified agreement or addendum?

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Each month we will talk about how your laws should address these types of issues, plus the new ones that surely arise. No matter how hard we try, the factories continue to change the game and the drafters of state laws are always trying to catch up. Don't forget that during the late 90s the factories made a hard run at operating retail dealerships in competition with their existing dealer body (FRN and GMRH) and also tried to set up Internet sites that would enable them to sell directly to your customers.

The problem is that the factories don't understand your customers and their needs. Those programs failed

because of that lack of understanding. Although many continue to believe that consumers would benefit from buying directly from the factory, the fact is that the consumer who had the opportunity did not! Not only did the consumer stop buying directly from the factory (because they still had a choice to buy from a dealer), but in each instance when the factory sold directly to the consumer, the factory lost substantial amounts of money and also lost market share. Despite the failure, there was and is a significant threat to existing dealers. Factories are slow learners and will come back to the same issue from a different perspective. This particular initiative was both blatant and well publicized. As a result, state dealer associations, with the help and guidance of their dealers, amended their statutes and stopped the factory direct sales from expanding before the plan eliminated the franchised dealer. It worked only because dealers were informed and willing to fight for their rights. Don't think the factory has had a change of heart with regard to selling directly to customers. They dream of doing business without you and will continue to try to find a way to make their dream come true.

*By Loula M. Fuller
& Richard N. Sox, Jr.*

Article summary

- Know your state law
- Identify what protections your dealership needs
- Actively participate in your state association

Dealership Compliance Do's and Don'ts

Failure to follow directions will cost you money

Are you properly disposing of your consumer records? Are you monitoring the disposal at all? Read this and see if you think a change may be in order!

WAR STORY: An automobile dealer did not shred the loan applications before tossing them into the garbage. A “dumper driver” (low-lives who look for personal information in garbage) retrieved one and used the financial information to commit thousands of dollars of fraud against the dealer’s customer who had just applied for a car loan. Sound possible?

The final rule issued last year by the Federal Trade Commission regarding proper disposal of consumer report information and records (the Fair and Accurate Credit Transactions Act of 2003 and the Fair Credit Reporting Act) becomes effective June 1, 2005.

The FTC Disposal Rule requires that persons who maintain or otherwise possess consumer information for a business purpose (car dealers are in this group) properly dispose of such information by taking “reasonable measures to protect against unauthorized access to, or use of, the information in connection with its disposal.” The purpose of this rule is to reduce the risk of identity theft and other consumer harm from improper disposal of a consumer report. **The rule includes specific examples of appropriate measures that would satisfy its disposal standard.** The standard under the Disposal Rule coincides with the standards imposed under the FTC’s Safeguards Rule, already in effect and applicable to new motor vehicle dealers.

In order to assess your responsibilities under the rule, you should evaluate your current records retention and disposal procedures and make changes if necessary. This is the latest hot button of the class action lawyers currently feeding on car dealers in far too many states.

1. Does your organization have a records retention/disposal schedule (written and known by the person(s) responsible for disposal) for personally identifiable information, whether stored in paper, micrographic or magnetic/electronic (computer) media?

a. **Stored records should be destroyed on a regular basis.** No record should be

kept longer than the scheduled retention period, unless a new period becomes applicable, e.g. – when litigation occurs.

b. The period of time you hold records should be determined by a retention schedule that takes into account their use and value to the business as well as applicable legal requirements.

c. Document the exact date of record destruction as well as the method and identity of the record(s) destroyed.

“Are you properly disposing of your consumer records? Are you monitoring the disposal at all?”

2. When disposing of computers, diskettes, magnetic tapes, CD-ROMs, hard drives and any other electronic media which contain personally identifiable materials, are all data erased with a proven utility program and/or physically destroyed?

a. **The only acceptable method of discarding stored records with covered information is to destroy them by a method that ensures the information contained therein is obliterated.** Again, document the date of record destruction as well as the method and identity of the record(s) destroyed.

3. When disposing of waste and recycling paper, are all documents which contain personally identifiable information placed in secure padlocked containers or shredded?

a. The daily trash of every business contains information.

b. **The information contained in waste and recycling materials could be subject to the Safeguards and Disposal Rule.**

c. Store materials with non-public and private information in a secure location until disposal/destruction.

4. If you use a recycling company, does your recycling company certify its disposal/destruction methods? Is it bonded? You need to investigate who you do business with and how they do their business. There are hundreds of dealers who learned this the hard way when they got sucked into Federal Super Fund Site law suits because they paid companies to dispose of their waste oil only to find out it was being dumped on public land. Ignorance is no defense.

a. There is no fiduciary responsibility inherent in the recycling of waste materials. Recyclers are generally not regulated, and transferring materials to a recycler normally waives the right to dictate how the materials are handled. **If you don’t know recycling then know your recycler!**

5. Do you self-audit or conduct compliance reviews to ensure your process and procedures (written) comply with applicable requirements (think federal and state laws and rules) and that employees follow them?

a. Many dealerships have incomplete programs, outdated policy manuals, under trained and uninformed management and staff, because of high turnover and active regulatory agencies.

b. **Simply creating a policy or procedure, without the regular training and monitoring (huge issue) to ensure compliance, may amount to “willful indifference” to legal requirements and result in devastating penalties.**

REMEMBER: Your customers are your biggest business asset. Guard your customer information, including credit reports, credit applications, and other financial data, like you do cash receipts.

By Robert C. Byerts

Article summary

- Rule regarding proper disposal of consumer information becomes effective June 1, 2005.
- The rule’s standard is flexible
- Lawsuit heaven for class action lawyers
- Review list in this letter of things to do to protect your dealership

Manufacturer Initiatives, continued from page 1

you don't use its captive finance arm. They are running most or all of their incentive money through their financing affiliates and subtly controlling the way you do business.

Oh, the answer to that question of what is the real "purpose"—CONTROL and AVOIDANCE. Control of your business and avoidance of the various state and federal laws.

What can you do to protect yourself? You need to pay attention to what the factories are saying and doing! You need to keep up to date on what is going on in the industry regarding the line-makes you carry! **You would not try to run your business without knowing what your competitors are doing and it is equally important that you know and understand what your business partners (the factories) are doing.** If you keep up to date with what the factories are trying to do, you can make an informed decision on how to respond before you get the visit.

Don't think because it is the factory and you are only the dealer that you have to go along with every thing the factory thinks up for you. Your options are completely dependent on your state law protections and the strength of your state law protections is directly related to how proficient your state automobile dealer association is and how active and supportive the dealer body is. You need to be active and aware of how your state automobile dealer association works and what it is working on! If you don't know how it works and don't regularly communicate with your association, it probably doesn't know what's important to you. The association is your first and best line of defense against manufacturer initiatives.

Most associations will provide you with a copy of your dealer protection statute and some will provide you with an interpretation of what the law does for you. If your association does not provide an interpretation, you should ask that one be created and provided to the dealer body. Associations, and therefore dealerships, are only successful if both the dealers and the associations have a clear understanding of what issues are important.

Most state laws were written over 25 years ago. Think how much our industry has changed in the last 25 years and you will understand how important it is to know what your law says and how it

protects you. Some state laws have not been updated in the past decade – some never. **Whether large or small, urban or rural, all dealers are dependent on state law protections.** Small dealers in sparsely populated states are some of the most vulnerable. They generally don't have the financial resources to fight the factory under the federal (much broader) laws. State laws are designed to protect the dealers in a particular state from abuses that specifically affect them.

Montana and South Dakota are great examples of states with predominately rural populations and laws designed

"State laws balance the playing field and most importantly, TRUMP the language contained in a sales and service agreement."

specifically to protect small rural dealers. Ask any dealer in Montana about the Ford Small Dealer Exit Strategy and they will tell you how important the law and the association can be when you are the target. If the factories target small dealers and the laws in their states are vague or out of date, then they are left completely at the mercy of the factories. Ever seen a factory show mercy?

Most of you have read your sales and service agreements and realized that they were written by factories, for factories. The agreements place the entire burden on you, the "good guys," and try to shield the "bad guys" from any and all responsibility. **State laws balance the playing field and most importantly, TRUMP the language contained in a sales and service agreement.** If your state law and your sales and service agreement conflict, your state law wins! Know your state law and make sure it fulfills the needs of your dealership.

In addition to knowing your legal rights, you need to become consistent letter/memo writers! Each visit and important phone conversation with a factory rep is accompanied by a contact report that goes into your dealer file back

in Michigan, California or New Jersey. You must know when a rep has phoned or visited the store and what was discussed. You should write either a letter of confirmation concerning who was present from the factory and the dealership, the purpose of the visit/conversation, and what was agreed to by your dealership if the issues were of major significance (ie. performance, capitalization, facility size or make-up, etc.), or write a memo to file identifying this same information along with the dealership response.

The memo or letter should be signed and dated and kept in a file or book that is maintained consistently. The file or book must be maintained consistently or it is of no practical benefit. If and when you need to clarify or describe a factory contact and what, if anything, your dealership agreed to do, you must have some written documentation to back up the dealership's position. Legal rights without written backup documentation are only an illusion. The factories know this and play the game. You must also! **If you have taken the time to learn the factory's plans for your business, to understand your legal rights and taken the time to document factory visits and criticisms, as well as dealership responses, then you are ready to address the specific initiatives we looked at above.** Next month we will begin to crack open the factory initiatives one by one and give you specific advice on what you can and should do.

*By Daniel E. Myers
& Richard N. Sox, Jr.*

Article summary

- Factories attempt to control dealerships and avoid state laws
- Incentives tied to sales, facilities, floor plans, financing, etc.
- Side agreements and addenda to the sales and service agreements hurt dealers
- Know what YOUR factory is trying to do
- Protect YOUR dealership
- Keep good records of meetings and conversations with your factory

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