The Wheels of Justice

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

Why We Don't Like to Go to the Doctor

Why bad F&I practices go uncorrected

Why is it that we don't like to go to the doctor? Is it because it is inconvenient? Or is it fear of the unknown? Most of us will put off going to the doctor even when we are not feeling well. We wait until we know for sure that we are, indeed, very sick.

Dealers often treat their legal compliance obligations in a similar manner. A dealership's processes, procedures and forms are often ignored until a major (and potentially catastrophic) legal claim is brought against the dealership. Unfortunately, in today's business climate, legal claims are like major illnesses. It only takes one to potentially put you out of commission.

The old adage "an ounce of prevention is better than a pound of cure" rings true from a legal compliance standpoint. Every dealership should commit itself to a legal compliance review this year. The law is constantly changing and your dealership is charged with complying with all applicable statutes and regulations – whether you know about the legal requirement or not. Further, who is checking up behind your sales and F&I personnel? The dealership will also be held responsible for the acts and omissions of individual employees in most cases.

Just as you go to a doctor for medical advice, it only makes sense that you go to a lawyer for legal advice. I am aware that a number of product providers are offering over the counter cures for potential legal problems. However, I encourage you to seek advice from a truly knowledgeable source.

By way of example, following is a sampling of only a few highly publicized F&I regulations where we continue to see repeated violations by dealers. Even though the list does not even scratch the surface of dealership compliance obligations, a check of your dealership's policies on just these issues could save you millions of dollars in governmental penalties and lawsuit damage awards.

continued on page 5

Faxing Potential/Current Customers

Explaining the Junk Fax Prevention Act of 2005

The Junk Fax Prevention Act of 2005 became law July 9, 2005. The act amends the Telephone Consumer Protection Act (TCPA) which, since 1992, has largely prohibited junk faxes. Now, dealers may fax advertisements to consumers and businesses with which the dealership has a qualifying "established business relationship" (EBR). However, dealers must meet each condition of a qualifying EBR before sending any ad fax pursuant to the EBR exception.

The TCPA generally restricts individuals, businesses and organizations from faxing "unsolicited advertisements," a broad category encompassing "any material advertising the commercial availability or quality of any property, goods or services." The TCPA now allows two exceptions to this general prohibition: (1) where the fax recipient previously gave express consent to receive a fax and (2) where the newly

continued on page 4

THIS ISSUE

Chrysler Continues the Exclusive Use Deception

I wrote a couple of months ago about Chrysler responding to our client's request for a transfer of ownership and dealer operator amongst existing dealership shareholders by sending the proposed new majority owner/dealer operator a "Letter Acknowledging Exclusivity." That letter purported to ask the dealer operator to simply acknowledge that the dealership had previously agreed to exclusive use of its facility for Chrysler products. What we found when we looked into the dealership's prior agreements with Chrysler was *no* agreement whereby the dealership granted exclusivity to Chrysler.

After several discussions with Chrysler representatives, we believe that Chrysler has relented. The revised transfer documents

continued on page 3

How to Read and Understand a Market Study, Part III

We conclude with the customer convenience, recommendation and impact sections

Last month we continued our analysis of the sections of a market study by examining the *Performance* and *Demographic* sections. This month we complete the analysis by reviewing the *Customer Convenience, Proposed Solution,* and *Impact* sections. As we have pointed out in past issues, all market studies are essentially the same because all manufacturers rely to some degree on Urban Science Applications, Inc. ("USAI") a.k.a., the Evil Empire.

Following the demographic section is the *Customer Convenience* section. This section analyzes the number of dealers of all line-makes in the study area. This section will analyze the distance between same line-make dealerships and compare the distance between competing line-makes. In other words, the bar charts will show the average number of miles a consumer will have to drive to visit another same line-make dealership and compare this average distance with the average mileage that consumers have to drive between the line-makes that you compete with. The premise being that the number of dealers in the market affects customer convenience and the closer consumers are to intra- and inter- brand competitors makes everyone sell more cars. While we all know that there are many other factors that affect sales and that overdealering can be a major problem for existing same line dealers, this section is usually included to show that a manufacturer's stores are too far apart to be competitive and that an additional dealership will solve this consumer convenience problem. We have seen situations where the before and after was less than a mile. Even in those instances the factory pretended that it made a big difference and that they were just looking out for the poor buyer. In this day of interstate highways buyers don't worry about driving a few extra miles to buy a car. They worry about inventory and price, something that is not shown in any market study we have ever seen. Customer convenience, like the randomly placed dots, is a well-crafted fiction designed to make a market look like it needs some type of network change. Look closely at both the theory and the foundation.

"The Impact assessment section attempts through smoke and mirrors, to show that an action plan such as adding an additional dealership will not negatively affect you."

Next, is the *Proposed Solution* or *Recommendation* section which will include optimal analysis map(s). These maps purport to objectively determine where each dealership in the market area should be located. The optimal location analysis is done by placing existing same line-make dealerships on a map of the market and asking a computer where each dealership or a proposed dealership should be located to provide the maximum level of customer convenience. Amazingly, if there is a proposed add point, the computer almost always picks a location incredibly close to the property where the proposed point is to be located. If you tell the computer what to do it will spit out the answer you want each and every time. The factory has already prepped you to rely on the accuracy of convenience so the next step is an easy one for them. USAI uses the word science in it name. Don't buy into the fiction that this is science, it isn't!

If an add point is proposed or market adjustments such as project Alpha moves are in the plans or you are being asked to relocate, look closely at this section. We were able to stop a manufacturer from adding a dealership because the manufacturer was attempting to add a line-make over 20 miles from the optimal location chosen by the computer. After we pointed this out to the manufacturer the application to add the line-make was withdrawn and remains open to this day. It looks and sounds good when the pretty graphs and colored maps are thrown at you but understand what they mean. This is not the circus; it's your livelihood.

Finally, the last section is the *Impact Assessment* section. This section attempts through smoke and mirrors, to show that an action plan such as adding an additional dealership will not negatively affect you. The premise is that there is enough business (think, "lost opportunity") in any market for all dealers to increase their sales. Manufacturers use the term "lost opportunity" because it implies that the dealers are solely responsible for the market share a particular market exhibits. It is merely a way to place blame on dealers and to use words that imply fault. To make matters even worse, USAI uses only gross registrations in its "loss analysis." Gross loss counts only census tracts that fall below the standard that you are being judged by. That is to say, the analysis looks at all the census tracts in a market and ignores the ones that exceed the "expected registration average" and adds all the lost registrations in the "loss" tracts. We have seen markets that have over 60 census tracts assigned to a particular dealer (PMA). In the entire 60 plus tract PMA only six tracts fell below the "expected penetration average and USAI tried to say the market was inadequately represented because there was

continued on page 3

Market Study, *continued from page 2*

"lost opportunity" in the PMA. They have testified many times that even 1 unit of lost opportunity means a market is being inadequately represented and inadequate representation is justification for an additional dealership in a market. By only taking into account those census tracts below the expected standard the factory guarantees the existence of "lost opportunity" and that it will always be justified to add more dealerships. In the example we gave you (60 plus tracts with only 6 below the standard) the market had a surplus of over 100 units in the 54 tracts that exceeded the standard and a shortfall of only 30 units in the ones that did not. The net result for the factory was a surplus of 70 registrations. They ignored the 70 unit surplus and cried long and loud about the 30 shortfall. In addition to ignoring the census tracts that exceed the expected standard, the factories treat all in-sell (sales made by dealers located outside the market) as "lost opportunity." All markets have in-sell and even USAI's founder Jim Anderson admits that a 10 percent in-sell is not cause for concern. The whole "lost opportunity" theory was created to convince dealers and judges that it is possible for a dealer to meet or exceed the expected registration standard in each and every census tract in its area of responsibility and that it is possible to eliminate (entirely) all sales made by dealers located outside the market. That is preposterous. We recently saw the fallacy of this theory when it was discovered that one of the largest Chevrolet dealers in the country did not meet the expected registration standard in the census tract where his dealership was located.

In conclusion, be careful when you look at a market study. If you believe that the recommended market action will negatively impact your dealership, write your manufacturer and tell it that you disagree with the recommendation and any other conclusions reached by the market study that make no sense or that you know can not be supported by sound science. Ask for the buyer profiles, look at the geography assigned to you and think about what you are looking at. If it doesn't make sense to you it probably doesn't make sense.

By Martin J. Hayes, Esq. and Dan Myers, Esq.

Article summary

- Customer convenience is a well-crafted fiction designed to make a market appear to need some type of network change.
- Optimal location analysis is almost always a "subjective analysis" used to justify the proposed location for a market action such as adding or relocating a dealership.
- Remember, with market studies, if USAI tells the computer what to do it will produce the result USAI wants.
- If you believe that a recommended market action will negatively impact your dealership, write your manufacturer and tell it that you disagree with the recommendation.
- When reviewing a market study, if a conclusion or recommendation does not make sense to you then it most likely does not make sense at all.

Chrysler Deception, *continued from page 1*

are being prepared by Chrysler. The reason I am giving you "the rest of the story" is that our client learned from Chrysler representatives that *many other dealers have already signed off on the letter acknowledging exclusivity.*

We implore you not to sign any "letters" or other "agreements" which purport to have the dealership simply acknowledge a prior agreement. If there is a prior agreement with the manufacturer related to something as important as restricting the use of your facility, you'll know it. If it's been awhile, then review your dealership's documentation before signing anything. If you have any question regarding the issue, contact an experienced dealer lawyer to straighten things out.

Some, but not all, state franchise laws expressly prevent a manufacturer from coercing a dealer into agreeing to certain terms which are unrelated to the request for approval that the dealer is seeking. It is critical that the dealer being asked to sign any such letter or agreement refuse to do so *in writing*. In your response, you should politely but firmly demand that the manufacturer respond only to the request being made. If it is an ownership change request or a successor dealer operator request, for example, the manufacturer is required by most state franchise laws to approve or disapprove that request based upon certain strict criteria. These criteria include experience, financial wherewithal, etc. These criteria never include items which the manufacturer chooses to add to the list.

Once a dealer makes the mistake of agreeing to some commitment in order to obtain a response to the dealer's original request, it is extremely difficult to unwind that agreement. It is difficult to explain to a judge that a sophisticated business man or woman was "coerced" into signing something that they did not have to sign in order to get a response to their original request. The manufacturers are very sly when it comes to leaving no trail of evidence which would support the real coercion which takes place in this type of scenario.

By Richard N. Sox, Jr., Esq.

Article summary

- Beware of Chrysler's Letter Acknowledging Exclusivity.
- Do not sign any letters or other agreements which purport to acknowledge a prior agreement in that the prior agreement should be sufficient.
- Document your refusal to sign such an acknowledgement by letter to your manufacturer.
- Insist upon the manufacturer focusing on the request at hand without including other "strings."

***Faxing Customers** continued from page 1*

established EBR exception applies to the fax.

If the dealer has received prior express invitation or permission from the recipient, its advertising faxes are not unsolicited and are therefore permissible. The act clarifies that written permission is not required – prior express invitation or permission may be secured "in writing or otherwise." Note that in a dispute, the burden of proving the existence of permission is on the sender of the fax, and may be particularly difficult to carry when permission is not in writing.

The precise requirements of the EBR exception will be established by the FCC implementing rules. In the meantime, the statute establishes that the new EBR exception requires meeting the following three conditions:

• **A valid EBR must exist between the fax sender/dealer and the fax recipient.** An EBR is formed by a "voluntary two-way communication" between the sender/dealer and the recipient in the context of an inquiry, application, purchase or transaction. The duration of authorization under an EBR is not set, but the FCC has authority to define an expiration date. Also, recipients may terminate an EBR at any time by asking the sender to stop transmitting fax ads.

• **The recipient must voluntarily disclose the fax number to use.** Such disclosures could be made directly to the sender/dealer or to the public generally. However, no separate voluntary disclosure is necessary if, as of July 9, 2005, the sender/dealer already had a valid EBR with the recipient as well as the recipient's fax number.

• **Sender/dealer must provide notice in ad faxes that recipients can "opt-out" from such faxes at anytime.** Such notice must conspicuously appear on the first page of the fax and clearly provide instructions and contact information for making a cost-free, opt-out request. Sender/dealer must honor such opt-outs, even if the recipient continues to do business with the sender.

Note: Senders are prohibited from buying lists of fax numbers or "mining" public sources for fax numbers. Although there is a grandfather clause for fax numbers in the possession of the sender/dealer on the date of enactment of the act, which may have been obtained in any manner, this grandfather clause applies only to EBR recipients, *not* to recipients with whom the sender does not have an EBR, such as sales prospects.

By Robert C. Byerts, Esq.

Article summary

- Dealers must meet each condition of a qualifying EBR before sending any ad fax pursuant to the EBR exception.
- An EBR is formed by a "voluntary two-way communication" between the sender/dealer and the recipient in the context of an inquiry, application, purchase or transaction.
- The recipient must voluntarily disclose the fax number to use.
- Sender/dealers must provide notice in ad faxes that recipients can "opt-out" from such faxes.

Protection from Unfair Termination

How well does your state statute protect you from unfair involuntary termination by the factory? Virtually every state in the United States has a provision that is supposed to protect dealers against unfair involuntary termination. But most state statutes do not effectively provide termination protection. In order for the termination section of your statute to have any meaningful value to the dealer, the statutory provision must provide for an "automatic stay" of termination until the dealer has the opportunity for a "final determination" of whether the proposed termination is "unfair." An "automatic stay" should be specifically defined to mean that the proposed termination does not take effect until there has been a "final determination" of whether the proposed termination is "unfair." A "final determination" should be specifically defined to include a hearing and the right to appeal the decision of a lower tribunal to a reviewing court. Thus, the proposed termination should not take effect until a final decision by the reviewing court if the reviewing court determines that the proposed termination is "fair."

"Virtually every state in the United States has a provision that is supposed to protect dealers against unfair involuntary termination."

In addition, the statute should expressly state that the dealer is entitled to sell the dealership while the litigation is pending. Our firm was involved in the appeal of a proposed termination in Florida (where statute provided for an automatic stay pending a final determination). When the dealer tried to sell the dealership during the appeal, the factory took the position that all the dealer had to sell was a "terminated dealership." Be sure your statute provides the dealer a right to sell the dealership with all the rights and responsibilities of the selling dealer under the existing (not terminated) dealer agreement between the selling dealer and the factory.

If your statute does not have the "automatic stay" pending "final determination" with the right to sell the dealership during the litigation, a dealer does not have any protection against

continued on page 5

Go to the Doctor, continued from page 1

Privacy Disclosures

The Gramm-Leach-Bliley Act requires dealers to provide to consumers an initial privacy notice describing, among other things, the personal information to be obtained from the consumer and to whom the information is disclosed. Every potential customer should be provided a privacy notice prior to pulling a credit report or taking a credit application. Privacy notices should be provided to the consumer by the salesperson. Finance managers rarely ever see the people that don't purchase a vehicle.

Information Security Program

Every dealership is required to formulate, implement and regularly monitor and update a written plan outlining how the dealership maintains the security of its customers' non-public personal information. The dealership must also designate an information security coordinator. The information security coordinator is required to periodically review all relevant areas of the dealership's operations and make changes in procedure where appropriate. The penalty for failure to fully comply with these government mandates can amount to $11,000 per day.

OFAC Requirements

The Office of Foreign Assets Control ("OFAC") has set forth minimum requirements financial institutions (which includes dealerships) must comply with when ascertaining the identity of a new customer. Most notable is the requirement that dealerships consult a list of known or suspected terrorists ("SDN" list) to determine whether the customer appears on the list. Dealerships may check the SDN list by logging onto the U.S. Treasury web site at http://www.treas.gov/offices/eotffc/ofac/sdn/index.html. There are also third party providers that will check the list for the dealership for a per transaction fee.

Fraud and Misrepresentation

Dealership personnel must never misrepresent facts of any kind to customers, employees, lending institutions or governmental agencies. Information contained on credit applications, buyer's orders or F&I product contracts must never be changed without the customer's signature or initials. Any falsification of customer information or contract alteration could be considered fraud and the dealership will likely be held responsible for the fraud. Do you really know whether your employees are doing business on the up and up?

Disclosure of Negative Equity

Negative equity on trades must be shown separately under "other amounts financed" or "other charges" (prior credit or lease balance) on the retail installment sale contract when calculating the amount to be financed. The amount should be identified as "negative equity," "balance owed on trade," etc. Negative equity must not be added to the vehicle sales price.

Conclusion

Your dealership needs an occasional legal check-up just as we all need periodic checks by a doctor. Long term fiscal health can be better assured if you know that you are taking reasonable steps to assure your dealership is legally compliant. The expense involved with conducting a legal review pales in comparison to the amount you will spend on legal fees and other defense costs for a single (and very small) lawsuit.

By Shawn D. Mercer, Esq.

Article summary

- Dealerships must keep up with the changing rules governing finance and insurance.
- Dealerships will be held responsible for violations of these rules by employees whether aware of the rules or not.
- There are very specific rules which must be followed related to providing privacy notices, maintaining plans for handling confidential customer information, ascertaining customer identity, representing finance and insurance products and disclosing negative equity.

Termination, from page 4

unfair termination. If the factory proposes to terminate the dealership and these three issues are not in your statute, then the factory can terminate the dealer and the dealer has no recourse or protection because the termination will take effect before a determination of whether the proposed termination is "unfair." In some states a dealer "may" then have a claim for damages (provided the termination is unfair), but no income to pay for the litigation.

When the statute covers these three issues then the dealer can effectively challenge the proposed termination as "unfair." If the lower tribunal and the reviewing court determine the proposed termination is unfair, the dealer gets to keep his/her store. If the lower tribunal determines that the proposed termination is "fair" then the dealer has the opportunity to sell the dealership while the case is being appealed to a reviewing court.

Our next article will address other termination protections that your statute should include in order to have any meaningful value to dealers. The article will, among other things, discuss the specific definition of "unfair."

By Loula Fuller, Esq. and Richard N. Sox, Jr., Esq.

Article summary

- There is no termination protection for a dealer if the statute doesn't cover three key issues.
- The first issue is providing for an "automatic stay" which must be specifically defined by the statute.
- The second issue is providing for the stay to remain in effect until "final determination" which must be specifically defined.
- The third issue is to provide the dealer the right to sell the dealership with all the rights and responsibilities of the existing dealer under the existing dealer agreement, that is not terminated.

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