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The NEWS

In This Issue

Call to Action! - Contact Your Assembly Member on Vicarious Liability

John McClurg, Chairman of NYSADA's Legislative/Governmental Affairs Committee, recently convened the group for the purpose of establishing the Association's legislative priorities. The bill that would abolish vicarious liability on loaner vehicles and the recall bill were determined to be uppermost in importance.

Due to the burgeoning number of factory engendered recalls, a far greater number of loaner vehicles are being disbursed to customers. Due to the nature of recall repairs, loaner vehicles are often in customers' possession for weeks or even months as opposed to the day or two required for normal shop repairs. While the dealer lending these vehicles did not create the recall, by virtue of ownership they are legally liable for the loaned vehicle. The "Loaner Vicarious Liability Bill" (S.5992/A.8289, Senator Golden, Assemblyman Gantt) is intended to correct this inequity. Under this bill, dealers would retain liability for their own negligence; product liability responsibility would not change, but otherwise liability would rightfully rest with the vehicle user.

Liability issues are always highly controversial in the Legislature. The legislative session is scheduled to end on June 16th. This bill will not pass in both houses of the Legislature unless members understand its importance to dealers and customers. Only you can do that. We asked that dealers contact their local legislators during the recently concluded legislative break and many of you did. Thank you! We are asking again, but this time we are requesting that you be very focused. Our greatest need is in the State Assembly, among the Democratic members. Please contact your local Assembly member. If you live or any of your stores are in the district of a Democratic Assembly member, please reach out and speak to each and every Democratic Assembly member representing your home or your stores site.

The message is a simple one. Dealers are being required to make loaner vehicles available to customers at no charge. For this free service, a dealer encumbers unlimited liability. With the huge number of recalls, the problem has gotten much worse. More cars are in more customers' hands for much longer periods. Mr. or Ms. Assembly Member, I'm asking you to go to Speaker Carl Heastie and say the Assembly needs to pass A.8289.

If you don't know who your Assembly member is and you need their contact information, you can go to www.NYSADA.com and click on Find Your Representative on the left hand side of the page. Enter your address in the address field and click on the magnifying glass icon to start the search. Once your representatives have been displayed, click on their name to display their contact information.

After you have made contact with your representatives, please email NYSADA President Bob Vancavage at Bob@nysada.com to inform him of any response you may have received.

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Unreasonable Factory Performance Standards For Dealers And What Dealers Should Do When Faced With Them

Article provided by By Eric L. Chase, Esq.- Legal Hotline Member

How Carmakers Coerce Dealers into Unfair and Onerous Agreements. For years, a growing number of automotive franchisors have tried to impose extraordinary performance standards on dealers. Here's the scenario: A dealer does not meet certain standards – say, in sales, CSI or facilities. The factory mails or hands to the dealer a pre-drafted amendment to the existing dealer agreement, ostensibly requiring the dealer to raise sales penetration and/or CSI scores to "average or above," based on a state or regional benchmark, and to maintain that level of performance for an extended period of time or indefinitely. There is nothing subtle about such amendments or the covering letters. They express disappointment and concern. In substance and tone, the franchisor says to the dealer, "sign this, or else...."

There is no negotiation. The terms are set by the carmaker. Typically, the factory-drafted language includes, among other things, the dealer's confessions that: (1) "below average" performance is a material breach of the dealer agreement that must be cured; (2) current sales performance and CSI scores are below par; and (3) the failure of the dealer to comply with the minimum required standards of the dealer agreement could lead to adverse consequences, including termination. The amendment may require the dealer to upgrade facilities (or relocate or become brand exclusive) to assure the continual payment of factory bonus or incentive monies, provided on a per-unit retailed basis. Such monies can be substantial, meaning the difference between dealership profitability and a losing operation.

Frequently, the factory's form includes the dealer's recognition that all the terms are reasonable, and that failure to satisfy them would constitute cause for franchise termination. Of course, on the face of it, a demand for "average or above performance" as a minimum is hardly reasonable, especially when accompanied by threats of forfeited incentive or bonus monies and the prospect of franchise termination. Indeed, it is impossible for all dealers to be above average.

Based upon anecdotal reports, Nissan and Kia lead this ill-advised nationwide trend, but dealers representing many brands report being subjected to this sort of coercion. It seems ironic – as well as unfair – that franchisors discriminatorily try to impose "agreements" to the highest performance standards upon those selected dealers that they see as the lowest performers.

The Dealer's Dilemma. Faced with the prospect of a monetary loss and factory disfavor, many dealers elect to yield to factory pressure, and they sign, agreeing that they are underperformers, in breach, who need to measure up. They cannot afford, they say, to risk losing the benefits that may be withdrawn for failure to sign, even if that signature runs serious franchise risks if benchmarks cannot be met. Dealers also say that signing is less stressful than putting up with harassing pressure – usually pressure that has been a constant for many months, or longer.

Yet, signing imposes new risks. Many dealers are not realistically poised to turn around significantly below-average sales penetration and CSI scores. This factory approach in the governance of a dealer network turns logic upside-down. Every dealer in a solid network should be able to perform satisfactorily. But an above-average minimum means that half the dealers will always be in breach. The dealer may assume that it is protected by the law and that signing under duress will not matter. But such confidence may be misplaced. Escaping the consequences of a signed agreement is never simple or certain.

Applicable Legal Framework. Dealers in almost all states have significant and detailed rights. All states, for example, forbid termination, except upon written advance notice, and proof of good cause to terminate.

New York has an excellent dealer law that provides comprehensive protection from a long list of potential abuses or overreaches by automotive franchisors. N.Y. Vehicle & Traffic Law §§ 460 et seq. State law bars franchisors from using "an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement." § 463(2)(gg). This provision, similar to those in many states, seems simple, straightforward and right.

Most readers would readily conclude that a mandate requiring a dealer to perform at least at above-average levels in sales and CSI at all times is "unreasonable, arbitrary or unfair" on its face. After all, as indicated above, such a "standard" suggests that half the dealer body must, by definition, always be in breach. This kind of statutory language has been the subject of a number of legal disputes.

Recently, in a matter receiving nationwide attention, New York's highest court, the Court of Appeals, in the matter of Beck Chevrolet v. General Motors, answered two questions that were certified by the United States Court of Appeals for the Second Circuit. One question went directly to the meaning of § 463(2)(gg), and asked "Is performance standard that requires 'average' performance based on statewide sales data in order for [a dealer] to retain its dealership 'unreasonable, arbitrary or unfair'"? The Court resoundingly found GM's requirement to be unreasonable, and chastised GM for arguing in favor of "a standard that misrepresents external market forces." The Court's decision did not per se outlaw the "average" benchmark, but did adopt the dealer's position that a franchisor cannot simply apply statewide average metrics to a locality that has influences on local sales beyond those accounted for in a statewide average. Beck is an important and helpful step for dealers toward a day when auto franchisors will be barred from claiming "breach" for supposedly less-than-average performance.

Dealers tend to be optimists. New York law is strong, designed to protect dealers from franchisor abuse. It forbids automakers from extracting

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UNREASONABLE FACTORY PERFORMANCE STANDARDS FOR DEALERS AND WHAT DEALERS SHOULD DO WHEN FACED WITH THEM

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agreements waiving the applicability of the law's protective provisions. Moreover, many dealers really do think that "it will never happen to me." The franchisors are good guys, and they just want signed documents for their files. Sometimes, the optimism is justified; sometimes not. But whatever the end result, the better choice – if there is a choice – is to do what is possible to avoid the dilemma in the first place. A legal fight should be a last resort.

What is a Dealer to Do? Challenge the Factory's Unreasonableness with Your Reasonableness. Although there is never a guarantee in such circumstances, when presented with a facially unreasonable (even outrageous) set of demands from the franchisor, the dealer should always respond in writing. Such a response must be civil in tone, factual and sensible; it has to be persuasive, not angry or emotional. The dealer should set forth why and how the factory's pre-drafted agreement/amendment runs counter to good business practice, violates state law, and should not be signed. "Average" or "below average" performance cannot rationally be a breach or cause for termination. The dealer should review its own professional efforts to market and represent the brand, and to serve customers conscientiously. A dealer should consider all the potential consequences of signing any agreement with onerous terms. Most franchise attorneys advise against signing an agreement that directly or tacitly confesses material breaches.

Usually, it is a good idea, as part of your letter, to invite the factory's recipient of the dealer's letter to visit the dealership, where the dealer can demonstrate the operation's viability, and discuss the dealer's aspirations for the future. In many situations, a responsible and reasonable, yet firm, communication from the dealer in answer to onerous demands triggers a more reasonable approach from the factory. In short, engaging civilly with your franchisor is always the preferred and best policy. If a worst-case scenario evolves, this professional approach preserves your rights and alternatives, which are substantial under state law.

NYSADA Offers Great Hole-in-One Insurance Deal Through ACECO

ACECO has been offering Hole-in-One Insurance since 1997. ACECO has been NYSADA's partner for many years. For a modest premium you can offer jaw dropping prizes at your golf tournaments like new cars or exotic vacations. We insure all types of golf tournaments including professional, member and charity.

Coverage Highlights:

- Competitive premiums
- Unlimited target hole prizes – more than one person can win the grand prize in a tournment
- Customized tee signs and shipping that provides spectacular advertising for your company or sponsor
- Attractive bonus prize packages for the other par 3 holes including such items as cash, cruises, airplane tickets, iPads, golf clubs and more
- Flexible yardage requirements
- Superfast turnarounds

Program Highlights:

- Convenient and secure online credit card payment
- Next day tournaments – we can insure a tournament up to the last minute

To procure your Hole In One Insurance, please go to nysada.com and click on Hole In One Insurance. For questions, please call (518) 463-1148 and ask for Peter Marthy (ext. 206).

DOL Expands FLSA Overtime - Effective Dec. 1

On May 18, 2016, the U.S. Department of Labor (DOL) published a rule updating the Fair Labor Standards Act (FLSA) to expand "white-collar" overtime exemption thresholds.

The "white-collar" overtime exemptions do not impact the salesperson, mechanics, or parts person exemptions. The rule will increase the salary threshold that determines who qualifies for overtime pay when they log more than 40 hours a week under the "white-collar" exemptions. The DOL increased the minimum weekly salary requirements for the FLSA's "white-collar" exemptions from the current $455 to $913 per week (i.e., $47,476 annually). This is approximately double the $23,660 ($455) threshold currently in place.

In addition, the Final Rule will automatically update the minimum salary amount every three years, with the first update taking effect January 1, 2020.

The Final Rule also provides that up to 10% of the new minimum salary threshold can be met with non-discretionary bonuses and other incentive payments, including commissions. To qualify, these payments must be made at least quarterly.

NADA has announced that its "Dealer Guide to the Fair Labor Standards and Equal Pay Acts" will be updated and re-released to reflect the new threshold mandates. The Guide contains details on how dealership employees generally qualify for the "white collar" overtime exemptions.

The new rule will become effective on December 1, 2016; however there may be attempts through legislative and/or legal action to stop the changes made by the DOL's Final Rule. NYSADA will continue to keep you updated on this issue.