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Burkhalter, Michaels, Kessler & George LLP

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Automotive Dealers Newsletter for Legal Resources

Ford Dealership Closures -- One Reason You Should Review Your Dealer Agreement

In September of this year, Ford announced it would slash approximately 600 U.S. dealerships from its 2005 total of 4,396. Ford has now revised that plan and announced its closures will be broader than originally anticipated. Although, Ford has declined to pinpoint the exact number of targeted dealerships, it has remarked that cuts will be made from a greater number of markets than the original 18 that Ford set in its sites back in September. Ford has confirmed that dealerships in Detroit, Chicago, New York, Philadelphia, Pittsburg, St Louis, Los Angeles and San Francisco are among those selected for closure. Perhaps the broader cuts should come as no surprise since Ford also disclosed that it bled a $5.8 billion dollar loss in this year's third quarter.

Although it's not clear why Ford chose to publicize its plan to "right size" its dealership family, it would not be surprising to see other manufacturers also contemplating the slashing of their expenses in a similar manner. All businesses understand the concept of belt-tightening in tough economic times. Although Ford has been quite vocal that the closures will be voluntary, it's irrefutable that if a manufacturer seeks a certain result and is unable to obtain it peacefully, it has a fair amount of leverage at its disposal. In such situations it is crucial for dealers to understand they have options. Dealerships must prepare themselves well in advance if they hope to take an aggressive position against a manufacturer.

Time after time in showdowns with various manufacturers, BMKG attorneys have observed a common theme -- dealerships

that are in strict compliance with their Dealer Agreement have a phenomenally greater chance of success than those who are not. By remaining in compliance, targeted dealerships can take an aggressive and offensive position if they find themselves in a hostile situation with their manufacturer.

There is no indication that Ford, or any other manufacturer, intends to unfairly coerce dealerships into abandoning their franchises. But such coercion is not without precedent. In fact, BMKG saw this type of unfair manipulation a few years ago when General Motors purchased the Hummer name and dealer

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Complying With "The Single Document Rule"

The Automobile Sales Finance Act is a frequently used tool for lawyers targeting dealerships with consumer fraud cases. A charge these lawyers often pursue after reviewing customer's sales documents is that the dealership violated the Act's "Single Document Rule." The best protection against these claims is for you to understand what

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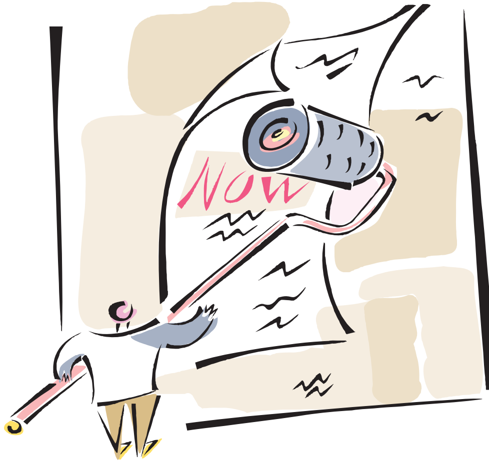
Advertise in Compliance with the Law

Most dealerships already use newspaper and Internet advertising as a primary source of marketing. Indeed, there are few marketing tools which afford dealerships the same ability to "drive" consumers into their showrooms more successfully than newspaper and internet advertising. However, California laws rigidly regulate dealership advertising, and dealerships which elect to use these effective methods of marketing should be cognizant of these legal requirements.



Some of these laws are well-known throughout the industry. For example, you probably already know that any advertisement for a new or used vehicle must identify the vehicle by its model, model-year and either its license number or that portion of its VIN that distinguishes it from all other vehicles of the same make, model and model-year. You are also likely aware that any advertisement which includes a specific vehicle's price must include all of the purchaser's costs at the time of sale, with the very limited exceptions of taxes, registration, and a few other fees.

But, in addition to these well-known requirements, California law also includes some restrictions that may be less familiar. For example, many dealerships may not know the law imposes an obligation on them to withdraw any advertisement of a vehicle which has been sold within 48 hours of the vehicle's sale.

As another example, the law prohibits claims in dealership advertising such as "we have the lowest prices in town," or "we will beat any dealer's price" unless the dealership has conducted a recent survey showing that it actually does sell its vehicles at lower prices than any other dealership in its trade area. Dealerships that run these types of advertisements touting their low prices must maintain records to substantiate these claims.

These are just a few examples of the myriad of laws governing dealership advertising. Although this type of marketing can be highly successful, dealerships may want to consider taking steps to insure they are compliant with the laws of this highly regulated activity.

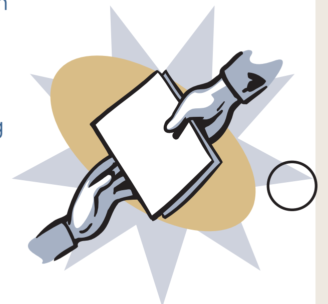
The Single Document Rule *continued from front page*

the "Single Document Rule" requires and to train your personnel so that your dealership doesn't run afoul of its provisions.

The Automobile Sales Finance Act requires that all of the terms concerning financing and the costs associated with the purchase of a vehicle be disclosed to the consumer in a single document. The Act actually sets out 18 separate items that must appear in that contract. The standard industry Retail Sales Installment Contract form makes provisions for all 18 of these items.

Problems can occur, however, when separate documents are used by dealerships which arguably alter the financial terms of the sale. Of course it is often necessary, if not prudent, to use a separate form to explain to customers an aspect of the transaction they are entering into. For example, often dealerships have customers sign an "Acknowledgment of Re-Written Contract" form if the customer elects to re-write their contract because they could not obtain financing under the original terms. As long as this acknowledgment form merely informs the customer of the situation and does not effect or alter the terms of the re-negotiated sale, it should comply with "The Single Document Rule." On the other hand, dealership personnel should never provide customers with any document (including handwritten notes) that contain terms not already included, as required, on the sales contract itself.

As a precaution, if you are contemplating the addition of any document for use in customer transactions, the most astute thing you can do is have your attorney review it first.



Review Your Lemon Law Coverage

A recent case serves as a good reminder about the importance of reviewing your lemon law insurance policy. In R&B Auto Center, Inc v. Farmers Group, Inc., 140 Cal. App. 4th 327 (4th Dist. 2006), R&B, a used car dealership, sued its insurer after the insurer sold it a Lemon Law policy that only covered new cars. R&B had specifically asked for coverage

that would extend to "title branded" vehicles. The Lemon Law generally applies to new cars only. However, a customer who purchases a used vehicle that has been "title branded" (repurchased by a dealership because of a Lemon Law claim and then sold again as used) may also have a claim under the Lemon Law. In R&B's case, R&B had been sued by consumers who purchased a used title branded car from R&B.

As it turned out, the insurer refused to defend and indemnify R&B when it was sued under the Lemon Law. The policy the insurer sold the dealership did not cover "title branded" vehicles. Alarmingly, it seemed the agents who sold R&B the policy were not familiar with the coverage it provided. R&B was forced to defend itself in the suit and ultimately settled the Lemon Law case for almost $70,000. R&B then sued the insurer for negligence, intentional misrepresentation, breach of contract, reformation, bad faith, breach of fiduciary duty and unfair competition.

The R&B case demonstrates that understanding the scope of your policy coverage requires a detailed review of the written policy itself. R&B found out the hard way that dealerships should never simply rely upon the insurer's assurances about what the policy covers.

Translations Required!

One of the most captivating things about California is its cultural depth and diverse population. But this also creates a potential complication for negotiating and eventually documenting your sales with customers who speak English as a second language.

The State legislature determined, based upon 2000 U.S. Census figures, that a staggering 39% of California's population speaks a language other than English in their homes. Because of this, the State has established protections for these consumers when they negotiate certain contracts in a language other than English. Contracts for the sale or lease of vehicles are included within these protections.

In short, the law requires that if your dealership "primarily" negotiates a lease or sale in Spanish, Chinese, Tagalog, Vietnamese, or Korean, then you must provide the consumer with a copy of the sales contract in that foreign language before the customer signs the English version. "Every term and condition" of that sales contract must be included in that translation. So, for example, if your salesperson negotiates a vehicle sale in Chinese, the customer must be provided with Chinese translations of every term and condition of the sales contract prior to signing the English version.

In fact, the dealership must provide the translation regardless of whether the customer even asks for it!

In addition, the law requires that if you negotiate the contract in a language other than English, that you post a notice in the negotiated language in the same place where the sales contract is executed. The notice must alert the customer to the fact that the dealership is required to provide the translated terms and conditions of the sales contract.

BMKG monitors the industry to see how dealerships are being targeted by attorneys who profit from bringing consumer fraud cases. One such law firm recently began advertising that the failure to provide these translations is a "common auto fraud issue." In light of this heightened scrutiny, it makes sense for you to work with your legal counsel to make sure your dealership has the proper translations available and the proper notices posted.

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California's New Standing Requirement For Unfair Competition Claims Applies to Pending Cases

As you may recall, in November 2004, California voters passed Proposition 64 which included a new standing requirement limiting who could sue for an alleged violation of the unfair competition laws. As a result of Proposition 64, an individual is only permitted to sue for unfair competition if he had actually been harmed by the conduct at issue. However, this new change in the law brought to the forefront an interesting legal question; what happens to the many pending cases in which plaintiffs, who suffered no injury themselves, alleged violations of the unfair competition laws prior to Proposition 64's passing?

In the last issue of the Dealers Advocate, we notified our readers that the California Supreme Court was expected to decide this summer whether California's new standing requirement for unfair competition claims would apply retroactively to cases that were already pending when the proposition was passed. And, we are pleased to report that in the landmark case of Californians for Disability Rights v. Mervyns, LLC, the California Supreme Court decided that Proposition 64 does, in fact, apply to cases that were already pending when voters passed Proposition 64. However, the California Supreme Court took some of the teeth out of this ruling in a companion case, Branick v. Downey Savings & Loan Association, wherein the court ruled that if a plaintiff lacks standing under Proposition 64 because he suffered no injury, the plaintiff may keep his case alive if he can amend the complaint to add a new plaintiff who did suffer an actual injury.

The Supreme Court's decision to apply Proposition 64 to pending cases is great news for dealerships that were victimized by opportunistic plaintiffs' attorneys who filed unfair competition claims against them with clients who suffered no actual injury. Although the court will allow these attorneys to try to amend their complaints to add a plaintiff who actually suffered an injury, it is quite possible that many of these attorneys will be unable to do so, and these unmeritorious lawsuits will hopefully be dismissed.

Our Irvine Office Has Moved ... *The Irvine office of Burkhalter, Michaels, Kessler and George LLP has recently moved to 2020 Main Street, Suite 600, Irvine, CA 92614 and will keep the same phone number listed at the bottom of this page. Our Westlake Village address remains the same.*

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channel from AM General. Dealerships with existing AM General franchise agreements were targeted by GM and presented with a slew of onerous dealership requirements that made selling the franchise back to GM (which was GM's apparent goal) the only viable alternative. Most of the targeted dealerships found themselves unable to battle GM and they lost their franchises. Two dealerships, however, resisted, and one who was hired by BMKG, ultimately received a $5.4 million dollar verdict as a result of GM's coercive conduct. No doubt those dealerships had the ability to be on the offensive because they had adhered to their Dealer Agreements.

Every dealership should use Ford's announcement as an opportunity to carefully review its contractual obligations under its Dealer Agreement. Careful review is even more important for those dealerships who feel an increase in the amount of negative feedback from their manufacturer. The bottom line is that if your dealership begins to see an uptick in visits from the manufacturer or if the manufacturer is sending more negative correspondence your way, be mindful that the manufacturer may be setting the stage for decisive action. Bring the situation to the attention of your legal team immediately. Rest assured, even the mightiest opponent has chinks in its armor and the dealerships in compliance with their Dealer Agreements will stand in the best position.

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Burkhalter, Michaels, Kessler & George (BMKG) is a law firm based in Irvine, California. The BMKG lawyers bring almost a century of combined legal experience to their clients. BMKG has the largest jury verdicts in California for dealers against manufacturers. BMKG services include prosecution and defense of manufacturer disputes, strategic defense of consumer litigation, dealership/real estate acquisition and sales, and employment law. In addition, BMKG provides owners with comprehensive estate planning services through their State Bar Certified Estate Planning Specialist.