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It Does Matter What You Sign

From time to time, we advise dealers on the potential prejudice to them of executing franchisor documents with waivers of dealer rights. Often, a dealer will point to state law and claim that regardless of what they sign, state law protects them. While state law can provide protections, a dealer should not waive valuable rights.

State law does establish a framework within which a franchisor's rights and obligations are regulated. That does not stop a franchisor from claiming that a dealer knowingly waived its rights, however.

Many franchisors attempt to slip waivers into documents presented to dealers for signature. If you execute such a document, where does that leave you? Unfortunately, the answer will lie ultimately with the courts in

your state. You will claim that the franchisor is bound by state law no matter what you sign. The franchisor will contend that you executed the document with full knowledge of your rights, and you thus made an informed decision to waive your



rights.

Who wins that case? It may depend on state law, and it may even depend on what judge is randomly assigned to hear your dispute. Don't put yourself in a position where you have to litigate with your franchisor to determine your rights. Maybe your state law will protect you regardless

of what you sign. But maybe it won't. And if it won't, costs will be painful, both in the attorneys fees to fight through the case and in a possible ultimate adverse result that may even cost you your franchise. Why get yourself into that position?

Use a Review Process

When you are presented with a document from your manufacturer, do some things:

*** Read the document and understand it.** What benefits do you derive from executing it? What detriments are imposed on you if you execute it?

*** Understand the impact of signing it.** If you are required to make acknowledgements contrary to your interest or waive rights, what will that mean in the future? What rights do you have under your franchise agreement and under the state law that the manufacturer is asking you to give up and what will that mean to you?

Enforcement Light on Processing Fees?

In a recent case decided by the Arkansas Supreme Court, Campbell v. Asbury Automotive, Inc., the Court ruled that automobile dealers could not charge a "documentary fee" where part of the services for which the fee compensated dealers included filling out deal paperwork. The court reasoned that charging for these services constituted the unauthorized practice of law.

According to the decision, part of the purpose of the fee was for preparing the vehicle installment contract (a legal instrument) for the purchase of a vehicle. The dealers in the case argued that the completion of standardized forms, necessary for the purchase of motor vehicles, does not require the training, skill, or judgment of an attorney and is not the practice of law. Plaintiffs in the case responded that the dealers' practice is to select the legal documents used in each transaction, fill in and complete the documents, and finally, to review and explain the documents to the customer. This, plaintiffs argued, generated revenue for the dealers and constitutes the unauthorized practice of law in Arkansas.

In reaching this result, the Supreme Court of Arkansas ignored its previous ruling that allowed real

estate brokers to prepare legal documents by filling in blanks in prepared legal forms. Apparently, the court felt that as long as real estate brokers did not charge separately for the services of filling in forms, but charged generally for doing that, this was somehow different than a situation in which dealers charge a documentary fee for a bundle of services that included the completion of forms.

The Arkansas decision is an unusual one. It relies on a distinction without a difference in approving actions that a real estate broker can do while denying car dealers the right to charge for those same activities. Arkansas law on what constitutes the practice of law by someone not licensed as an attorney is also much stricter than the law in most other states and is unlikely to be followed by other states.

What the case may do, however, is shine a light on dealer documentary or processing fees that state enforcement agencies and plaintiffs' lawyer in other states may seek to use to their advantage. Because of this, dealers must be careful to ensure that their practices in charging processing fees and charges carefully follow state law.

***Make your own business decision of whether and what to charge.** Whether you want to charge a documentary or processing fee and what to charge is the personal decision of each dealer. You are not obligated to charge a fee. Agreeing with another dealer to charge a fee or on the amount of a fee could be a violation of the antitrust law. Make your own business decision.

***Call it what the statute allows.**

If the state legislature named the fee or charge you can impose, use that name. Don't call it a doc fee if state law calls it a processing fee. And use the proper term in all dealership documents. Some dealer computers are still programmed to print "doc fee" on a retail installment sale contract where the statute gives it another name. Change that.

***Follow the law.** If state law provides requirements you must observe to charge a documentary or processing fee, know the requirements and observe them completely.

***Don't add additional fees unless specifically allowed by law.** A state law about documentary or processing fees is designed to create a safe harbor. Other fees or charges will likely lead to lawsuits alleging violation of state law unless it is something like a fee for electronically processing tag work specifically permitted by law.

***Make sure personnel are trained to explain the fee or charge.** It is never for processing credit, nor is it for electronically processing tags when the dealership is separately compensated for that. It is always something that the dealership is allowed to charge, not something the dealership is required to charge. Use a brochure that explains the fee or charge. When asked to explain the fee or charge, personnel should hand out the brochure.

***Respect caps and be reasonable.** If there is a state cap, don't exceed it. If there is no cap, don't expect to increase the fee at will. Recognize that a fee must be reasonable. Be prepared to justify the amount of the fee.

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***Ask why you should sign.** If there are rights that the document is asking you to sacrifice, you must make a decision. Are you willing to run the risk of a court someday saying you waived those rights? Or would it be better to solve the issue now by demanding changes?

***Engage with your Franchisor.** If you determine that you must solve the issue now, engage your franchisor and negotiate acceptable language.

***Consult a legal advisor to help you through the process, if necessary.**

What to Look Out For

Here are some things, based on history, that you should be looking for:

***Waivers of rights.** You receive a request for information for renewal of your franchise. You have an absolute right to that renewal unless the franchisor is willing to commence a proceeding under state law to terminate or non-renew your dealership. However, at the end of the renewal package, there is an innocent looking signature page in which you waive your right to automatic renewal and make it subject to the sole discretion of your franchisor. You should not sign any document that requires you to waive your rights.

***Releases.** Sometimes a manufacturer will simply slip in a release from any liability into a new program document. You should not release a franchisor from potential wrongdoing before you even get started into the program.

***Acknowledgements of Breach.**

When signing a renewal term agreement, you may see that the franchisor has slipped into the document language by which you acknowledge your obligation to cure your breach of the dealer agreement. It may even say that if you don't cure it as agreed you agree that termination of your franchise is appropriate. Never sign any acknowledgements that you have breached your franchise agreement or that you agree to termination if you don't cure it.

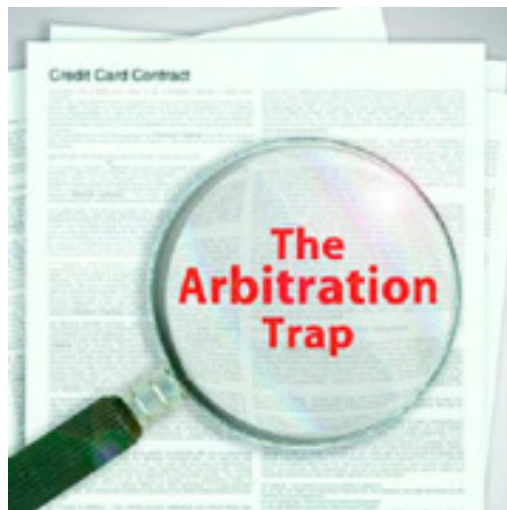
***Mandatory Arbitration.** You are presented with a document that changes the terms of your dealer agreement. It contains a mandatory arbitration provision. A franchisor cannot require you to agree to pre-dispute mandatory arbitration in a franchise agreement. The real question is what is a franchise agreement? The franchisor uses a very strict definition that this consists of the dealer sales and service agreement only. Any dealer in a dispute with a franchisor will use a very broad definition that any agreement that affects the franchise rights of the dealer is subject to the prohibition on mandatory pre-dispute arbitration. It will ultimately be in the hands of a judge or an arbitrator to decide who is right, but agreeing to

an arbitration provision in a document that may or may not be construed as a franchise agreement may very well hurt your position.



***Venue and Jurisdiction.** From time to time, a manufacturer will send a document that sets the location where a dispute will be heard as the manufacturer's home state and includes a provision in which the dealer agrees to jurisdiction in that state. You will want to have matters involving your dealership in your state. If there are any franchise issues with respect to the document you are signing, you should insist upon a change to this venue and jurisdiction provision.

***Artificial Time Limits.** Sometimes a manufacturer will attempt to have you agree that the time within which you may object to an action by the franchisor or to assert a claim is artificially shortened. Your state franchise law generally sets the time periods within which you can take action. Shortening it is not in your interest.



Have an Emergency Preparedness Plan

The recent killer tornadoes in the midwest and south, and even in Massachusetts, should remind dealers of the importance of an emergency preparedness plan. In creating a plan for a dealership, there are a number of things that a dealer should



consider.

***Prepare a Written Plan.** A written plan will serve as a roadmap for the employees of the dealership to undertake the tasks necessary to get the dealership back in business and selling cars, service, and parts.

***Communicate to Employees.** The plan should be communicated to employees. Employees should understand what they must do in the event of an emergency.

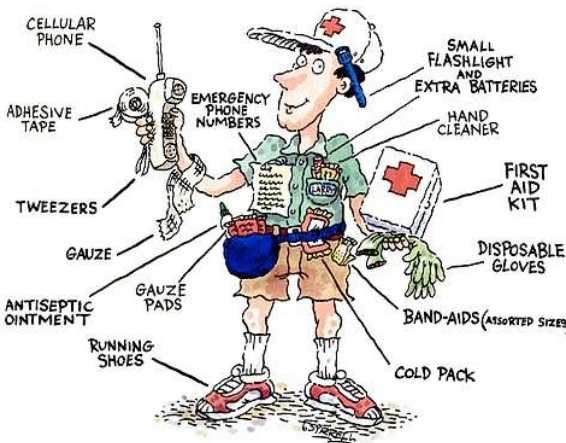
***Appoint a Spokesperson/Point of Contact.** In the event of an emergency, who will speak for the dealership? Who will be in charge of carrying out the company's plan? How will the business stay in contact, especially with employees and customers? Expect that if an emergency happens, all means of contact originating from the dealership may go down. Is there a location to which calls can be forwarded? Can information be posted to the dealership's website from an off site location?

***Check Your Insurance to Protect your Investment.** Are the dealership's insurance policy coverages adequate to protect your business? Is the company fully protected against all natural disasters such as hurricanes, floods, tornadoes, and earthquakes? What about protection against man-made disasters resulting from arson and acts of terrorism? Does the company have business interruption insurance to take it through the time the business has to close down? Is it sufficient to maintain the salaries of employees whom you will not want to lose if the business is down for a time? Are the company's computers (including data) and other key facilities adequately insured?

***Protect the Company's Computer Records.** How will the computer records of the company be protected? If the company's server and/or central processing units are on site, how does the dealership protect against physical destruction? Are

company organic records, etc. should be maintained onsite by the safest means possible. There should also be offsite storage of hard copies of critical documents. They should also be converted to an electronic format (for example .pdf) and kept off site. This can be done at the company's off site storage facility. Writing these materials to a flash drive kept by dealer executive personnel off site is also a simple answer. The best answer is to keep these in a virtual storehouse. Contact your computer vendor to discuss this.

***Other Critical Documents.** Sales and repair records will be important to the dealership's recovery. Summaries or key portions of these records are probably in the dealership's computer system. That is why back up is critical in the event of destruction of the company's system. The hard copies of these documents should also be maintained in fireproof storage to provide the maximum possible protection.



***Contact Information.** In the event of a tragedy that cripples or even shuts down the dealership, it will be necessary to contact your franchisor, your licensing agency, suppliers, and many others. Keep a complete list of contact information so that this can be done easily.

The government has provided advice concerning emergency planning for

businesses in general at <http://www.ready.gov/business/index.html>.

That is a good starting point that, when combined with these tips, will help you prepare a solid plan for your dealership.

back-ups kept off site? Can the company arrange for server capacity off site to take over in the event of an emergency, with off site back-up?

***Protect the Dealership's Organic Documents.** The critical records of the company such as franchise agreements, deeds and leases,