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AUTOMOBILE DEALERSHIP REPORT

A QUARTERLY PUBLICATION DISCUSSING CURRENT LEGAL NEWS, HOT TOPICS AND BEST PRACTICES OF THE AUTOMOTIVE INDUSTRY

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FIRST CLASS ACTION FILED ON NEW SPOT DELIVERY LAW

By Steven R. Freeman, Freeman Rauch, LLC, July 2016

Within the past few months, the first class action was filed against a Maryland automobile dealership alleging violations of the newly enacted Md. Code Ann., Transp. § 15-311.3 (Notice to buyer prior to third-party approval of dealer-arranged financing or leasing agreement) which came into effect on October 1, 2015. The suit alleges that the dealer failed to provide its customer notice that the dealer-arranged financing had not been funded within four (4) days of the delivery of the vehicle to the customer, among other things. Although the customer returned the vehicle to the dealer and, allegedly, the dealer "unwound" the deal, it was alleged that it did not do so in a timely manner and failed to return the deposit, titling fees, taxes, and dealer processing charge. The suit further alleges that at the time of the sale, the dealer failed to provide the customer with a copy of the statutory notice required by law and signed by the dealer and the customer.

Protect Yourself

"…protect yourself by providing the customer with the required notice at the time of sale signed by the Dealer and the buyer. The new law specifically requires that the customer be given a copy of this agreement. This notice must have the exact language of the statute."

While the new law was intended to protect buyers and dealers from the issues raised when a bank fails to fund after a vehicle is delivered, it is unclear when the form must be used and, in any case, the four (4) day notification period in which the dealer must notify the buyer, in writing, that the financing terms had not been approved, is unrealistic. This new lawsuit may serve to clarify some of these issues. In the meantime, protect yourself by providing the customer with the required notice at the time of sale signed by the Dealer and the buyer. The new law specifically requires that the customer be given a copy of this agreement. This notice must have the exact language of the statute.

Further, you must keep track of final approval from financial institutions. While the four (4) day notice of failure to gain approval is unrealistic in many cases, you must do your best to send these notification letters to the customer on time. Ensure that a copy of the fully executed notice given to the customer at the time of delivery is in every deal file in which third party financing is utilized.

A further way to protect yourself is to take advantage of the flexibility in the new law which allows the dealer and the customer to agree on new financing or lease terms upon the failure of a bank to fund after the vehicle is delivered. When possible, settling with the customer on new or different terms may save costs of litigation.

STEVEN R. FREEMAN

Mr. Freeman has over thirty years of experience representing businesses and individuals in complex civil and criminal litigation. Mr. Freeman has litigated cases, jury and non-jury, in the state and federal courts of Maryland and the District of Columbia, and has argued numerous appeals in the United States Court of Appeals for the Fourth Circuit, Maryland Court of Appeals and the Court of Special Appeals of Maryland. In addition to assisting clients in a wide range of business, commercial and personal matters, Mr. Freeman focuses on the defense of automobile, recreational vehicle and motorcycle/motorsports manufacturers, dealers and automobile finance companies directly, and on behalf of insurance carriers, in class actions, products liability, warranty, employment litigation and administrative matters. He regularly advises manufacturers, dealers and distributors in regulatory, franchise and EEOC matters, including all aspects of dealer operations, MVA investigations, and state and federal regulations.

New CFPB Proposed Rule Banning Class Action Waivers in Consumer Arbitration Agreements – The Dealers' Options

By Steven R. Freeman, Freeman Rauch, LLC, July 2016

> *"…instead of relying on the arbitration agreement with class waiver, included in the Retail Installment Sales Agreement, dealers are encouraged to produce their own standalone arbitration agreement with class waiver to be signed by the customer at the time of sale."*

Under the new Consumer Financial Protection Bureau's proposed rule (May 5, 2016), the use of an agreement that provides for arbitration and that prevents the consumer from filing or participating in a class action with respect to the covered consumer financial product or service will be banned. While the new proposed rule has not yet been passed, if it does, the arbitration provisions with class waivers commonly included in retail sales installment agreements will be illegal. Moreover, banks and financial institutions will most likely reject any contracts which have an arbitration with a class action waiver provision included. While under Maryland Law, arbitration in class action clauses are currently not effective when claimants bring actions under the Magnussen Moss Federal Warranty Act, they are extremely helpful with other claims. Because the CFPB does not have jurisdiction over automobile dealerships, except in very limited circumstances, the return to the old standalone arbitration agreements with class waivers may become necessary. Accordingly, instead of relying on the arbitration agreement with class waiver, included in the Retail Installment Sales Agreement, dealers are encouraged to produce their own standalone arbitration agreement with class waiver to be signed by the customer at the time of sale. While these types of standalone agreements produced by dealers were once questionable under Maryland Law, the Maryland Court of Appeals in Ford v. Antwerpen Motorcars Ltd., 443 Md. 470 (2015), has made clear that there is no "single instrument rule" recognized in Maryland and if properly drafted a standalone arbitration agreement with class waiver may be effective.

Dealers are advised not to include two separate arbitration agreements in a deal, i.e. one in the Retail Installment Sales Agreement and a separate standalone arbitration agreement with class waiver, however, if the new rule does pass and arbitration agreements with class waiver in Retail Installment Sales Agreement become extinct, a Dealer should use a carefully drafted standalone arbitration agreement with class waiver in every single deal, new, lease, or used.

DARCARS — A Lesson In What Not To Do In Succession Planning

By Lee B. Rauch, Freeman Rauch, LLC, July 2016

In a recent decision, a Maryland trial court judge dismissed a complaint filed by Tamara Darvish against her father and the company he started, DARCARS Automotive Group. Ms. Darvish, who had worked for the dealership for many years, had claimed that beginning in the late 1990s, her father had promised that upon his retirement or death, she would be provided an equal one-third ownership stake in the company along with her two half-brothers if she continued to work there. But, after her father made a written succession plan in January 2014 that outlined his plan for equal ownership, her half-brothers became hostile towards her and ultimately pressured their father into breaking his promises to her. Her lawsuit followed.

In dismissing her claims, the judge acknowledged Ms. Darvish's longstanding work at the company but noted that she had no written employment agreement and that she was, therefore, at will, meaning that she could be let go at any time. The judge ruled that even if the brothers pressured their father into doing it, the conduct was not unlawful because the father's alleged promises were simply too vague to be enforceable under Maryland law.

The decision is noteworthy because many dealerships are family or privately owned and do not have formal succession plans in place. The case illustrates the controversy, costs, and disruption that can occur when longstanding expectations are not properly documented as required by law. If you own a dealership and want to protect against these dangers, you should consult counsel who can guide you accordingly.

U.S. Supreme Court Update — Dealer Wins Round On Overtime Case

By Lee B. Rauch, Freeman Rauch, LLC, July 2016

In an opinion issued June 20, 2016, the U.S. Supreme Court rejected a lower court's decision that dealership service advisors were eligible for overtime pay under the federal Fair Labor Standard Act ("FLSA"). In doing so, the Supreme Court found that a 2011 Department of Labor ("DOL") regulation on which the lower court based its decision, that provided that service advisors were not exempt employees, was procedurally defective.

The Supreme Court reasoned that the DOL had issued its 2011 regulation without the reasoned explanation required in light of its change of position and the significant reliance interests involved. The automobile dealership industry had relied since 1978 on the DOL's position that service advisors were exempt from the FLSA's overtime provisions and had undoubtedly negotiated and structured pay plans with this understanding. While an agency was free to change its existing policy, to do so in these circumstances without any detailed analysis was arbitrary and capricious.

Although hailed as a major victory for auto dealers, the case still merits following because the Supreme Court did not completely resolve the issue. Rather, it sent the case back to the lower court for that court to make a new determination of whether service advisors are exempt based on the language of the FLSA, without regard to the DOL's regulation. If you have any questions about the decision or related issues, you should contact an attorney.

LEE B. RAUCH

Lee Rauch has practiced civil litigation since 1993. He represents businesses and individuals in a wide variety of matters in federal and state courts in Maryland and the District of Columbia. His practice has a focus on complex commercial matters and business torts. Mr. Rauch has represented clients in the automotive industry for over twenty years. His practice focuses on the defense of automobile dealerships, ranging from national dealership groups to locally owned stores in the areas of: TILA, ECOA, and other financing statutes; misrepresentation; consumer protection laws; negligence; product liability; breach of warranty; premises liability; breach of contract; and employment law claims. Mr. Rauch also represents providers of automotive finance and insurance products. He has also represented auto manufacturers in lemon law and warranty claims as well as rental car companies in personal injury suits.

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For litigation issues in Maryland and the District of Columbia requiring skilled representation, Freeman Rauch, LLC, can help you achieve the results you are seeking. Automobile dealerships have for decades regularly turned to the lawyers of Freeman Rauch, LLC, for legal counsel and dispute resolution on a wide array of issues. Extensive experience with Lemon Law, products liability, warranties, franchise issues and routine operations of automobile dealerships gives our attorneys a full understanding of the legal issues that dealerships frequently encounter. We work closely with clients to help them anticipate obstacles, prepare and implement sound business plans and execute strategies to ensure their success. If you are contemplating the purchase of a motor vehicle franchise or if you own an automobile, truck, motorcycle or recreational vehicle dealership in Maryland or Washington, D.C., call our law firm at 410.842.6600 to learn how our extensive experience in automobile manufacturer, dealership and franchise law can benefit you.