Profit DRIVERS

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PROFITABLE IDEAS FOR AUTOMOBILE DEALERS

Updates from the War on Arbitration

By: Jonathan Morrison, President, Auto Advisory Services

One of the most devastating personal and financial experiences a dealer may ever face is class action litigation. Whether it comes from a disgruntled (or greedy) customer or employee, and even regardless of result, the dealer is in for a long and expensive battle with its reputation and huge amounts of money at stake. One of the most critical tools to prevent unscrupulous trial lawyers from turning an individual dispute into a class action battle is the proper completion of a valid arbitration agreement containing a class action waiver. While the United States Supreme Court has fervently defended the use of such agreements in recent years, California courts, politicians, and the federal Consumer Financial Protection Bureau have been less than friendly to arbitration and are testing the interplay between a state's ability to limit the use of binding pre-dispute arbitration clauses and the Federal Arbitration Act (FAA), which requires courts to enforce agreement to arbitrate. Oftentimes, developments for auto dealers in California are like coming attractions for the nation.

Here's an update from several battlegrounds in this critical fight.

California Legislation

Assembly Bill 2617 (Weber, D-San Diego): This bill would prohibit requiring a waiver of state anti-discrimination law protections (including the right to have a lawsuit heard in court) as a condition of entering into a contract for goods or services. The person seeking the enforcement of such a waiver would have the burden of proving the voluntary nature of the waiver. A violation (e.g., by requiring an agreement to arbitrate any disputes as part of an employment application or vehicle sale or lease contract) would be considered a violation of state civil rights laws.

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This bill has passed through all required committee hearings in both houses, and awaits a floor vote in the Senate, a concurrence vote in the Assembly, and the Governor's signature.

California Courts

Sanchez v. Valencia Holding Company: This dispute before the California Supreme Court involves the enforceability of the arbitration language in a vehicle installment sale contract. The Court must decide whether the arbitration agreement renders the contract "unconscionable" (so unfair that a court will not enforce it). Recently, the Court has asked interested parties to submit their interpretation of what standard should be used in California in determining whether an arbitration agreement is unconscionable.

Sonic Calabasas v. Moreno: This case involves whether the Labor Commissioner can force employers to go through an employer-unfriendly informal hearing process when the employee had previously agreed to arbitrate any disputes with the employer. The California Supreme Court recently held that the FAA does not allow for pre-arbitration Berman hearings, but opened up the door to allow for a Superior Court to find such arbitration agreements unconscionable.

Iskanian v. CLS Transportation of Los Angeles: This dispute involved whether a class action waiver in an employment arbitration agreement can be struck down on the theory that individual arbitration would not allow an employee to effectively enforce non-waivable statutory rights. The California Supreme Court held that employee arbitration agreements with class action waivers are enforceable under the Federal Arbitration Act, despite California public policy to the contrary. While this was a win for employers, the Court found separately that California's Private Attorneys General Act (PAGA), which permits individual employees to file lawsuits on behalf of California and similarly situated co-workers is not subject to the arbitration waiver. The Court sees PAGA actions as claims by the State, which did not agree to arbitration. Because of this, employers may see plaintiffs' attorneys shift tactics to focus on claims under PAGA. This may be appealed to the United States Supreme Court.

Consumer Financial Protection Bureau

The federal Dodd-Frank Wall Street Reform and Consumer Protection Act (which established the Consumer Financial Protection Bureau (CFPB) requires the CFPB to study the use of pre-dispute arbitration agreements in consumer finance transactions. After the CFPB completes its study, it must report its findings to Congress and is empowered to limit or prohibit the use of consumer arbitration agreements consistent with those findings. The CFPB has already released its preliminary findings of the study, and most observers believe that pre-dispute arbitration agreements relating to consumer finance products will be strictly regulated or banned. While dealers are exempt from CFPB general jurisdiction, the various finance companies who purchase dealer sale and lease agreements are not exempt—leading many to believe that the CFPB could conceivably prohibit finance companies from purchasing sale or lease agreements containing arbitration clauses. This would indirectly eliminate the use of arbitration clauses in dealer contracts.

Jonathan Morrison was named president of Auto Advisory Services (AAS) in 2014, taking over day-to-day operations from now-chairman Rob Cohen. Prior to joining AAS, he served as Director of Legal & Regulatory Affairs and as registered lobbyist for the California New Car Dealers Association (CNCDA) where he worked since 2006. Morrison was responsible for CNCDA's legal, compliance and regulatory operations and was an architect behind many of CNCDA's regulatory and legislative lobbying projects. He was the principal author of compliance articles in the CNCDA Bulletin and various CNCDA Dealer Guides. In addition, he was content editor of the CNCDA Dealer Management Guide and F&I Compliance Manual. Morrison was the lead trainer in several popular CNCDA seminar series and spoke publically at various industry conferences.

Dealer Performance Hinges on Asset Management

Cash. It is required to pay employees and suppliers and can affect a dealer's need for financing. Cash flow can be as important to an auto dealer's survival as its profitability. Many dealers can improve their cash flow by properly managing the assets on their balance sheets.

Carefully managing contracts in transit has become particularly crucial as the costs of new and used cars have increased thereby tying up substantial amounts of cash. Floor-plan expenses are accruing as soon as vehicles are delivered and continue until funds are received.

Dealers can reduce the waiting period until receipt if they require their sales department to forward logs to the accounting department at least daily. Any transactions not clearing within three days should be marked for attention. Rejected contracts should be submitted promptly and paperwork forwarded to finance companies several times a day. Closely monitoring contracts in transit can reveal additional strategies for reducing the time between payment and receipt.

Delayed vehicle receivables can result when side notes or hold checks are accepted. This can translate into nonpayment of past due contracts, charge-back of paid contracts or problems related to sales commissions and lender relationships. To combat these problems, review vehicle receivables daily. Follow up on those more than 10 days old. Require down payments instead of hold checks.

Dealer balance sheets include other assets that, if managed properly, can improve cash flow.

- Used vehicle inventory. Compare the average cost of sales per unit for the prior month to the current average inventory cost per unit. Large discrepancies may signify your existing inventory is too expensive/cheap in relation to typically sold vehicles.
- New vehicle inventory. Reconcile and verify your floor-plan credit statement monthly. See that payoff dates are correct and be on the lookout for discrepancies between a vehicle's delivery date and the date interest begins to accrue. A limited number of staff should be responsible for ordering inventory and ensuring compliance with internal policies.
- Parts inventory. Items should not remain in inventory longer than three months. Phase-in/phase-out criteria and software should be used to control obsolescence. Conduct regular audits of core deposits.
- Accounts receivable. Sub-accounts for credit cards, body shop receivables and wholesale parts should be established. Monitor body shop and employee receivables and wholesale parts. Implement a credit policy with credit restrictions and collections programs. Limit those who can approve credit limits on commercial accounts.
- Cash accounts. Use zero balance and sweep accounts to minimize idle cash. Any $0 payroll checks should be voided to prevent fraud and they should not have any taxes or deductions associated with them.
- Finance receivables. Set up individual schedules for each financing source to identify those that are slow paying.
- Warranty receivables. Assess the aged warranty receivables schedule. An average of three to five days between submitting claims and receiving payment should be kept.
- Other receivables. Auto dealers shouldn't underwrite loans to employees or family members. They should be transferred to a bank or finance company.

Effective asset management can help increase your dealership's profitability and put more money in your pocket. When we work with clients, we are always on the lookout for ways to ensure their money is working for them. If you would like to learn more about the services we provide to dealerships, please contact one of our specialists today.

Maximizing Net Profit

We all agree that selling vehicles and service must be your first concern; but to truly accomplish your goal of maximizing NET profit, you must finish the job by controlling costs or expenses. Both selling and controlling of expenses is best accomplished by concentrating on one problem at a time. That does not mean that you must first fix your sales problems before starting on expense control. It means setting priorities for each department and assigning each manager his top issues.

Cost controls are not the slash and burn practices of cutting advertising and payroll. This practice is just a knee jerk matter of expediency. Controlling costs is also not just cutting expenses. Real cost control is a consistent elimination of waste and inefficiencies. It is also spending money wisely so that your benefits produced meet or exceed your costs.

Successful cost control starts with an item-by-item analysis of every expense in your store. The questions to ask are: Is it wasteful, unnecessary or inefficient? Is it producing the desired gross?

As a matter of practice, even before completing the analysis of all expenses, first pick the low hanging fruit.

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Maximizing Net Profit

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Make the easy changes that produce an immediate benefit. If you make a change today, which effect is seen on tomorrow's DOC, this will motivate you and your employees to stay focused on your goals.

The following questions are to help jump start the process. These are not the only questions to ask; you probably have hundreds of your own.

- Are job descriptions used to make sure you need each employee, or do you use each employee to determine job descriptions?
- Do you have enough cooperation between department managers?
- Would programmable thermostats help in controlling utilities?
- To whom do you provide cell phones?
- Are expenses allocated properly to determine real costs and department profits?
- Are competitive bids received for services; i.e., insurance, telephone, computers and supplies?
- Does someone in management always talk with each customer before he/she leaves?
- Are you spending too much time waiting for new customers and ignoring old customers?
- When were reconditioning procedures last checked for efficiency and cost?
- Are you retailing good, cheap vehicles rather than wholesaling?
- Are you planning your own advertising or just taking what the ad salesman gives you?
- Are you promoting the sale of overage parts?

We can help you with the process. If you are diligent and accept our recommendations, then you are sure to maximize your NET profit.

Profit Drivers has been created to serve your needs. We are available to answer any questions you have regarding your business or personal affairs. If there are topics you would like to see covered in ***Profit Drivers***, please let us know.