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Trend spotting

Good news for franchised car dealers! It looks like the franchised dealers are finally starting to gain some ground on independent automotive repair shops. In the most recent financial reports, publicly traded auto dealers showed an average same- store sales increase of 5.4% and gross margin improvement of about 0.3% in their parts and service segment. It looks like the vehicle repair market is splitting between franchised auto retailers and low end repair chains like Midas, Monro, and tire stores, with those shops in the middle, trying to be everything to everyone, like Pep Boys and Strauss Auto getting squeezed. To wit, Midas observed a 5% difference between its stores that were active tire stores (defined as selling one tire a day), and those stores that were not active in selling tires.

With **Mazda's** announcement that it will build a hard-top convertible Miata MX-5, the trend toward retractable hard tops is gaining momentum. Pontiac has a hard top in the works for its Solstice, Audi is working on one for the TT, and BMW is working on a hard top option for its Z-series roadsters.

Chrysler is planning more diesel engines. The new Chrysler Sebring mid-size sedan will be available with a diesel engine in Europe and possibly North America within another year. This is a first for Chrysler in this market segment. The 2.0-liter engine will produce 140 horsepower and be coupled with a six-speed transmission, one of four power train options planned for the North American version of the Sebring.

Car dealers and the law

California car dealers brace for continuation of auto lease test case

By Aaron Jacoby, Esq. and Jeffrey Tanzer, Esq.

Negative equity and trade-in payoff adjustments are at the heart of this case which has been filed against virtually all franchised car dealers in California.

What is known to dealers in California as the Trygar case was filed as a class action by the attorneys from the firm of Masry & Vititoe, of Erin Brockovich fame, against all dealers in the State of California. The lawsuit is back on the court calendar for a status conference on August 23, 2006 to determine the future of the case.

The good news for California dealers is that on July 24, 2006, the California Supreme Court held that the State's Proposition 64, the dealer-backed modification to California's unfair competition law, does apply to cases that were already pending when it took effect. However, in an interesting twist to this good news, in a companion case decided the same day, the

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Court also decided that if a plaintiff, like Trygar, lacks standing under Proposition 64, it may be possible to amend the complaint so that lawyers can find and add a new plaintiff to cure the "problem."

At the status conference, attorneys will discuss the application of the Supreme Court rulings to the Trygar case. Lawyers for the dealerships will assert that the plaintiff no longer has standing to pursue the matter against the Keyes dealership, the lead dealer defendant, or any dealer due to lack of standing and that, given that a summary judgment disallowing any order of restitution in this case as already been obtained, the matter should be dismissed. Mr. Trygar's lawyers will argue that he continues to have standing to pursue the remaining class issues regarding non-disclosure of negative equity and that, if not, that counsel has a right to conduct discovery to find a new plaintiff to allow a fourth amendment of the Complaint to keep the matter alive.

Case history

The Trygar Case grew out of a prior action in which Louis Trygar initially sought relief only against the Keyes European dealership (Keyes). At that time, Keyes, like most other dealers, used a "Trade-In Pay-Off Adjustment" form (PAF), which stated that, if the pay-off balance on Mr. Trygar's trade-in exceeded the estimated amount, the customer would pay the additional amount. In the case, Mr. Trygar alleged that Keyes's use of this form somehow violated the Vehicle Leasing Act (VLA) and the unfair competition law (UCL).

Mr. Trygar obtained summary judgment on the VLA claim in his favor, arguing, in substance, that when he leased a vehicle from Keyes in 1999, the parties executed both a lease contract and a PAF relating to his trade-in vehicle; that the two forms were "separate" documents; and that use of such "separate" documents violated the requirement of California law that "Every lease contract shall . . . contain in a single document all of the agreements of the lessor and lessee with respect to the obligations of each party." Mr. Trygar did not move for adjudication of his UCL claim.

Mr. Trygar subsequently commenced what has become known as the Trygar Action by filing a class action complaint against the Keyes dealership and about a dozen other defendants. After various amendments and orders, another case was consolidated with the Trygar Action and assigned to Judge Mohr in Los Angeles. Mr. Trygar's VLA and UCL claims from the Van Nuys case were duplicated in the Trygar Action as the second and third causes of action, and asserted against the Keyes store only.

A thousand dealers drawn into the case

A first cause of action – for unfair competition based on alleged VLA violations – is asserted by Mr. Trygar and three other lessees against the Keyes dealership and more than one thousand other dealers, purportedly in individual and representative capacities, and on behalf of a class. The three other dealerships involved in the transactions with the three additional named customers are Browning Mazda, Sierra Toyota, and Miller Nissan.

After the filing of a Second Amended Complaint in July 2001, discovery was directed toward Trygar and Keyes personnel, and the Court ordered the parties to submit motions for summary adjudication to resolve issues relating to Keyes's use of the PAF, and potential remedies arising there from. During this period, a Third Amended Complaint was filed that apparently expanded the scope of the action to include an inquiry into whether Keyes and other dealers improperly failed to disclose "any outstanding prior credit or lease balance" on lease contracts, which disclosure is required under state law. Since this new claim has not been litigated, the precise nature of Mr. Trygar's assertions in this regard is somewhat uncertain.

Motions for Summary Adjudication

In 2003, both Mr. Trygar and Keyes filed motions for summary adjudication directed at liability and remedies issues arising from the use of a PAF.

Amicus briefs were also filed on behalf of other dealer-defendants. As a consequence of the filing of the Third Amended Complaint, which raised negative equity issues for the first time, the scope of the motions expanded beyond what was originally contemplated, and addressed a "narrow" alleged negative equity issue pertinent to the use of a PAF – specifically, whether an amount owed by a customer when an actual pay-off balance exceeds the pay-off balance estimated in a PAF, could or should be disclosed as an outstanding prior credit or lease balance. The motions did not address any alleged "larger" negative equity issue, e.g., whether an over allowance on a trade-in requires any further disclosure on a lease.

The hearing on the motions was postponed while lengthy settlement discussions were conducted. These discussions were ultimately unsuccessful.

On September 14, 2004, after lengthy hearings and post-hearing briefs, Judge Mohr issued an order granting Keyes' motion for summary adjudication on the issue of restitution. In substance, the court ruled that, whether or not customers owed money to Keyes as a consequence of a single document rule violation, they were not entitled to restitution of additional sums that were collected for a high pay-off balance on the customer's prior vehicle owed to a third party lender. The Court did not rule on any negative equity issue.

Subsequent proceedings

For a variety of reasons, including the passage of Proposition 64 in November 2004, there has been no further substantive litigation in the Trygar Action since Judge Mohr's September 2004 ruling. Under Proposition 64, a private person has standing to sue under the Unfair Competition Law only if he or she "has suffered injury in fact and has lost money or property as a result of such unfair competition." The amendment also limits so-called actions on behalf of the "general public"; representative actions are now only permitted to the extent that the procedural requirements of class actions can be met. Following the passage of Proposition 64, however, it was uncertain whether its provisions are retroactive (and thus applicable to the Trygar Action). As discussed below, that question has now been resolved by the California Supreme Court.

After Judge Mohr's ruling, plaintiffs sought leave to conduct class certification discovery directed at both PAF and negative equity issues, and amendment of the complaint to address such matters as a "refund class," Plaintiff Trygar's apparent lack of standing under Proposition 64, and the addition of representative plaintiffs with regard to other dealerships. After extensive briefing on these matters, as well as on the retroactive application of Proposition 64, the court ultimately stayed the Trygar Action in its entirety, pending the Supreme Court's resolution of the retroactivity issue. ❖

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