

## The Growing Threat of Forced Disclosure of Association Communications – Supplement

### **Slide 3 – The Role of Dealer Associations**

- Education
- Advocacy
- Communication

The three bullet-points above summarize primary functions of dealer associations. There can be other tasks as well, but the three areas are expounded upon below.

- Education
  - Dealer associations are involved in educating their membership, the public, legislators and regulators.
  - For example, dealer associations often conduct training and/or seminar type activities for their membership when changes in a law or regulation occur.
  - Dealer associations may also work to educate regulators (such as the state Department of Motor Vehicles) on industry issues. Or, a taxing authority on the impact of changes to state tax laws and/or use fees and how that practically impacts a motor vehicle transaction.
  - Finally, dealer associations also are involved in more broad education through auto shows and other public activities.
- Advocacy
  - Dealer associations often advocate for dealer interests at the local, state and federal level. A simple example is the work NADA performs on the multitude of dealer issues that it addresses on a daily basis. State and metropolitan dealer associations engage in similar activities.
  - Advocacy efforts often occur in face to face meetings with policy makers, or through written position papers and/or draft legislation/regulations on an issue.
  - Dealer associations may employ lobbyists to assist in their efforts.
- Communication
  - Communication is inherent in an associations work. Whether the work is administrative, educational, or advocacy, the association must communicate in order to accomplish its goals.
  - The communication may take the form of verbal, telephonic, e-mail, memorandum, position paper, draft regulation, etc.

### **Slide 5 – OEM Constitutional Challenges**

- Constitutional Challenges of State Dealer Statutes
  - *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox, Co.*, 439 U.S. 96 (1978).
  - *Deere & Company v. State*, 130 A.3d 1197 (N.H.)
  - *Alliance of Auto. Mfrs., Inc. v. Currey*, 610 Fed.Appx. 10 (2d Cir. 2015)
  - *Association of Equip. Mfrs., v. Burgum* (Case No. 1:17-cv-00151 (D. N.D.))

- *Alliance of Auto. Mfrs., Inc. v. Jones*, Case No. 4:08cv555-MCR/CAS (N.D. Fla. Sept. 11, 2013)
- *Tesla Motors, Inc. v. Johnson*, Case No. 1:16-cv-1158 (W.D. Mich. 2017)
- *Lupient Milwaukee, Inc., v. Nissan North America, Inc.* Case No. 18-cv-02023-JPS (E.D. WI. 2018)

The cases cited above are some of (but not all) of the manufacturer challenges to State dealer statutes. The most common challenges involve the Contracts Clause, the Dormant Commerce Clause, Equal Protection and Due Process.

Some, but not all, of the cases above have been the basis of attempts to obtain internal, associational documents in an effort to show that the legislation was passed for a constitutionally infirm reason. For example, in the Florida warranty case (*Alliance of Auto. Mfrs., Inc. v. Jones*), the Alliance sought the information to show that the law was passed for an “improper purpose” under the Contracts Clause. In the more recent *Tesla Motors, Inc.* case in Michigan, the association information was sought to show “discriminatory intent” under the Dormant Commerce Clause.

#### **Slide 9 – What Now?**

- Association Activity
  - Business as Usual?
  - Duty to Maintain Records?
    - Board Minutes
    - Emails
    - Bill Drafts
    - Lobbying Strategies
    - Outlook Calendar
    - Texts

In light of the recent cases that have permitted the discovery of internal association documents relating to legislative activities, the question becomes how associations will conduct activities moving forward. For example, is there a record retention requirement for any of the documents relating to legislative activities? If there is not a record retention requirement for some documents, is there a periodic deletion that occurs with files? Or, are activities conducted in-person?