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Social Media Sells Cars:

Implementing a Successful Social Media Program Can Prevent Unfair Competition

By Christian Scali
The Scali Law Firm

"If Facebook were a country, it would be the third largest in the world."[1] In the last few years, social media has conquered the Internet realm; and it continues to increase in importance, with even more new social networks expected in 2014. As a result, many employers encourage or require their employees to obtain and actively use social media platforms to attract new customers, and maintain the interest of current ones.

By now, almost every business has some form of social media presence. And they're wise to have it; 97% of consumers use social media when researching goods and services, with 47% of consumers choosing the Internet as their favorite method of shopping.[2] Digital marketing statistics point to one conclusion – social media is critical for businesses that want to thrive in the contemporary marketplace.

The marketplace for cars is no exception. According to the Automotive Buyer Influence Study conducted by Polk and AutoTrader.com, consumers who use the Internet to shop for a new vehicle spend an average of 18-19 hours researching. Even more telling, consumers of both new and used vehicles spent 60% of shopping time online.[3] In 2012, DriverSide and Dealer.com partnered with GfK Automotive Research to examine the impact of social media on automotive sales. They found that:

- Of those car buyers who use Facebook, 27% have used it, or will use it, as a resource while shopping for their new vehicle;
- 41% of social-media users saw a post that caused them to consider a brand or model that they hadn't considered before;
- Social-media use and engagement among consumers who consider themselves loyal to at least one dealer or manufacturer is higher than among those who have no such loyalty; and
- The experience consumers have with a product or service after they have purchased it continues to form their opinions and these opinions are usually shared with others via social media, significantly influencing the purchase decision of others.[4]

Simply put, to remain competitive, auto dealerships have had to embrace the importance of social media outlets such as Twitter, Facebook, LinkedIn, Youtube, and Pinterest.

Marketing via social media isn't without its challenges, though. How should you, as an employer, deal with the overlap between personal and professional online activities? What happens to an employee's social media accounts and their followers when he or she leaves and goes to work for a competitor or starts a competing business? The departing employee likely assumes that

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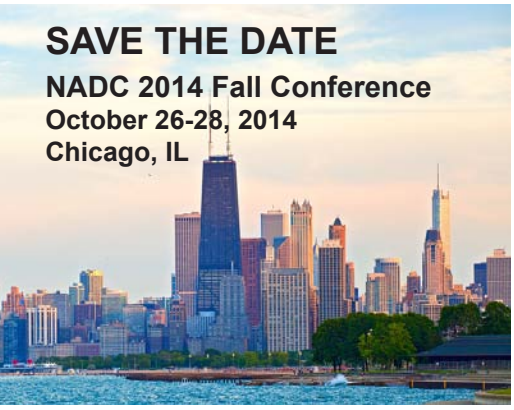

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these accounts and followers belong to him or her. But the company likely assumes that these accounts and their followers belong to it, since the requirement that its employees open and maintain accounts is an extension of its branding effort and, in some cases, as a source of advertising revenue. It is best to answer these questions before a conflict arises; and the best way to do that is to have a clear policy on the ownership of social-media accounts and contacts when they are used by employees for business purposes.

Litigation over who owns social media accounts is a fairly recent phenomenon, so the law in this area is still evolving. The leading case on the issue, *PhoneDog v. Kravitz,* Case No. C 11-03474 (N.D. Cal.)[5], settled and therefore offers only limited guidance. But the case survived two motions to dismiss, and the court's rulings in those motions provide some direction on how an employer can establish ownership of social media accounts and damages caused by the theft of these accounts.

In *PhoneDog,* the District Court in the Northern District of California was poised to answer the questions of who owns Twitter accounts and what they are worth. It was the first lawsuit to claim that Twitter accounts and their followers belonged to the company and to allege a value per Twitter follower ($2.50 per follower, per month). PhoneDog is a mobile-reviews web resource that obtains its income from paid advertisements on its website. It uses a variety of social media to generate page views on its website, as well as to market and promote its services. To generate page views, the company requests that its employees maintain Twitter accounts to use in the scope of services they perform for it. PhoneDog agents tweet links directing followers of its various Twitter accounts to its website, which in turn drives traffic to the company's website and generates advertising revenue for PhoneDog.[6]

PhoneDog alleged that there are details about its relationship with its advertisers, Twitter followers, and website users that are trade secrets, including the passwords to its Twitter accounts. Product reviewer Noah Kravitz, as part of his job, submitted content to the company which was transmitted to its customers via its website and the Twitter account that Kravitz used and maintained. He had access to the Twitter Account's password.[7]

PhoneDog alleged that Kravitz suddenly resigned his position in October 2010. Following his resignation, the company asked Kravitz to stop using the Twitter Account. Instead, he used the account's password to change its handle and continued to use it. Kravitz then obtained a full-time position at a competing business and continued to use the Twitter Account under the new handle to promote his new employer's services to PhoneDog's customers, the 17,000 followers of the Twitter Account.[8]

PhoneDog alleged claims for misappropriation of trade secrets, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and conversion. To establish its interference with prospective economic advantage claim and to establish damages, the company tied its method of obtaining advertising revenue to the alleged redirection of advertisers to Kravitz's new employer that resulted in reduced website traffic. The court found this sufficient to satisfy pleading requirements.[9]

Cases like *PhoneDog* highlight the importance of having a written agreement as to the ownership of social media accounts and contacts, as well as having a formula to value social media. For example, in *Ardis Health, LLC v. Nankivell,* Case No. 11 5013 (NRB) (Oct. 19, 2011, S.D.N.Y.), a former employee refused to return the access information for Ardis Health's social media and related websites. Relying on an agreement the employee signed, Ardis was able to obtain a preliminary injunction compelling the return of the stolen information.[10] Similarly, in *Eagle v. Morgan,* Case No. 11-4303, E.D.Pa., the Court relied on the absence of such formalized policies at the company, despite the company's knowledge that the absence of such policies was problematic, as a basis for finding it engaged in wrongdoing by attempting to keep a former employee's LinkedIn account, modify it for its new employee, and divert potential connections.[11] Therefore, at the inception of employment, employees should enter a written agreement with formalized policies that clearly communicate and define how social media accounts will be handled.

In addition, the limited case law regarding these issues has set forth several factors courts may consider when determining the ownership of social media accounts, which include the extent to which the account was created for the employer's benefit, who set up the accounts, who directed what content to include in the account, were the accounts created before or during employment, who had access to the

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accounts and passwords, how the account was associated with the employer's name or brand, the value of the followers, fans, or connections, and other indicia of ownership to determine who owns the account. Equally important, employers should find comfort in the fact that the trade secret status of "friends" or "followers" or "connections" was affirmed in March 2012 by a federal court in Denver, Colorado in *Christou v. Beatport, LLC,* No. 10-cv-02912-RBJ-KMT, 2012 WL 872574 (D. Colo. Mar. 14, 2012).[12] Therefore, at the beginning of employment, employers should also incorporate explicit language addressing these factors and information into offer letters, employee handbooks, and job descriptions as a means of avoiding litigation and protecting their social media assets.

A written agreement establishing the ownership of social media accounts may serve an additional purpose for employers, particularly those operating in California where courts often prohibit non-compete clauses. In the majority of states, courts generally recognize and enforce a non-compete agreement that is reasonable in scope and duration. But, for those employers operating in a state that limits the enforceability of non-compete agreements, such as California, an agreement that protects the employer's social media brand and assets can be crucial to avoiding later disputes over the dealership's content and contacts by estopping former employees from competing and misappropriating assets without reliance on a "non-competition agreement." Even in states with more with more limited restrictions on non-compete agreements, social media contracts can expand a dealer's rights beyond a non-compete agreement's permitted scope.

Dealerships should be mindful that fitting social media into your company's intellectual-property framework requires some forethought. To obtain trade secret status of passwords on social media accounts – and thereby protect access to the account's followers – adequate steps must be taken to maintain their secrecy. Additionally, to establish that the passwords and accounts are the company's confidential information and not the employee's, employment agreements should clearly establish that these accounts are for business use only, not for personal use, and should spell out that the passwords, the handles, the accounts and the followers they generate are the confidential property of the company. Moreover, such policies should require employees to return all social media logins and passwords at the termination of employment. Companies may also want to consider registering or creating the account themselves and granting a limited license to the employee.

One problem for dealerships seeking to protect the value of their social media is the post-hire implementation of these policies. In those cases, it can be difficult—but not impossible—to delineate between personal social media accounts and business personal accounts, particularly with long term employees, and consequently to identify what belongs to the employee vs. the employer. A handful of states, like California, add an additional layer of complexity to these efforts by restricting employer or potential employer access to employee and applicant social media accounts. For example, California law prohibits an employer from requiring or requesting an employee or applicant for employment to disclose a user name or password for the purpose of accessing personal social media to access personal social media in the presence of the employer, or to divulge any personal social media. It also prohibits an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by a violating employer. Labor Code § 980. However, even in California, implementing a solid social media program, which includes properly drafted social media, invention and confidentiality agreements and metrics on the value of social media, gives a dealership a remedy for loss, or unauthorized use, of its valuable social media accounts (and more importantly, its fan-base of customer and potential customer contacts) when a long-term employee leaves to work for a competitor.

It is very upsetting to dealers when a key employee leaves to work for a competitor down the street or a few miles away. I often get calls from dealers asking whether they can do anything to stop a competing dealership or former employee from contacting the customers or customer-base that their sweat equity has built. Former employees often maintain customer contact information through their social media accounts, *e.g.,* friends, connections and contacts, and keep in contact with them after they leave their employment. In the absence of evidence of theft of a customer list, it is generally very difficult to enjoin a former employee's communication with a dealership customer or potential customer. Thus, adopting a good social media program can give a dealer additional means of protecting itself from unfair competition by clarifying who owns social media contacts and connections (dealership customers and potential customers), such that a dealer may enjoin a former employee or competitor's communications with its customers or potential customers even in the absence of a theft of a traditional customer list. ■

Christian Scali is the principal of The Scali Law Firm. He and his team offer full legal services to franchised and independent auto dealers, groups and publics, among others, with a presence in California in all areas from compliance advice and counsel to litigation and class action defense in areas that include: advertising, anti-trust, BHPH, F&I, franchise operations and disputes, labor and employment, intellectual property and competition, privacy and warranty. Mr. Scali is an associate member of the CNCDA, a delegate for IADAC and is on the Trade Secret Committee of the AIPLA. He recently co-authored the non-compete and confidentiality agreements chapter for an upcoming PLI publication.

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President's Message

Oren Tasini
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At the NADC we are always striving to improve the organization for the benefit of its members. To that end we are currently engaged in strategic planning to formulate a strategic plan to best meet the needs of our members. You should have received a survey by email about the NADC which I encourage you to complete. It will take less than ten minutes and will be of great benefit to our efforts.

Our 10th Annual Member Conference is fast approaching and as always we will have a broad and informative group of panelists. It's not too late to register and for those of you weary of the cold weather, it is a great time to be in South Florida.

It is hard to believe that my presidency is almost one year old. Once again, I welcome any questions, comments or concerns you may have. I look forward to seeing all of you at the Annual Conference, April 27-29, in Palm Beach, FL. ■

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The Real and Present Danger to the Automotive Franchise System May Not Necessarily be Telsa

Renegade Brokers and Leasing Companies Serve as "Pump-In Satellites" for Remote Dealers

By Leonard A. Bellavia, Esq.
Bellavia, Blatt, Andron & Crossett, PC

Introduction

If it were happening during the Prohibition era, they would be called "rum-runners," however, because the selling or leasing of cars is not so nefarious, a less disparaging name applies – "auto broker." An auto broker or auto buying service is a person or entity that engages in the business of brokering where there is an arrangement under which such broker, for a fee, provides (usually to an individual consumer) the service of arranging, negotiating, assisting or effectuating the purchase or lease of a new or used motor vehicle not owned by such broker. What does this mean in plain English? An auto broker helps retail customers find cars from dealerships and acts as the agent for such customer for the purpose of negotiating and purchasing or leasing of the vehicle for a fee or commission.

Although the advent of broker/leasing companies as a business is not a recent phenomenon, there have been a proliferation of store-front style broker/leasing companies that are delivering new vehicles in the very back yards of franchised dealers—frequently at locations literally right next door to them. Furthermore, while there is a prevalence of broker/leasing companies in Metro New York and New Jersey, the successes realized by these brokers/leasing companies has resulted in the expansion of their footprint to other regions, including California, Florida and New England.

The purpose of this article is to raise awareness of the issues related to the wide-spread and growing problem of renegade automobile brokers/leasing companies working in conjunction with certain franchised dealers to engage in the unlawful and unregulated sale and lease of new motor vehicles. So while Tesla's proposed sales model dominates the headlines based on concerns of how it may impact the franchise system in the future, the actions of renegade brokers/leasing companies pose an immediate risk to the continued existence of franchised dealers.

What's the Big Deal?

Aside from violating numerous statutes and regulations designed to protect dealers and consumers (as discussed in greater detail below), the practices of outlaw brokers/leasing companies are severely detrimental to each manufacturer's dealer network and brand. Specifically, while some franchised dealers pay substantial real estate taxes, incur enormous overhead and operating expenses, and are subject to time consuming and expensive federal, state and local compliance regulations, brokers/leasing companies operate with (NOTE: if you keep the Latin, it's minimis, not minimus) minimal overhead and with a total disregard for the regulatory scheme. In addition, many franchised dealers have been severely impacted by these illegal "pump-ins" as reflected in reduced sales figures. As a result, a manufacturer's sales effectiveness scores and indices have been rendered meaningless due to the complicity of manufacturers in permitting out-of-state dealers to continually "pump-in" vehicles to PMAs located a great distance from their own. Indeed, a manufacturer cannot legitimately measure the sales effectiveness of an urban dealer that permits multiple out-of-state dealers working with brokers/licensing companies to "pump-in," scores of a vehicles on a daily basis.

Further, brokering also has a significant impact on both a dealership's bottom line and its valuation. Dealers that are victims of brokering

lose considerable blue sky value because of lost sales. Assuming $2,500 gross profit per vehicle, a dealer losing 100 sales each month to brokers could mean the gross loss of $3,000,000 annually. Utilizing a multiple of five to calculate blue sky value, a dealer that is negatively impacted by this broker/leasing company conduct could face a $15,000,000 diminution of the blue sky value of his or her dealership.

Likewise, this practice has serious implications for a buyer of a dealership, too. Dealerships that wrongfully sell through brokers are overstating their sales. The broker's activity artificially inflates and increases a dealership's planning volume thereby skewing the sales expectations of incoming dealers. If the brokering business dries up, the buyer will be unlikely to achieve the sales objectives he bargained for at the time of sale. Further still, a dealer may have agreed to build facilities based on units in operation when such units are, in fact, sold through brokers. Given the heavy reliance on empirical data in the automotive retail industry, the distortion of that information has significant and far-reaching consequences for the industry.

It bears further noting that the harms caused by these renegade sales practices are not limited to just consumers and dealers, but also negatively impact manufacturers. While a manufacturer may feel that it benefits in the short-run from the sales activities of these brokers/licensing companies insofar as they maintain or even increase market share (which underscores manufacturers' acquiescence to this unlawful practice), it ultimately causes harm to brand loyalty in the long run. Unlike franchised dealers, brokers gain nothing from promoting brand loyalty and thus have no incentive to cultivate customer goodwill towards the brand. The result is that customers do not develop any allegiance to the manufacturers, thereby damaging the brand's long-term viability.

As an additional point, dealers in some cases identify the brokers they transact with on their Manpower Reports. In addition to misrepresenting the role of these individuals to the manufacturer, these designations entitle the unlicensed brokers to commissions and incentives intended to benefit the dealer network and their sales representatives. Indeed, the manufacturers did not implement these programs with the intent of rendering payments to renegade brokers.

The Role And Motives of Franchised Dealers Assisting Renegade Brokers/Leasing Companies

Although there are many moving pieces to this rapidly growing cottage industry, the reality of the broker/leasing company business model is that franchised dealers have brought it on themselves. To be sure, broker/leasing companies are obtaining new vehicles from franchised dealers who are located generally out-of-state or from remote in-state market areas. Franchised dealers do not sell or lease new vehicles to broker/leasing companies, but rather sell or lease such vehicles (on their own bill of sale) directly to retail customers who contact or walk into storefront broker/leasing company locations located hundreds of miles away.

Given that this practice is thriving in certain parts of the country, one glaring question raised by this phenomenon is – why do franchised dealers sell or lease vehicles to brokers at little or no profit? There are a myriad of reasons, none of which suggest that there is a direct profit to be made by the selling/leasing franchised dealer. Instead, this practice appears motivated by the need to pump up retail sales volume to achieve stair step thresholds, to curry favor with the franchisor in order to obtain a desirable model mix of vehicles, to bolster sales effectiveness scores, and to enable dealers to document a high volume of retail deliveries under the dealership's name.

The Enablers – The Manufacturer Who Turns a Blind Eye to This Practice

Adversely affected dealers are quick to point out that all manufacturers are implicated in this practice as franchised dealers of every line-make are working with broker/leasing companies on a systematic basis. Furthermore, these sales or leases are invariably financed by the captive finance arms affiliated with the manufacturer. While a manufacturer may plead ignorance in the face of this problem, the information readily available to the manufacturers demonstrates their awareness of, and tacit cooperation with, this practice. Through monthly Pump-In Reports, a manufacturer can easily monitor the amount of

sales and leases to customers that allegedly originate from franchised dealers located outside their respective PMA. As such, it is clear that manufacturers are not only aware of this practice, but have been knowingly condoning it to the detriment of their dealer network and consumers. In this respect, how could a luxury, high-end manufacturer (*i.e.,* Mercedes-Benz, BMW) not find it odd that 100 new vehicles per month were being sold to Brooklyn customers by a Boston dealer?

Manufacturers also gather detailed information from their dealers, both for prospective customers and completed sales, which certainly enable them to identify these transactions. For example, many manufacturers require dealers to provide access to customer files, customer relationship management ("CRM") databases, and internet lead management ("ILM") tools to reconcile leads submitted to manufacturers with leads submitted to dealerships. Manufacturers with captive finance companies also collect significant information on consumers that apply for financing and purchase or lease vehicles.

In addition to data that is gathered directly from franchised dealers and customers, manufacturers also gather data from external sources that enable them to identify these conspicuous transactions. Manufacturers subscribe to third party resources that provide cross-sell and registration data on transactions conducted within each of their dealers' relevant market area. Collectively, this information allows manufacturers to obtain granular data on sales within a particular market area to determine whether one dealer has a disproportionate sales effectiveness in a particular market.

There is no doubt that manufacturers have sufficient resources and information available to them to flag extraordinary sales performance by their own franchised dealers that may be linked to brokering–provided they are interested in discouraging such activities. Factories aggressively enforcing anti-export provisions of dealer agreements by charging back dealers (even when they could have no legitimate basis to know that a delivered vehicle would ultimately be shipped overseas) brazenly permit dealers to operate satellite "broker" showrooms with impunity. Fear of losing market share to competing manufacturers, however, has caused manufacturers to purposefully look the other way when faced with this activity.

Federal and State Statutes and Regulations and the Dealer Sales and Service Agreement

Aside from the damage caused to their own franchised dealer network, this practice ultimately harms consumers. By permitting this practice to occur, a manufacturer is ostensibly allowing violations of multiple federal statutes and regulations with which broker/leasing companies rarely comply (*i.e.,* Telephone Consumer Protection Act 27 USC 277, the Red Flag Rule 16 CFR 681.1, Form 8300 Reporting 26 USC 6050I, Safeguards Rule 16 CFR 313.1, Disposal Rule 16 CFR 682.3, the Truth in Lending Act 15 USC 1601, the Consumer Leasing Act 15 USC 1667a, the Equal Credit Opportunity Act 15 USC 1691). For example, it is clear that many of these broker/leasing companies are routinely provided access to sensitive and confidential consumer information in violation of federal privacy statutes. Indeed, some broker/leasing companies are even given access to dealer computer networks, thereby compromising confidential consumer data as well as placing the manufacturer in danger of committing a serious security breach (*i.e.,* similar to a security breach recently suffered by Target Stores). At a minimum, it exposes the manufacturer to liability under the applicable federal and state statutes, most of which are strict liability statutes that do not require knowledge to hold a manufacturer responsible..

Many brokers prominently feature a manufacturer's trademark and logo in their advertisements and web pages. The use by a broker in an advertisement or web page of a manufacturer's trademark gives the broker the appearance of being an authorized dealer for a particular manufacturer or that the broker is licensed or affiliated with a particular manufacturer. This conduct confuses consumers as to whether the brokers are authorized dealerships for the manufacturer. The unauthorized use of these trademarks/logos by the brokers constitutes a misappropriation of the manufacturer's intellectual property and goodwill, and would give rise to claims under 15 U.S.C. 1114 (trademark infringement) and 15 U.S.C. 1125(C)(1) (trademark dilution). Regrettably, however, manufacturers choose not address this

conduct, rarely ever seeking to enforce their proprietary rights against the infringing broker/leasing companies.

A manufacturer's acquiescence in this activity also constitutes a violation of state franchised motor vehicle dealer statutes that are designed to prohibit the operation of unlawful satellite dealerships. *See, e.g.,* N.Y. Veh. & Traf. Law § 463(2)(cc); Cal. Veh. Code § 11700; WI STATUTES 218.0119(2); SC CODE 56-15-310(A). Specifically, dealers that transact with broker/leasing companies can be found to have effectively established an unauthorized satellite location (*i.e.,* the broker's business location), which violates both their own franchise agreements and state law requirements regarding licensure. *See, e.g.,* N.Y. VEH & TRAF. LAW § 415(3). Armed with a dealer's inventory of vehicles, a broker conducts sales activity from his or her premises, including soliciting customers, showing vehicles, negotiating transactions, consummating sales, and delivering vehicles. This activity certainly violates the requirement that dealers conduct all sales activity from the dealership's premises or from premises specifically authorized in the dealer agreement. Likewise, this activity is doubtless in violation of state motor vehicle statutes that require sales activity to occur at licensed facilities.

Other statutory violations that arise from the unauthorized operation of a satellite location are state motor vehicle franchise statutes that prohibit the placement or relocation of competing dealerships within the relevant market area of existing franchised dealers without the prior approval of the affected dealer, the particular state motor vehicle commission and the manufacturer. See N.Y. Veh. & Traf. Law § 463(2)(cc)(1); VA CODE § 46.2-1569(4); SC CODE § 56-15-46.

Furthermore, manufacturers who ignore unauthorized satellite locations or permit brokering activities may be held liable to dealers adversely affected by such conduct under a host of different theories or claims including, but not limited to, the constructive termination of a dealers' franchise, the breach of the covenant of good faith and fair dealing required under a dealer agreements, and tortious interference with the franchise agreement.

To the extent that a dealer is suffering a severe economic impact due to the manufacturer's complicity with this renegade activity, a manufacturer's conduct may also amount to a constructive termination of such dealer's franchise in violation of state motor vehicle franchised statutes. While in the ordinary course, a dealer receives a notice of termination from the manufacturer and then files a lawsuit claiming that the manufacturer is wrongfully seeking to terminate its franchise without due cause, some Courts have recognized a dealer's claim of constructive termination of its dealer agreement without due cause. In this respect, a dealer does not need to rely upon a formal termination notice from a manufacturer if the actions of the manufacturer have the effect of destroying the dealer's business. Specifically, Courts have

held that the relevant inquiry is whether the above-alleged actions of the manufacturer could and did result in a substantial decline in the dealer's revenues or the destruction of its business. See *Petereit v. S.B. Thomas, Inc.,* 63 F.3d 1169 (2d Cir. 1995) (Second Circuit, in construing the Connecticut Franchise Act, finds that a constructive termination of a franchise "may be found when a franchisor's actions result in a substantial decline in franchisee net income."); *Crest Cadillac Oldsmobile, Inc. v. General Motors Corporation,* 2005 WL 3591871 (N.D.N.Y. 2005) (plaintiff automobile dealer alleged "constructive termination" claim under Section 463 of the New York Dealer Act by alleging that defendant manufacturer's conduct, among other things, "destroyed the value and transferability of plaintiff's Oldsmobile franchise").

Applying this reasoning to the broker/leasing company at issue, it certainly can be argued that the manufacturers' conduct in permitting the broker/leasing conduct is tantamount to a constructive termination of the franchise because it is resulting in a substantial decline in the dealer's revenues or the destruction of its business.

Finally, to the extent that any captive finance company affiliated with a manufacturer is involved in perpetuating these broker/leasing company transactions, both the captive finance source as well as the manufacturer could be found liable under many state franchised motor vehicle statutes. As just one example, § 463(2)(u) of the New York Dealer Act provides that it is unlawful for a manufacturer "[t]o use any subsidiary corporation, affiliated corporation, captive finance source or any other controlled corporation, partnership, association or person to accomplish what would otherwise be unlawful conduct under this article on the part of the franchisor." As such, a manufacturer will not be able to escape liability for the actions of your captive finance affiliates.

What Can Dealer Counsel Do to Protect its Dealer Clients?

From a group perspective, dealers of a similar franchise should unite and demand that factories enforce dealer agreements prohibiting unauthorized facilities. Automobile trade associations can also lobby their state governments for better enforcement of existing laws that are being violated by broker/leasing companies and for additional legislation that would prohibit certain broker/leasing company activity. State dealer associations that are concerned that they may expose themselves to liability or allegations of illegal antitrust related conduct should note that Noerr-Pennington doctrine is a judicially created doctrine that is a defense to an antitrust claim against trade associations because of lobbying activities or other requests/petitions to government agencies for legislative or governmental action. These state dealer associations, however, should not get involved in urging the respective OEMs to enforce their dealer franchise agreements by eliminating dealer sales of new autos to unfranchised auto brokers.

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As a valued member of NADC, your opinion matters greatly. Your responses to the 2014 Membership Survey will help shape the direction of our activities, ensuring we remain a truly member-driven organization. Please contact Executive Director Erin Murphy, emurphy@dealercounsel.com, with questions or for a link to the survey.

Stated otherwise, an automotive trade association is permitted to lobby state and federal law government authorities and regulatory agencies to enforce existing laws ensuring that consumers are protected in the purchase of new cars by strengthening existing legislation so that only franchised auto dealers are making those sales. These lobbying efforts are permissible as any antitrust claim based on these efforts would fail, because lobbying is clearly immune from antitrust liability and protected by the First Amendment to the U.S. Constitution. The immunity from antitrust liability for lobbying activities arises out of the Noerr-Pennington doctrine, established in *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). Even if lobbying efforts are successful in prompting governmental action that eliminates competition from unfranchised auto brokers, trade association lobbying efforts would remain immune from antitrust liability, as the elimination of competition would be the product of government action, which is outside the scope of the antitrust laws. *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365 (1991).

Conclusion

Although the brokering epidemic is most acutely felt in certain specific states, dealers from all over the country should be concerned. While the direct selling issue raised by Tesla is a theoretical one raising much controversy, what MAY happen if the Tesla nightmare scenario were to play out is all too real right now for franchise dealers in New York, New Jersey, California, and Florida. Simply stated, this renegade conduct that is so damaging to franchised dealers is starting to spread and, if left unchecked, will soon become a problem on a national scale, the significance and magnitude of which will jeopardize the franchise system as we know it. ■

Leonard A Bellavia is the Senior Partner of Bellavia Blatt, Esqs in New York. He serves as a member of the Board of Directors of NADC and is the Chair of its Litigation Section.

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