



McNees Automotive Dealership Law



*Your Mission, Your Goal
Your Lawyers*

AUTOMOTIVE DEALERSHIP LAW GROUP

The attorneys in McNees Wallace & Nurick's Automotive Dealership Group have been counseling automotive dealership clients since 1988 in a broad range of matters. The retail automotive business is laden with manufacturer demands and regulatory oversight. Dealers need legal counsel who have dealt with the unique issues arising from the purchase or

sale of dealerships and dealership real estate. We have a team of experienced advisors who understand the automotive business and provide effective representation and assistance in all matters affecting your dealership. Our experience has demonstrated that early advice and counseling will prevent a problem from developing into a formal dispute. When a formal dispute arises (court action, audit, licensure proceeding), the experienced counsel at McNees can guide you through the process.

UNDERSTANDING THE BUSINESS OF AUTOMOTIVE DEALERSHIPS

Buy/Sells

Whether it's the acquisition of a single point or sale of a dealer group, our attorneys have the experience and knowledge to guide you through a sale or acquisition. The automotive-specific aspects of a buy/sell (e.g., manufacturer approval, rights of first refusal, etc.) are well known to our attorneys.

New Points and Relocations

Pennsylvania dealer franchise law specifies the parameters for establishing a new point and for dealership relocations. Whether you are the new point or relocating dealer, or are facing a competing new point or a relocating competitor, we can advise you on the law and guide you through the rights and remedies available to you.

Dualing

Manufacturers routinely limit dealerships' ability to dual franchises and, in many instances, are demanding that dealerships un-dual franchises. A brand's poor position in the marketplace, or insufficient volume, makes it difficult for dealers to justify stand-alone dealerships. We can counsel you on the law in this area and assist you in making the best decisions, while also assisting you in educating your manufacturer on its duties and responsibilities to you.

Terminations

Has your dealership received a termination notice? Poor sales performance and the failure to meet agreed-upon facility requirements are the leading reasons for a manufacturer to seek termination. Manufacturers may not terminate a dealership without proving that they have just cause to do so. Dealers have a right to protest terminations to the Pennsylvania Vehicle Dealer Board and to continue to operate during the hearing and review process. We routinely counsel dealerships in these matters.

Warranty and Sales Incentive Audits

Sales incentive and warranty audits remain a mechanism for manufacturers to charge back dealers. Good relations with your sales and service representatives are unlikely to be of help when responding to chargebacks resulting from audits, because the auditors are separate from the manufacturer's operational employees. The Vehicle Dealer Board and Pennsylvania's Commonwealth Court have considered these issues and laid the foundation for what is and is not permissible in audit chargebacks. We can assist you in educating the manufacturer on the state of the law and in challenging unwarranted chargebacks.

Consumer Protection

If you are selling cars, you inevitably will have an unhappy customer, even if it is only a case of buyer's remorse. Customers have a lot of outlets to complain to – the Attorney General's Bureau of Consumer Protection, the Better Business Bureau, any agency that regulates you, and private attorneys. We know the consumer protection laws and regularly deal with the regulators who oversee dealerships.

Advertising

Whether you are using radio, newspaper, television, mailers, or the Internet to communicate with buyers and prospective buyers, the same state and federal laws relating to advertising apply. Pennsylvania's Office of Attorney General regularly scrutinizes and monitors automotive dealership advertising practices. We review and edit advertising to help dealers avoid enforcement actions. We also counsel dealers facing enforcement because of non-compliance with advertising regulations.

Licensure Requirements

Automotive dealers have many licensure requirements – dealership licenses, salesperson licenses, inspection licenses, installment sellers licenses, tag agent licenses. We assist dealerships in dealing with unique licensing issues, and in securing, maintaining and updating licenses.

Banking Audits

The Pennsylvania Department of Banking actively audits automotive dealerships to ensure compliance with the Motor Vehicle Sales Finance Act. This often includes scrutinizing a dealership's leasing and buy-here/pay-here practices as well. Civil penalties and consequences for non-compliance in this area can be extreme. We can assist you in making sure you are in compliance and defend you when faced with enforcement action.

PennDOT Relations

Dealer plates, registration and titling issues, and inspection activities are three continuously active areas of any automotive dealership business, and licenses and privileges you do not want to be without. We can assist your dealership if it is faced with enforcement actions or other challenges in these areas.

State Police

The Bureau of Patrol, Vehicle Fraud Investigators routinely monitor dealerships and pursue enforcement actions for alleged violations. This can result in administrative enforcement as well as criminal actions. We routinely counsel automotive dealerships in these areas.

Leasing Operations

Considering a leasing operation? We can walk you through the do's and don'ts in leasing, to make sure you are in compliance.

Environmental Laws

Environmental concerns can permeate many levels of your business. You may be concerned with issues related to storage tanks and spray booth permits, possible leaks from in-ground lifts and floor pits/drains, asbestos and air conditioner certifications, waste disposal requirements, and regulatory reporting. Also, especially in transactions involving real estate, you may be confronted with conducting and interpreting property environmental audits, and managing potential cleanups. We have advised our dealer clients (buyers and sellers) on hundreds of these matters and can provide the experienced guidance to see you through.

Dealership Succession and Estate Planning

Planning for the future is as important as day-to-day operations. Your Dealer Agreement, Pennsylvania law and franchise relationships will all be involved in developing a sound business succession plan. We can assist and counsel you on entity structure, franchise issues and estate planning, including tax minimization.

Labor and Employee Issues

Whether it involves discrimination claims, wage and payment issues, compensation plans, hiring or firing decisions, FMLA and ADA issues, overtime exemptions, handbooks and employment policies, or union organizing attempts, our labor and employment lawyers have counseled and successfully represented numerous dealerships in resolving and preventing these types of claims. If you need help navigating the alphabet soup of governmental agencies (PHRC, EEOC, NLRB, OSHA, OFCCP, DOL, and L&I), or if your management team would benefit from training on sexual harassment avoidance, FMLA and ADA compliance, union avoidance, or any other topics of concern, we can help.

Dispute Resolution/Mediation

As the trend in the legal world moves away from courtroom actions, disagreements with a manufacturer are being subjected to mediation, arbitration, or other forms of dispute resolution. Internal appeals of manufacturer disputes, as well as mediation required where a dispute is going before the Pennsylvania Vehicle Dealer Board, are areas where we can provide assistance with direct appearances as your attorney, or to help a dealer prepare a strategy where a lawyer cannot attend. We have been successful in using the Pennsylvania franchise law protections as a tool to force a manufacturer to provide the dealer the protections and benefits guaranteed under the law in all levels of dispute resolution matters. We can help bring a dispute to a close in a reasonable fashion, and to allow the parties to move forward with their business relationship to sell and service vehicles, for the benefit of all.

Real Estate Matters

Real estate is a crucial element for all dealership operations. From the purchase or leasing of land, to navigating through the municipal approval process, dealership real estate issues present unique challenges different from those normally associated with commercial real estate. We routinely work with dealers in all aspects of the property acquisition process, as well as obtain approvals for new dealerships and expansions.

AUTOMOTIVE DEALERSHIP LAW TEAM



STEPHEN A. MOORE, CHAIR

General, Buy/Sell, Dealer Licensing Board, Franchise Litigation, Dealer Manufacturer Issues
717.237.5307 / smoore@mwn.com

Steve is the Chair of the McNees Automotive Dealership Law Group. He has been a member of the group since it was formed in 1988. During the course of his 30-year legal career at McNees, he has represented dealers in a wide range of matters involving licensure, franchise relations, and consumer protection claims, as well as counseling dealers on issues regarding business succession. Steve has represented dealers before the Pennsylvania Dealer Licensing Board, as well as state and federal courts in franchise termination, new point and relocation cases. Also, he has provided advice to both national and regional dealer associations, and assisted in drafting amendments to the Pennsylvania Board of Vehicles Act since 1996. During the last 15 years, Steve's practice has focused on buying and selling dealerships, shareholder and succession issues, antitrust and competition issues, and franchise relations with manufacturers, including termination threats and dualing issues.



BRUCE D. BAGLEY

Labor & Employment
717.237.5338 / bbagley@mwn.com

Bruce has been a member of the Auto Dealer Group since its inception. For many years, he has provided advice and counseling to dealers concerning various labor and employment-related issues, including avoiding unionization, defending dealers against employment discrimination complaints, and providing advice concerning wage/hour audits, the Family and Medical Leave Act, the Americans With Disabilities Act, drug testing, employee handbooks, and hiring and firing issues.



PETER K. BAUER

PennDOT, Bureau of Consumer Protection, State Police, Dealer Licensing, Dealer Manufacturer Issues
717.237.5460 / pbauer@mwn.com

Peter concentrates his practice in areas of automotive franchises and dealerships, administrative and litigation. For 25 years, Peter has worked exclusively on dealer issues at both the state and federal level. This includes working with such state agencies as the Vehicle Board, Office of Attorney General, Departments of Transportation, Banking, Revenue and Environmental Protection, and State Police. Peter also has represented dealers' interests on various statewide boards and commissions, as well as assisting in the redraft the Board of Vehicles Act, which helps protect dealers' franchise rights.



BARBARA A. DARKES

PennDOT, Bureau of Consumer Protection, State Police, Dealer Licensing Board
717.237.5381 / bdarkes@mwn.com

Barb joined the firm after serving as counsel to the Pennsylvania Department of Transportation, Bureau of Motor Vehicles, for almost seven years. Her automotive dealership practice focuses on defending dealers against consumer protection claims, litigating franchise disputes, and in representing dealers faced with regulatory enforcement matters, including the Department of State, the Department of Transportation, the Department of Revenue, the Department of Banking, the Attorney General's Office, and the Pennsylvania State Police.



JAMES P. DEANGELO

Franchise Litigation
717.237.5470 / jdeangelo@mwn.com

With a broad ranging litigation practice, Jim handles litigation projects in state and federal court, administrative proceedings, arbitration, and mediation. As a member of the McNees Automotive Dealership Group, he represents automobile dealers in franchise disputes, including relocation, new point and termination cases.



LOUIS A. DEJOIE

Buys/Sell
717.237.5387 / ldejoie@mwn.com

Lou represents clients in a broad range of commercial transactions, including private placements, mergers and acquisitions, intellectual property development and licensing, and product distribution. Applying these fields, Lou regularly works with emerging companies as well as public and private companies which are well established. Since joining the Firm, he has developed a particular practice representing automobile dealers in automotive buy/sells.



RICHARD H. FRIEDMAN

Environmental
717.237.5469 / rfriedman@mwn.com

Rick practices environmental counseling and litigation with a focus on environmental compliance and permitting matters, business and real estate transactions, the Clean Air Act, Superfund and cost recovery, toxic tort defense, Brownfields and land use, above and underground storage tanks, right-to-know compliance, environmental due diligence and environmental management issues. He represents businesses, individuals and public entities, and advises in matters affecting state and federal environmental laws. Rick gained experience as a senior enforcement attorney at the headquarters of the U.S. Environmental Protection Agency from 1977-1989. Rick is the author of the federal Clean Air chapter of the PBI treatise "Pennsylvania Environmental Law and Practice."



BRADLEY J. GUNNISON, CPA

Buys/Sell
717.237.5479 / bgunnison@mwn.com

Brad represents closely-held businesses in a broad range of industries – from manufacturing to wholesale distribution to retail. He is a trusted advisor to his clients, often serving as general counsel for companies that do not hire in-house counsel. His primary areas of focus for automotive dealerships are buy-sell agreements, business and tax planning, and general corporate matters. Brad is also a certified public accountant.



ERIK M. HUME

Dealership Real Estate Issues
717.237.5340 / ehume@mwn.com

In his practice, Erik advises clients through all aspects of real estate transactions and development. He represents landowners and developers in the sale, acquisition, leasing, financing and development of commercial and residential real estate. His practice also includes the creation, development and administration of commercial and residential condominiums and planned communities.



SARAH HYSER-STAUB

Franchise Litigation
717.237.5473 / sstaub@mwn.com

Sarah is an associate in the Automotive Dealership Law and Litigation groups. Prior to attending law school, Sarah worked as an intern with the Monroe County District Attorney's Office, in Rochester, NY, where she assisted district attorneys with discovery and trial preparation.



KELLEY E. KAUFMAN

Labor & Employment

717.237.5248 / kkaufman@mwn.com

Kelley provides advice and counseling to employers on a wide range of labor and employment law topics, including issues relating to compliance with federal and state employment discrimination laws, wage and hour regulations, family and medical leave, employee relations and employee benefits. Kelley represents clients before the Equal Employment Opportunity Commission, the Pennsylvania Human Relations Commission and the Pennsylvania Unemployment Compensation Board of Review.



PETER FRITZ KRIETE

Business Counseling

717.237.5486 / fkriete@mwn.com

As a member of the Automotive Dealership Law Group, Fritz's practice focuses on issues of corporate governance and business transactions. He works with dealers on structuring relationships among owners through shareholders and partnership agreements, dealing with business succession issues and assisting with resolving disputes among co-owners. He also advises on antitrust and competition issues, and represents clients in buying and selling dealerships and associated real estate.



AMY CAPOBIANCO MARSAR

Buy/Sell, Dealer Manufacturer Issues, Voluntary Terminations

717.237.5415 / acapobianco@mwn.com

Amy primarily practices in the area of automotive buy/sells and manufacturer-dealer relations. In addition to negotiating and closing automotive buy/sells and advising clients in connection with voluntary and mutual terminations, a significant portion of her practice includes (i) counseling dealers in connection with the terms and conditions of dealer sales and service agreements and various other industry-specific contracts routinely entered into by dealers; (ii) counseling dealers on various regulatory matters such as Gramm- Leach-Bliley Act and the CanSpam Act, among others; and (iii) drafting employment agreements, option agreements, dealership leases and various other contracts common in the automotive industry.



ELIZABETH P. MULLAUGH

Business Succession Planning, Estate Planning

717.237.5243 / emullaugh@mwn.com

Elizabeth's practice focuses on business succession planning, estate administration, non-profit organizations and probate litigation. Elizabeth advises clients on estate planning issues ranging from preparing simple wills to complex transfer tax planning. She works with many owners of closely-held businesses and has particular expertise in advising clients in the automotive dealership sector.



Ten Simple Suggestions for Avoiding Dealership Problems

- (1) **Be concerned about disparate impact issues.** The CPFB is using banks as its enforcement arm. Dealers are now routinely receiving letters from their finance sources purporting to identify potential groups of borrowers who are being disparately impacted by markup issues. Dealers should review these letters and, as appropriate, respond. However, more importantly, dealers should implement safeguards such as the process developed by NADA to ensure that any claims of disparate impact can be defended. Don't expect this issue to go away anytime soon.
- (2) **Stay vigilant on privacy issues.** Take a walk around your dealership. Are deal jackets in plain view on unattended desks? Are files containing sensitive information being locked up at the end of the day? Are your privacy notices kept up to date? Failure to comply with privacy laws has been the source of increased fines on dealers by the regulators.
- (3) **Respond to manufacturer correspondence alleging deficiencies.** There has been increased activity by manufacturers against dealers who are not compliant with the manufacturer's requirements in matters such as minimum sales requirements, customer service measurements, and facilities, to name a few areas. Some issues are not the dealer's fault. For instance, sales deficiency is often related to an inability to acquire sufficient product to meet minimum requirements. Don't simply throw these letters in the trash. Respond to them as you receive them. Ask the manufacturer for its assistance where appropriate, or provide an explanation as to why certain conditions are occurring.
- (4) **Stay compliant with labor and wage and hour laws.** There has been increased activity by the Department of Labor in the area of exempt and non-exempt employees. Make sure that you are aware of the appropriate classifications and that pay plans accurately reflect how employees are being compensated.
- (5) **Train employees on harassment issues.** While issues related to sexual, ethnic, and racial discrimination have been with us for decades, many dealers continue to fail to implement appropriate programs and training to avoid these situations and, if they arise, to deal with them and minimize any impact on the dealership.
- (6) **Keep all of your licenses and dealer agreements up to date.** Various state agencies are routinely auditing dealerships to ensure that their licensure is up to date. This includes the Board of Vehicles confirming ownership, appropriate use of fictitious names, and current licensure of salesmen. The Department of Banking also routinely audits dealerships. Similarly, to the extent you are changing ownership or officers in a dealership, the manufacturers should be informed and, in some cases, their consent must be secured.
- (7) **Regularly review deal jackets.** Either self-audit deal jackets or have a third party (such as PAA Services) do so. To the extent there are issues, it is better to identify and correct them before the Department of Banking or the Bureau of Consumer Protection finds them during an audit or investigation.
- (8) **Keep copies of all contracts on file and calendar any automatic renewals.** Many dealers are unaware of the fine print in some of their service and supply contracts. For instance, it is not uncommon for a uniform contract to have a three- or five-year term with an automatic renewal of like length. To the extent possible, eliminate any auto renewal provisions or simply have the contracts run month-to-month once the initial term is completed. Also, note on an electronic calendar the "notice to cancel/non-renew" due date, which is three to six months before the automatic renewal provision would take effect. You should also keep copies of contracts on hand so that if questions arise the contracts are readily accessible.
- (9) **Check your advertising for compliance with regulatory requirements.** While print advertising has decreased, the Bureau of Consumer Protection continues to cite and fine dealers for noncompliant advertising.
- (10) **Stay on top of titling issues.** Make sure title work is submitted timely. PennDOT continues to identify and fine dealers who are submitting late title work.

HARRISBURG, PA

100 Pine Street • PO Box 1166
Harrisburg, PA 17108-1166
Tel: 717.232.8000 • Fax: 717.237.5300

LANCASTER, PA

570 Lausch Lane • Suite 200
Lancaster, PA 17601-3057
Tel: 717.291.1177 • Fax: 717.291.2186

SCRANTON, PA

125 North Washington Avenue
Scranton, PA 18503
Tel: 570.209.7220 • Fax: 570.209.7222

STATE COLLEGE, PA

330 Innovation Boulevard • Suite 101
State College, PA 16803
Tel: 814.867.8500 • Fax: 814.867.6200

COLUMBUS, OH

21 East State Street • 17th Floor
Columbus, OH 43215-4228
Tel: 614.469.8000 • Fax: 614.469.4653

WASHINGTON, DC

777 North Capitol Street, NE • Suite 401
Washington, DC 20002
Tel: 202.898.5700 • Fax: 202.898.0688



Your Mission, Your Goal, Your Lawyers

www.automotivedealerlaw.com

www.mwn.com