

# When buying a franchise, it's buyer beware!

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The recent decision of the Ontario Superior Court in *Butera v. Mitsubishi* features a number of interesting points, not the least of which involves the importance of doing one's homework before opening a new-car franchise.

From a legal perspective, the case is interesting because it highlights the difficulty in pinning liability for negligent misrepresentation on a manufacturer entering a new market.

In 2002, Butera, a young lawyer working in St. Catharines, Ont., applied to Mitsubishi Canada for a Mitsubishi dealership he wanted to open in nearby Niagara Falls.

In the proforma sales forecasts that he included with his application, he forecast that he would sell 180 new and 120 used vehicles in his first year of operation and 350 new and 125 used vehicles in an average year.

Ultimately, he signed a dealer agreement with Mitsubishi and opened up.

By 2005, less than three years later, he claimed that his losses to date were about \$500,000 and growing.

His dealership stopped selling cars in October, 2005, but maintained a service business. It stopped carrying on business altogether in late 2007.

His sales figures were nowhere near his forecasts. In 2002, he sold 14 new vehicles. He sold 127 in 2003, 100 in 2004 and 29 in 2005.

After closing, he sued various Mitsubishi entities for damages arising out of alleged misrepresentations which he claimed had induced him to enter into the

agreement.

Mitsubishi had disclosed its sales levels in the United States and made comments about greatly expanded sales of their cars in the United States and Canada.

Plaintiff Butera claimed that the statements were flawed and misleading because they did not distinguish between fleet sales and actual sales. He also claimed that many U.S. sales resulted from a promotion to customers involving favourable credit terms – zero down payment, zero interest and zero payments for one year.

He insisted that all of these statements misled him into entering into the transaction as a result of which he and his companies lost over \$3 million.

The court found against him on a number of important points.

Firstly, the court was satisfied that there was no evidence the statements presented to him on actual U.S. sales were false.

Secondly, the court found that he knew or should have known the distinction between fleet and customer sales and bore the burden of making further inquiries if he felt it important.

Finally, the court determined that less than one per cent of total sales of Mitsubishi cars in the United States during the relevant period were sold under the zero, zero, zero financing program.

The important legal issue of the impact of a possible misrepresentation by Mitsubishi as to projected sales was determined with reference to a clause in the dealer agreement usually referred to in legal circles as an "en-

tire agreement" clause.

The entire agreement clause is now almost universal in these types of cases. It specifically provided that the written agreement constituted the entire agreement between the parties and superseded any and all prior written or oral agreements or understandings. This particular clause even provided that: "Dealer agrees that any oral statements of any MMSCAN personnel shall be of no force or effect and that Dealer has not relied on any such oral statements in entering into this Agreement."

The court found that this clause directly impacted the heart of Butera's claim, which was that Mitsubishi misrepresented the future prospects of sales of its cars in Canada based on its past performance in the United States.

As a result of the entire agreement clause, the court found that this was not a viable argument even if Mitsubishi's representatives had made misrepresentations.

There is another aspect of the case relating to the alleged misrepresentations that is worth noting.

In law, a misrepresentation can only form the basis of a claim if it is a statement relating to an existing and ascertainable fact.

Courts have decided that statements about prospective sales or other future events are merely expressions of opinion about the future.

If a vendor provides a forecast and the forecast results are not achieved, the forecast will not constitute an untrue statement of a material fact as a matter of law.

It probably will not constitute a misrepresentation giving rise to liability. If the vendor negligently misrepresents existing facts, that may be a different story – unless an entire agreement clause applies.

But even an entire agreement clause won't shield a vendor from an outright lie.

Butera was buying into what was essentially a new venture. Had he been buying an existing store and had misrepresentations been made to him about the sales results for the store to date, the result may well have been different if that information had been false.

So, when starting up a new venture, take extra care and keep the following in mind:

- When a manufacturer provides a forecast as to future results, don't assume that this will give rise to liability in the event that the forecasts are not met.
- An entire agreement clause will protect a vendor from liability for negligent misrepresentation.

In other words, it's buyer beware!

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*Also see [www.vehiculaw.com](http://www.vehiculaw.com) and Irvin's blog at [www.irvinschein.com](http://www.irvinschein.com)*

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## FSP now offers dealer event marketing

New plan uses local newspapers for pre- and post- event coverage

Sometimes it takes more than an inflatable gorilla on the roof to get customers through your dealership doors.

With that in mind, a new initiative from seasoned event marketing company Formula Special Projects (FSP) could provide the spark your store needs to benefit from experiential marketing.

"The marketing game for dealers has changed," explained Jock McCleary, head of FSP. "Whether it is a new store opening, customer appreciation day or a conquest sales program, FSP can come up with a perfect solution to your needs."

FSP is a division of Metroland Media Group, Ontario's largest community newspaper publisher and publisher of Canadian AutoWorld. The group has more than 100 newspaper titles with a combined distribution of more than 5 million copies per week.

Readers on the corporate side know FSP as an event management and marketing company specializing in the automotive industries needs that has run na-

tional automotive events include national media Introductions, cross-country experiential marketing tours and national product and sales training for two decades.

"We pioneered the consumer ride-and-drive event concept with our Carguide Challenge series more than 20 years ago. Since then, we have conducted similar events on behalf of Toyota, Honda, Hyundai, Chrysler, General Motors, Ford, Kia and more."

McCleary explains that this new spin from FSP is a reimagined look at the Challenge Series concept for a modern audience that draws on partnerships with community newspapers.

Using a three-pronged approach, he said, FSP starts the process by working with a dealer's local newspaper on pre-event marketing.

FSP said it then offers a turn-key event that could encompass anything from professional drivers on a closed track to a road-routed ride-and-drive to customer information nights at the

dealership.

For the Challenge concept, FSP would conduct ride-and-drive events that encourage unbiased opinions from among Metroland Media Group's reader base. "The formula is simple: turn readers into automotive journalists for a day and record the results."

The day would include driving a pre-planned road route followed by a "detailed questionnaire" given at the end of the day to gather info about the vehicle and its performance.

The local newspapers will handle post-event coverage again, making for a complete product.

The key to a successful dealer event, McCleary noted, rests with providing a positive experience for participants. "And what could be better than turning a prospective customer into a brand ambassador for your dealership and your brand thanks to a positive event experience."

For more information visit [www.formulaspecialprojects.com](http://www.formulaspecialprojects.com)