

DEFENDER

THE NADC NEWSLETTER

First Annual NADC Member Conference



Georgia Tech Hotel & Conference Center

The NADC's first annual members' conference will be held at the Georgia Tech Hotel & Conference Center in Atlanta, April 24 to 26, 2005.

Program information and on-line registration are available at the events section of www.dealercounsel.com. Information is updated as the program develops, so visit the website often.

There will be a session for each of the NADC's 10 sections: bankruptcy and debt collection, buy/sell agreements, F&I, federal and state regulatory compliance, labor law for dealers, litigation, manufacturer relations and franchise

issues, sales and advertising, taxation and warranty, and fixed operations. In addition, the membership meeting and receptions offer members ample networking opportunity.

Registration is open to NADC members at \$395 per person. Register on-line today or download the registration form and fax it to 410-684-3036. CLE credit will be available

For room reservations, contact Georgia Tech Hotel & Conference Center at 404-347-9440. Mention the NADC conference for the special rate of \$149. Space at this rate is limited.

The NADC has moved. Please make a note of the new address, phone and fax numbers:

NADC

P.O. Box 383

Linthicum, MD 21090

410-684-6165

Fax 410-684-3036

Website and e-mail addresses remain the same.

Dealership Advertising: Promoting Business and Problems

Alex Kurkin, Esq.

Dealerships are big advertisers. Interestingly, though, since competing dealers advertise more or less equally, some economists opine that there may actually be no net gain to any dealer from advertising, but rather, it is a necessary evil to maintain market share. Hoping to be an exception to this proposition, dealers are becoming increasingly creative in their search for the next "where's the beef" blockbuster advertisement.

While some states have specific rules regulating advertisements, and other states have non-specific prohibitions against deceptive or misleading advertisements, the issue primarily remains the same; the criteria being whether the reader's net impression will be honored by the dealership.

Common Advertising Problems

Dealers that advertise total price often fail to include dealer mark-ups such as pre-delivery service fees, administration fees, etc. This failure would likely be considered a violation of most states' laws – the net impression being that the customer should be able to purchase the vehicle for the advertised price subject to government fees. Some dealers attempt compliance by footnoting that the price excludes various dealer fees. This is likely insufficient to comply with most states' laws, and invites industry scrutiny over the ever-increasing amount of those fees. A better practice is to include dealer fees in the advertised price and footnote that the fees are included in the price without referencing the amount.

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President's Letter



Jonathan P. Harvey
Harvey and
Mumford LLP

The February 7, 2005 issue of *Automotive News* contained a story, "Dealership loses bid to limit jury award." The story reported an Iowa dealership's unsuccessful appeal of a plaintiff's jury verdict of \$35,000 punitive damages, \$14,800 actual damages and \$44,152 in attorneys' fees for a total of \$93,952, not including legal fees, paid to defend the case and handle the appeal, all because the dealership failed to disclose vehicle damage to the customer. The vehicle was a used 1997 Ford F-150 pickup, the article does not reveal how much the plaintiff paid for the vehicle, but I am guessing it was something less than \$93,952. The plaintiff was not physically injured; he sim-

ply sued the dealership because they didn't tell him the truth.

The issue in the case was whether a dealership intentionally failed to tell its customer that the used truck he was buying had been wrecked and repaired. The article says the dealer did not disclose the damage and that a salesman told the buyer that "everything looked good." Someone from the dealership also apparently told the customer that the truck had "zero damage." The jury and the State Appeals Court were evidently impressed with the plaintiff's arguments, and that appears to be, as they say, all she (or he) wrote.

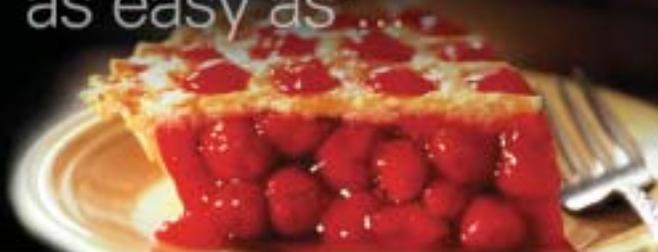
So why am I writing about this? Because we are lawyers, this is the kind of case that gives us the willies, and it is just the sort of story that reminds us why we are here, and what we are supposed to be doing for our clients. By this point in my letter, you'll have figured out that whatever profit the dealership made on that truck was in stark contrast to its out of pocket cost. This disaster could have been avoided by good, preventive maintenance. Jury trial consultants teach trial lawyers about a theory they call "defensive attribution." The theory is that regardless of how a plaintiff is injured, if a juror feels vulnerable to the same thing happening to him, he will attribute fault to the plaintiff in order to get himself psychologically "off the hook." He wants to go to sleep at night knowing why this terrible thing won't and

can't happen to him. Do you see where I'm going? Well, in the case of our clients, just like those jurors, our dealer might look at this pickup truck calamity and think, well, this terrible thing would never happen to me because I would never tell a customer a car had zero damage when it had been wrecked, and that Iowa dealership was clearly wrong. In that way our dealer separates himself from what happened to the Iowa dealership, he's taken himself off the hook and life goes on as usual, right? Wrong. The Iowa truck case is exactly what can and does happen to dealerships, and no amount of defensive attribution will change that. Sales people get distracted, F&I people make mistakes, and stuff can happen. I think you will find the more we remind our clients to foster a dealership culture that rewards truth tellers and honors careful work, the fewer times they will call us about a disaster. Make a point of sending a letter to your clients reminding them about the consequences of this kind of conduct, and the economic realities of a pound of cure. Nothing succeeds like preventive maintenance.

On the subject of NADC, we are now at 210 members, and for those who are attending the conference in Atlanta, we are fortunate indeed to have been invited by member and Labor Law Section Chair Jerry Coker's firm, Ford & Harrison LLP, to a reception at his firm's offices. This is a generous thing for them to have done, and we are all looking forward to the event. If you have time, log on to the website, www.dealercounsel.com, click on *events*, and then click on *program*. You will see the preliminary program for the April conference, and it is impressive. I look forward to seeing you in April. Don't miss it.

Jonathan P. Harvey of Harvey and Mumford LLP is President of the NADC and can be reached by e-mail at jpharvey@harveyandmumford.com

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Sales Tax Exemption for Foreign Diplomats

Rob Cohen, Esq.

If you advise dealer clients who sell vehicles to foreign diplomats, you better take note of the procedures for sales tax exemption. Rather than attempting to paraphrase, I thought it best to give you the procedures "straight from the horse's mouth." The following was taken directly from the U.S. Department of State's website.

The Office of Foreign Missions (OFM) enforces the exemption of eligible foreign missions and their members from payment of any taxes when purchasing, leasing, registering or titling a vehicle. The following procedures detail how vehicles acquired by diplomatic personnel can be authorized for tax exemption.

All Official and Personal Vehicle
Acquisitions Must Be Authorized
for Tax-Exemption by OFM

1. The purchaser must: present a mission tax exemption card, a personal tax exemption card, or a protocol identification card to the seller of the automobile. This proves to the seller that the purchaser is indeed a diplomatic agent or is authorized to make official purchases on behalf of a diplomatic mission. The seller is required to retain a copy of this card. The seller must: contact OFM at (202) 895-3500 for a determination on the tax-exempt status of the purchaser. If the purchase is being made outside of the Washington D.C. area, the purchaser may contact an OFM Regional Office.

2. OFM will: determine the tax-exempt status of the purchaser and provide a letter to the seller. This letter will state whether or not the purchaser is eligible for exemption from any sales and use

tax imposed at the point of purchase by the state in which the sale will occur. If sales and use taxes are imposed by the state in which the sale is taking place, and the purchaser is determined not to be eligible for exemption from this tax, the purchaser is required to pay this tax to the seller.

Only letters of authorizations provided directly from OFM to the seller are valid for tax-exemption. Letters provided from any entity besides OFM should not be honored and this practice should be immediately reported.

Existing vehicle registration procedures will not change as a result of this new policy. Diplomatic missions and their members, including dependents, are required to register all vehicles that

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Alex Kurkin
Pathman Lewis LLP

Another common problem involves rebates. An advertised price regularly requires the use of a rebate. If, however, the rebate is available only to a small portion of the intended audience and its limitations are not conspicuously and proximately disclosed, problems may follow. The limited applicability of any required rebate should be apparent from the advertisement.

A similar problem involves the advertisement of a price with a footnote that the price requires a net trade-in value of a certain amount. An Attorney General's perspective is quite simple. The consumer is "baited" by the large and conspicuously displayed discounted price only to learn later that the footnote eliminates that discount.

These claims are sometimes brought by a private attorney, but most often, by an Attorney General's office or other enforcement agency. Generally, we have found that approaching an

Attorney General with a hostile and defiant tone is counter-productive; especially since they are generally not looking to create a windfall.

Still, this does not require you go to them hat-in-hand. Instead, understand your defenses and meet with them as soon as possible. Unless you have no choice, it is impractical to litigate with the government because government attorneys are generally not dissuaded by the threat of protracted litigation, and ultimately, the head of that department may seek political gain via fifteen seconds in the media spotlight at the dealership's expense.

Running Interference

One important defense tool is the advertising agency. Aside from ensuring that the agreement with the agency includes a solid indemnity provision and reviewing the agency's ability to back the indemnity, agencies can be a strong ally when there is a problem. We have been able to persuade agencies to serve as a shield to divert the government's attention, and more importantly, media scrutiny. Negative press is very damaging for dealers, but much less so to an advertising agency. In fact, we have convinced many agencies that by standing by, or rather, in front of their

clients, they create marketing material for themselves which they can use when they pitch other dealers for work, e.g., "We protect our clients." To the extent the dealer has to make it up to the agency, it can do so in a number of ways, including lengthening the contract term.

There is a constant tug-of-war between dealer attorneys and their clients. Dealers promote creativity and risk adverse attorneys seek to temper that creativity. This results in negotiations between attorney and client as to what is acceptable. One trap is having these negotiations 30 minutes before deadline. Over the years, we have learned to balance our client's advertising goal (to generate more revenue) with our goal to keep them out of trouble. Attorneys who perform this service must recognize this balance and be cautious as the time constraints and competitive demands might cause them to lose a client or to approve a bad advertisement.

Alex Kurkin, a Partner at Pathman Lewis, LLP, Miami, FL and an NADC member, focuses his practice on dealership law and represents the Florida Automobile Dealers Association.

Message from Executive Director



The first meeting of the NADC membership will occur at our first conference on April 25 - 26 in Atlanta, at the Georgia Tech Hotel & Conference Center. After managing this Association for the past six months it has become abundantly clear to me that the primary benefit of our membership is communication. If you have been enjoying this newsletter and the on-line forum and list serve you will undoubtedly enjoy the conference. Face-to-face communication is always the best.

We are preparing a comprehensive educational program as an additional benefit of attendance. We will have a

presentation from each of our 10 sections. The program will run over two days with plenty of opportunity to mix and mingle with your peers. Check the events page on the web site www.dealercounsel.com to find out the latest additions to the program. Bring you spouse or significant other. They are welcome at both scheduled receptions. April in Atlanta is a beautiful time of the year, and the downtown location affords many cultural, recreational, shopping and dining opportunities.

Attendance at this event is limited to NADC members only, so if you know of anyone who should be joining the Association and hasn't, tell them to join up and come. I look forward to meeting all of you in Atlanta in April.

Jack Tracey, CAE, Executive Director

Sales Tax Exemption... continued from page 3

they own or lease with the OFM Diplomatic Vehicle Office. At the time of purchase, all original ownership documents must be submitted to the Diplomatic Motor Vehicle Office for proper vehicle registration. Auto dealerships and state motor vehicle administrations should treat this transaction as an out of state registration. OFM will issue a registration card and federal license plates once proper documentation is received. Also, a title will be sent to the indicated lien holder to protect the interest of the lender.
(From: www.state.gov/ofm/tax/vehicles)

The diplomat will likely require the MSO or title, therefore, be sure to confirm funds prior to releasing such documents. Providing titling documents to finance customers is extremely risky and not advisable under most circumstances.

Be sure to check with your local DMV to determine what documentation (if any) they expect to see for these types of transactions.

Rob Cohen, Esq. is managing partner of Auto Advisory Services, Tustin, CA, First Vice President of the NADC and Editor of Defender, The NADC Newsletter

Communicate With Your Colleagues

Check out the forum at www.dealercounsel.com and sign up for the NADC list serve. Use the on-line membership directory for quick access to address information.

MAKE YOUR RESERVATION TODAY!

NADC MEMBER CONFERENCE

APRIL 24-26, 2005

GEORGIA TECH HOTEL & CONFERENCE CENTER

ATLANTA, GA

Join your colleagues for the first ever meeting of NADC members. Timely topics in each of the special interest sections. Go to www.dealercounsel.com for on-line registration and updated program information.

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NATIONAL ASSOCIATION
OF DEALER COUNSEL

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