

DEFENDER

THE NADC NEWSLETTER



Michael G. Charapp

INDIRECT FINANCING AGREEMENTS

Michael G. Charapp

You may have seen recent publicity about finance companies and banks strengthening their indirect finance agreements with dealers to obtain protection from many new causes of action.

The rights of a lender under an indirect dealer agreement derive primarily from the representations, warranties and covenants made by the dealer. Here are some representations, warranties and covenants to watch out for:

Warranty of Customer Information. Some agreements require dealers to warrant not only what they know and represent to the lender about the customer, but also that everything the customer has rep-

resented is true. While it is reasonable for the lender to require the dealer to represent that it has told the lender what it knows, it is overreaching for the lender to require a dealer to guarantee the truth of all representations made by the consumer. Any such warranty representation should contain a "knowledge of the dealer" qualifier.

Insurance. Does the agreement require the dealer to verify insurance? Or does the agreement require the dealer to guarantee that fully paid insurance covers the vehicle? A lender requirement that the dealer verify insurance is appropriate. A

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Jonathan P. Harvey

President's Letter

Jonathan P. Harvey

I write after having attended the first national NADC conference. An article regarding the details of the conference appears elsewhere in Defender, and it is worth reading. Upon returning from the conference, I sent an e-mail to each of the 100 attendees, asking for their suggestions regarding what we could do to improve the conference and the association. A substantial number of people responded with good, substantive criticism. The board of directors will meet in June to discuss the next conference and the meaning and impact of the overwhelming enthusiasm we saw in Atlanta. As I have suggested to you in past letters, this organization was long overdue, and the reac-

tion of conference attendees confirms that.

Shortly after the conference, there came a flurry of activity on the forum and the list serve and, once again, the unselfish and truly incisive commentary regarding issues such as UCC Article 4, negative equity, manufacturer treatment of dealers and a variety of other topics confirms and amplifies the generosity of the dealer bar.

By the time the Defender reaches you, you may have seen a copy of Automotive News for the week of May 16, 2005, in which there is an article about the NADC. Mike Charapp and I spent over 90 minutes on the telephone

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TIME TO TAKE A CLOSE LOOK AT SALES PAY PLANS

John E. Donovan

Most dealers are familiar with the wage and hour aspects of a sales pay plan and know that even commission paid salespeople must still receive at least minimum wage for all hours worked in the commission period even if they sold no cars. However, many dealers overlook the “contract” aspects of the same pay plan. This can be a very expensive mistake.

Over the past few years there has been a growing number of lawsuits filed against dealers in which the sales people allege that the dealer has “defrauded” them or shorted them on their commissions. They typically point to a one or two sentence pay plan

which states that the dealer will pay them 25% of commissionable gross or similar words. The problem is that the dealer is not doing that. Generally, the dealer makes a number of deductions from the gross profit on a deal for packs, prep fees, inventory adjustments and so forth.

Courts often rule that because the dealer drafted the pay plan, if he wanted to take anything out of the gross profit before calculating the commission, he could have said so. However, his failure to mention such deductions means that the salespeople are entitled to 25% of the actual gross profit. A dealer’s liability can be quite significant. A contract action can go back as much as six years, depending on the state. In

addition to the unpaid wages, employees may seek punitive damages for the dealer’s “knowing and intentional conduct.” Employees may also include a claim under the state wage payment law allowing additional damages and attorneys’ fees.

Recently, a former finance manager turned whistleblower announced that he will be helping attorneys target dealers who “illegally reduce” their sales peoples’ commissions with various hidden deductions.

To avoid these kinds of claims, we strongly recommend that every dealer adopt a detailed, written pay plan and commission schedule that explains in layman’s terms how the salesperson’s

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lender requirement that the dealer guarantee the existence of insurance that is fully paid is overstated, unless the dealer is prepared to take the steps necessary to make sure that is the case in every deal it sends to the lender.

Service. Does the agreement state that the dealer will provide all required service to the vehicle upon request of the buyer? Or does the agreement state that the dealer will provide and maintain service as established by the manufacturer? Clearly, the dealer has no control whether the buyer will return to it for service, and a guarantee that the vehicle will be serviced cannot be met.

Delivery Prior to Assignment. Does the agreement include a representation by the dealer that a vehicle was not delivered to the customer prior to assignment of the contract to the lender? In spot delivery situations, vehicles are always delivered to the customer prior to assignment of the contract to the lender. This is an obsolete representation that should be deleted.

Representations, warranties and covenants are important because a breach by a dealer provides grounds for

the lender to require repurchase of the contract. That is standard in most agreements. However, most agreements also require repurchase of the contract if any dispute arises between the customer and the dealer. This is simply too broad. Customers sometimes make baseless claims, and that frequently happens when the customer is having trouble making their payments. Consequently, a provision requiring repurchase of a contract simply because a dispute arises is detrimental to the dealer. The provision should be applicable only in the event of a claim or dispute with a customer that is successfully adjudicated by the customer against the dealer.

Look carefully at the language of what the lender requires to be repurchased if there is an event requiring repurchase. Is it only the contract involved? Or is the language broad enough to allow the lender to seek repurchase of an entire portfolio of paper purchased from the dealer for any breach? Clearly, the latter would be crippling for any dealer, and you should not agree to it.

The indemnification that a dealer gives to the lender must be reviewed carefully. Is the dealer indemnifying against the dealer’s acts? Or is the indemnification broad enough to include indemnification by the dealer for claims against the lender for the

lender’s acts? Of particular concern is responsibility for forms provided by the lender. If the lender provides the form retail installment sale contract, does the agreement make the dealer responsible for indemnifying the lender against claims against the lender for violations contained in the lender’s own form contract? No dealer should indemnify a lender against claims arising from the lender’s acts or forms.

Do not simply accept the representation of lender representatives that the lender will not negotiate the terms of the standard agreement. As in all agreements, the flexibility of the parties depends upon the perceived market power of the parties. If the lender wishes to enter the dealer’s market or wants to establish a business relationship with the dealer, it is likely to have flexibility. If the dealer is chasing the lender to establish the relationship, there is likely to be less flexibility in the lender’s position. In any event, a dealer will not know what can be achieved until it engages the lender to discuss provisions of the agreement that the dealer finds onerous or oppressive.

Michael Charapp is a partner with Charapp & Weiss, LLP in McLean, VA. He is Second Vice President of the NADC and serves as Chairman of the Membership and Advancement Committee.

NADC Member Conference



The first NADC Member Conference was held in April in Atlanta. The roster of attendees was nothing short of a Who's Who in dealership legal representation. The discussions were real, the environment was exciting. Exciting? Dealership law? Okay, perhaps I am a bit prone to hyperbole, but for those of us who have long desired a forum in which dealership representation and consultation strategies could be discussed and refined, it was exciting.

"The body of knowledge that exists within this organization is really staggering," said NADC board member, Oren Tasini, a partner with Haile, Shaw & Pfaffenberger, P.A. in North Palm Beach, Florida. Oren was among the 20 speakers who presented to the 100 attendees. Topics varied widely, ranging from buy/sells to advertising issues, superfund matters to arbitration agree-

ments, and negative equity disclosure to employee benefits. Each of the 10 NADC sections gave an hour-long presentation, with every presenter offering practical and oftentimes detailed advice.

The presenters and attendees alike all had considerable first-hand experience in various dealership representation issues. But even more impressive than the collective talent and experience, was the overall willingness of conference participants to share some of their secrets. At the first face-to-face meeting of the NADC steering committee, which was only seven-and-a-half months prior to the conference, I was concerned that dealership attorneys may not be willing to share their knowledge with other attorneys out of fear they may be educating a competitor. However, my fears proved to be ill-founded judging by the collaborative spirit demonstrated by the presenters.

Although space and time limitations preclude me from providing details on

every speaker, the following provides a general idea of the conference events. Gene Kelly, a partner with Arnstein & Lehr LLP, in Chicago, was the Master of Ceremonies who introduced each of the credentialed speakers. NADC President, Jonathan Harvey, of Harvey and Mumford LLP, in Albany, initiated discussions by posing insightful questions throughout the presentations.

On day one, Jerry Coker, a partner with Ford & Harrison LLP in Atlanta, candidly discussed sensitive issues with respect to the impact of labor unions on a buy/sell. We then heard Dave Pearson, a partner with Ford & Harrison LLP in Tampa, who took on the topic of employee benefits. These two gentlemen offered pertinent information concerning labor matters that often go overlooked during a buy/sell.

Day one closed with two noteworthy presentations from Len Bellavia, of Bellavia Gentile & Associates LLP, in Mineola, New York, and Lewis Goldfarb

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with a staff writer from Automotive News, answering questions she had about the NADC.

One of our dealer clients asked the other day about what the NADC can do for them. I told them it could save them money. How, the owner wanted to know. The answer is that instead of having to reinvent the wheel every time an issue comes up, whether arcane or routine, a member can go to the list serve or the forum and get help. That saves time, and we all know what that means to the client. My sense from talking with lawyers at the conference is that none of them had the time to selfishly bill unnecessary hours and that, in fact, the opposite was the case. They were overburdened with work and did not have enough time to complete the tasks at hand. The NADC communication vehicles help them save time and, at the very least, point them in the right direction. Sometimes we just need to know that what we have discovered from our own research and analysis is the correct answer, and often the NADC list serve and forum serve that function.

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compensation will be calculated. It should clearly define industry-specific terms such as "commissionable gross profit," "pack," "spiff," etc., and provide examples, as necessary, to show how the actual calculations are made. The pay plan should also address other issues which often give rise to disputes; issues such as additional charges against the vehicle, when a commission is actually earned, how a commission is paid when the salesperson has left the dealership before the vehicle is delivered, and whether contest awards are made after the salesperson leaves.

Because weekly or monthly bonuses make up a significant amount of a salesperson's overall compensation, dealers should be sure to include all of these in the pay plan too. But dealers should take care to explain exactly how the bonus is calculated, when it is paid and what a salesperson must do to

I wish you all a good summer and look forward to seeing you at the next conference.

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of Goldfarb Associates, LLC in New York City. Len's presentation focused on general litigation strategies, while Lewis discussed the art of early settlement.

On day two of the conference, NADC board member Mike Charapp, of Charapp and Weiss, LLP in McLean Virginia, and Tony Grimaldi, of Donnelly, Grimaldi & Gallagher, PC in Fairfax, Virginia, provided some well-received insight on insurance coverage issues and a few tips on how to work effectively with insurance counsel. Mike's presentation had a very broad appeal, given the number of areas within dealership operations that are affected by insurance coverage.

Each and every speaker's contribution

to the conference cannot be overstated. Everyone seemed to find something worthwhile to take back with them; a gem or two that will help them better represent their clients.

To be fair, though, I did receive a couple of negative comments about the conference. Mainly, they were along the lines of "it was a bit too much information." Those comments have been well-taken and the board members with whom I have spoken all agree that next year we should have break-out sessions so that attendees will be able to better focus on specific subject matter.

I believe it is safe to conclude that the conference was a success, and major kudos should go out to Jonathan Harvey, Jack Tracey and Gene Kelly for making it happen. I don't think it is a stretch to predict that next year's conference will have even more attendees and offer better flexibility.

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

qualify for the bonus.

Every salesperson should sign a copy of the plan, evidencing his or her awareness and understanding of its terms. If a dealer decides to change the plan in any way, the change should only be made prospectively. In addition, the dealer should either reissue the revised pay plan to every salesperson or, at least, have a memo signed by each salesperson acknowledging the specific change and the effective date.

We know from experience that a poorly drafted pay plan — or the lack of a written pay plan — can subject a dealer to significant back wage liability. Therefore, we recommend that dealers review their pay plans to

make sure that they "say what you mean and mean what you say." Then, have the plans reviewed by counsel experienced in dealership wage and hour matters to ensure that you have all of the protection you need.

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