DEFENDER
THE NADC NEWSLETTER

Trends and Predictions for 2006

Rob Cohen

As 2005 comes to a close and visions of sugarplums dance in our heads, perhaps it is best to take a peek around the corner to see what 2006 has in store for us dealer attorneys. If sugarplums aren't dancing through your head, maybe you can think of potato latkes or something. Just work with me.

Last month I asked a few of our section chairs to put together some predictions for next year. Knowing how busy everyone is, I was a little nervous. If no one actually responded, I would be stuck publishing some lame parody of 'Twas the Night Before Christmas; a version that somehow related to dealer representation.

Fortunately for everyone, I received five insightful articles written by attorneys who are leading this organization. I'm going to go out on a limb and say that these articles are dead-on. But you decide for yourself.

I will close with a couple of my own predictions. Due to the success of this organization, I predict I will be a better attorney next year. I now have contacts and resources I never even knew existed. I have been given the opportunity to learn from some of the top legal minds in this area, and for that I am grateful. I also predict the plaintiffs' bar is going to feel the effects of the NADC. As we continue to grow and offer more resources, our members will be armed with hundreds of years of collective dealer law experience. Dealers represented by NADC members will no longer be easily picked-off by a plaintiff's attorney seeking a quick score.

Idealistic? Perhaps. But hey, 'tis the season.

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

Sidebar

Contents:

Feature Articles 1-8
President's Message 4
New Members 4
NADC Leadership 6
CLE Credit Update 8

State & Federal Regulatory Predictions

Thomas B. Hudson

Rob has asked that I polish up the old crystal ball and predict what the year 2006 will bring in the area of state and federal compliance. Some predictions are easy, so let's start with them.

The feds will likely stay quiet, for the most part. The FTC is likely to finally get around to issuing their long-delayed FACT Act adverse action/risk-based pricing regulations. The Federal Reserve Board has been quiet lately, and I don't look for any changes to the Truth in Lending Act, the Consumer Leasing Act or to the Equal Credit Opportunity Act, and ditto as to the implementing Regulations Z, M and B. If the negative equity cases keep popping up, the FRB staff may decide to once again address that topic in its Official Staff Commentary.

At the state level, there is no doubt that we will see versions of the California Car Buyer's Bill of Rights proposed in several more states this year. I expect that the measures will face intense dealer resistance, and will not be enacted in states with effective lobbying by dealership trade groups.

We can expect that the state frenzy over new data protection and breach notification will continue, and that legislators will not provide carve-outs for car dealers or for small businesses.

continued on page 7

The Pink Elephant in the Room

Oren Tasini

As chair of the buy-sell section, I have been asked to predict the trends for 2006 in the transactional arena. I am sure there is famous wisdom on why not to make predictions, but I can't remember it. So, here it goes.

There is a pink elephant in the room. Well that might not be accurate, because no one talks about the proverbial pink elephant, while the industry is all abuzz about this one. It is called General Motors. Perhaps albatross is a better description.

GM's problems weigh heavily on the automotive sector and thus on the nature of the legal issues we will see as attorneys. The company's stock recently fell to an 18-year low on concerns about GM's financial problems; a possible bankruptcy filing; and a showdown between the United Auto Workers and management at bankrupt Delphi Corp. Its bonds are rated as junk and they recently decided to close nine plants and layoff 30,000 workers. So, labor lawyers and bankruptcy lawyers be ready. Lawyers representing anyone doing business with GM be ready. Based on its 2004 gross revenue, GM was ranked as the third largest company in the United States. Its failure would be an economic tsunami. Will GM go bankrupt? Right now the "markets" are saying yes, but only time will tell. In the end, GM may have no choice and it might be the "right" thing to do to protect shareholder value.

So what does all the economic talk have to do with buy-sells and lawyers? Well, if GM goes bankrupt, it could seek to reject all or some of its franchise agreements, jettisoning underperforming dealers. If GM downsizes its production, it will have no choice but to reduce its dealer body. There will not be enough supply of vehicles. All GM dealers will be unsecured creditors, standing in line behind all of GM's secured creditors. Holdback, incentive money, credits to the parts account, would all be in jeopardy. The other domestics would most likely have to do some cost cutting of their own to compete with GM (as GM is free to squeeze out costs by discharging all of its unsecured debt). As an aside, you should advise your clients to stay very current with payments from GM.

Now for the good news. Gas prices are declining. Interest rates are steady and unlikely to rise quickly, although they will rise. Inflation will be in check. We will be a car-based society for a long time and the rest of the world will be too (go look up how many cars have been sold in China this year as opposed to last year). Given all of the above, I expect dealership buy-sell activity to be brisk in 2006. Some GM dealers will seek to run for cover by selling, while other dealers may look at this as a buying opportunity. The foreign makes are going to continue to demand high multiples.

On a more finite level, given the extremely tight profit margins of car dealerships, legal compliance can enhance a dealer's bottom line. This is a hard sell, but the dealer who does a little preventive maintenance on legal compliance will spend far less then the dealer who gets sued for poor practices or receives an inquiry from the attorney general. Tell your client what it will cost for you to perform a legal audit and then tell him what a lawsuit will cost. The difference should get his attention.

Oren Tasini, Haile, Shaw & Pfaffenberger, PA, North Palm Beach, FL, is Chair of the NADC Buy-Sell Agreements Section.

Top Labor and Employment Issues for Dealerships in 2006

D. Gerald Coker

While many dealers understandably are focused on the challenging business environment as we head into 2006, prudent dealers and their management team members also will take steps to reduce their exposure to major labor and employment problems. These problems not only cost money to defend, they exact a toll on employee morale and productivity and are a major distraction for management team members.

Union Organizing Initiatives at Dealerships

Seven unions recently formed the "Change to Win Coalition" (CWC) and withdrew from the AFL-CIO. The division was caused by the inability of the unions to agree on how best to attempt to halt declining union membership in the U.S. The CWC has formed a strategic organizing center to guide both multi-union and single-union organizing campaigns and will be very active in 2006.

In addition, the Machinists Union recently announced a drive to attract 50,000 new members annually through an aggressive new organizing push. The Machinists Union previously identified dealership technicians as a primary target. The Union considers technicians to be a natural target because of the skilled nature of their work and the fact that their jobs cannot be exported. The Machinists Union already represents thousands of dealership technicians nationwide and has a large number of former techs working as full-time staff organizers.

All unions consider the Sun Belt to be an attractive geographic area for organizing. While the South has not been a traditional stronghold for labor unions, dealerships in any area of the country that consider themselves immune from organizing can be in for a rude surprise. For example, in August, 2005, a union became the collective bargaining representative of the fixed operations employees at a Nissan store in Orlando, Florida when the union won an election conducted by the National Labor Relations Board.

The end of the year is a good time for dealerships who value their union-free status to "audit" their level of preparedness. Managers should always be alert to any change in "normal" employee behavior which could be a warning sign of union activity. Also, dealerships should: (1) identify any workplace issues that a union organizer could seize upon and address them in a timely and effective manner; (2) review all pay plans to ensure internal equity and competitiveness; (3) review benefits policies (particularly health insurance) to make sure that they are competitive and that employees understand the value of these benefits.

Wage and Hour Law Violations

Some dealerships may not be in compliance with all aspects of the Fair Labor Standards Act (FLSA), the federal law which requires all non-exempt employees to receive the minimum wage and overtime premium for all hours worked over forty per week. In addition to investigations at dealerships by the Wage and Hour Division of the U.S. Department of Labor, wage and hour class actions (called collective actions) in federal courts have surpassed all other types of employment class actions *combined* since 2001.

Every dealership should "audit" its practices. Make sure that the overtime exemptions for "salesmen, mechanics and partsmen" are only being applied to those employees who truly qualify. In addition, under the regulations that went into effect last year, an employee must meet the applicable duties test and receive a salary of at least $455 per week in order to qualify for the executive or administrative exemption from the minimum wage, overtime and timekeeping provisions of the FLSA. Make sure that everyone except those who are entitled to the executive or administrative exemption are punching a time clock or otherwise maintaining an accurate record of their hours worked; remember, it is the dealership's obligation to ensure that an accurate record of hours worked is maintained for all non-exempt employees. Check that overtime is properly calculated; nondiscretionary bonuses must be included in the base rate for overtime premium calculation. Also, check to make sure that non-exempt employees are being paid as they should be (for example, when they start work early or work through their lunch breaks).

It takes only one complaint from a current or former employee to trigger a government investigation into all job classifications at a dealership.

Sexual Harassment and Other Discrimination Claims

Discrimination charges and lawsuits are being filed at a record pace. Unfortunately, some of these claims involve the conduct of dealership personnel, particularly managers. In most cases, managers are agents of the corporation and can create liability by their conduct. A dealership found guilty of unlawfully discharging an employee can be ordered to reinstate the individual with full back pay and benefits and to pay compensatory and punitive damages, as well as the individual's attorney's fees. In addition, certain discrimination cases bring with them the significant risk of negative media coverage and the loss of management credibility with employees.

continued on page 7

President's Message

Jonathan P. Harvey

Since this last issue of 2005 is filled with predictions of what will happen in 2006, I thought it would be interesting to see whether I could come up with some predictions about the NADC. First, I believe that by next September, our second anniversary, we will have over four hundred members nationwide. I predict we will be arranging for a booth at the 2007 NADA Convention, and that we will be recognized as the association of lawyers to consult about a dealership issues, problems, solutions or ideas. I predict we will be having at least three CLE seminars per year, and that the President of NADA will be a keynote speaker at our national convention in April. I also predict that someone will take over the reins from me, and that I will be able to sit back and look with great pride at a membership of selfless, first class lawyers who made something valuable and worthwhile happen.

To each of you who participated in the formation and maturing of this fledgling organization, I thank you on behalf of all lawyers, past, present and to come. Finally, I send you all my greeting for a healthy, prosperous and safe new year, and happy holidays.

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Manufacturer Relations and Franchise Issues

Ronald L. Coleman

A look back at 2005 is a great way to get an accurate reading of what to expect from the manufacturers for 2006.

The manufacturers will continue to push the dealers with regard to facility upgrades and exclusivity. The push will be stronger from those franchisors who continue to lead or improve on the sales side.

There will be continued discussion and continued emphasis on CSI, with the approach that will best benefit the manufacturer as opposed to the dealer. The dealer counsel representatives will need to work to try to protect the dealers on this issue.

Even with the difficult market conditions, the manufacturers' need to produce and sell product to meet other financial demands will place additional pressure on dealers for performance on the sales side. Efforts will be made to provide incentives or rebates with some programs continuing to, in effect, create a fixed price for the product. Manufacturer strategies will also have the continued effect of providing a greater benefit to larger dealerships, to the detriment of smaller dealerships.

While manufacturers and dealers agree that they want to be able to compete in the marketplace, there will continue to be a difference of opinion on how to best compete in this very competitive market. Termination notices will more quickly be issued for poor sales. Rights of first refusal will continue to be used to control markets; however, termination is a much more economical way to proceed, especially if the non-performing dealer is struggling financially, which can lead to self-termination.

In closing, dealers need to pay attention and carefully read each and every line of every document a manufacturer asks them to sign. Dealers must keep careful records and create their own paper trail, leaving no letter unanswered, to be properly prepared in the event of any dispute with a manufacturer on major or minor issues.

Ronald L. Coleman is senior shareholder in the Tacoma, Washington law firm of Davies Pearson, P.C., where he chairs the firm's motor vehicle dealer practice group. He is Chair of the NADC Manufacturer Relations and Franchise Issues Section.

Litigation Hot Points for Finance & Insurance Department Practice

Charles (Chuck) Geitner, Esq. and Robert E. Sickles, Esq.

Charles Geitner, Esq.

As more information becomes available to consumers with respect to the retail and wholesale prices of new and used vehicles, dealerships face heightened pressure to recoup their overhead and obtain profit through means other than the vehicle's price. As a result, among other areas of focus by the plaintiffs' bar next year, we predict an increase in litigation over dealer fees, which may be included in the transaction as a fixed fee, or which may be received by the dealer upon assignment in the form of finance charge or rate participation.

We discussed the legal landscape of non-discriminatory dealer participation in the finance charge or receipt of a rate spread at NADC's first annual convention held in Atlanta this past April. Since then, a handful of courts have discussed the practice and in large part found that, in the absence of discriminatory credit pricing, dealer participation in the finance charge is not unlawful.[1] That being said, we anticipate that states will continue to adopt legislation limiting the amount a dealership may participate in the finance charge as Louisiana (dealer rate spread capped at three percent) and California (dealer rate spread capped at two and one half percent for contracts 60 months or less and two percent for contracts greater than 60 months) have, or adopt legislation requiring dealerships to disclose their finance charge participation in the contract, or both.

As for fixed fees, there are several pitfalls that dealerships must navigate to avoid non-compliance with state consumer legislation. For example, a dealership cannot describe a fee that it retains in whole or in part in a manner that suggests that the fee is a tax, title, registration or other state imposed fee, unless, in fact, the fee is going to the state agency for such purposes.[2] Similarly problematic is charging a fee for services that are reimbursed by the manufacturer or that are already encompassed within the price of the vehicle. For example, in *Motzer Dodge Jeep Eagle, Inc. v. Ohio Attorney General*,[3] the dealer charged for services related to the inspection and delivery of the vehicle, describing the fee as a "delivery and handling" fee. The Motzer Dodge court found that in doing so, the dealer violated the state's Deceptive and Unfair Trade Practices Act because many of the vehicle preparation and delivery services which the dealer asserted it performed in exchange for the fee were the same services that the manufacturer paid the dealer to perform with respect to the vehicle. Although some states expressly allow dealerships to charge for certain services, such as document preparation, often times the dealer must disclose that it may profit from the fee it receives.[4]

When examining whether the dealership you represent should charge a fee as part of the transaction, among the factors that should be considered are:

(1) Whether the state has expressly permitted or restricted the fees for the services that the dealer is trying to recoup;

(2) Avoiding a description that implies that the fee is required to be paid by or will be paid to a state agency or for some official state function;

(3) Disclosing when charging the fee that the dealership may profit from the collection of the fee, as opposed to suggesting the recovery of the cost of the services;

(4) Whether the manufacturer permits the dealership to charge for the service being furnished;

(5) Whether the fee is duplicative of a fee that is already being charged for similar services described in the window sticker;

(6) Whether the fee is charged only to customers who finance their purchases, in which case the dealer should, in most instances, disclose the fee as a finance charge;

(7) Whether advertising restrictions imposed by the state prohibit charging a fee when doing so results in a vehicle's sale price exceeding an advertised sale price;

(8) Whether the fee will be negotiable, which could lead to claims of discrimination if the average fee charged is

continued on page 8

1 *See, e.g.* Guinn v. Hoskins Chevrolet, 836 N.E.2d 681 (Ill. Ct. App. 2005) (finding that dealership's failure to disclose rate participation did not violate TILA or state installment sales and DUTPA acts); Claybrooks v. Primus Automotive Fin. Svcs., Inc., 363 F. Supp. 2d 969 (M.D. Tenn. 2005) (declining to toll the statute of limitations for alleged violations of Equal Credit Opportunity Act (ECOA) under the fraudulent concealment doctrine in light of the absence of any duty to disclosure the fact or amount of rate participation); Bey v. Daimler Chrysler Svcs. of N.A., LLC, 2005 WL 1630855 (D. N.J. July 8, 2005) (declining to grant summary judgment in favor of finance contract's assignee on rate participation issue because minority plaintiff's allegations of discriminatory lending raised issues of fact)

2 *See e.g.*, Gibson v. Park Cities Ford, Ltd., (2005 WL 2764244 (Tex. Ct. App. Oct. 26, 2005) (summary judgment reversed on dealership's contention that amount which it charged for dealer inventory tax was in fact paid by dealer to state agency because part of customer's claim is that tax was not properly represented on installment sales contract)

3 642 N.E. 2d 20 (Mich. Ct. App. 1994)

4 *See e.g.* Fla. Stat. § 501.976(18).

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NADC welcomes the following new members:

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- Warranty and Fixed Operations — Wayne Peters, Gearhiser, Peters, Lockaby, Cavett & Elliott, PLL, Chatanooga, TN

State & Federal... from page 1

More state level privacy protection laws will be on the way, as well.

Several states have hopped on the patriotism bandwagon with their own versions of the Servicemembers' Civil Relief Act. Unlike the federal law, though, at least some of these laws will require creditors to reduce rates and take other steps to protect obligors even if the obligation was incurred after the servicemember entered the service. Why should that bother dealers? I expect that banks and sales finance companies that buy retail installment sales contracts from dealers or who make loans to the dealers' customers to purchase cars will reduce their exposure to these creditor-unfriendly requirements.

Pushed by the large banks and sales finance companies, the legislatures in states whose laws do not clearly permit the financing of negative equity are likely to enact legislation that gives the green light to the practice.

In states in which trial lawyers hold sway with the legislature, look for measures seeking to ban or limit the use by dealers and financing sources of mandatory arbitration agreements. Outright bans will be ineffective because the constitutional doctrine of federal supremacy prescribes that the Federal Arbitration Act trumps an outright prohibition. The trial lawyers are getting smarter about arbitration, though, and are now hiding their anti-arbitration measures in broader consumer protection legislation in an effort to avoid the federal preemption argument.

In the enforcement arena, look for the recent actions against dealers regarding advertising to continue and expand. As the AGs who have successfully tagged dealers with big fines crow about their achievements, other AGs will realize that advertising enforcement is really low-hanging fruit, and will initiate similar efforts themselves.

And, finally, look for legal issues to surface regarding dealers' sales of cars over the Internet, especially in cases in which the dealer is selling to a buyer in another state. Most dealers have not done their homework regarding the licensing, contract, documentation and consumer protection issues that such sales create, and even those dealers who have examined these issues have found that state laws and regulations often offer little guidance on how the issues should be resolved.

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Top Labor & Employment... from page 3

Many dealerships need to do a better job of training department managers who have the authority to hire and fire employees. They should at least be trained on the basic requirements of federal and state anti-discrimination laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination and Employment Act and the Americans with Disabilities Act. While it may not be possible to make every manager a "subject matter expert," they at least should be able to recognize when they are dealing with a situation that could give rise to a claim of discrimination.

Training is particularly needed in the area of providing a harassment-free workplace. Managers must understand that they cannot engage in conduct of a harassing nature and they must make sure that the employees they supervise are not harassing one another. All complaints must be taken seriously and promptly investigated. If there is merit to a complaint, the law requires a dealership to take appropriate action to ensure that the harassment does not take place again.

While equal employment opportunity and anti-harassment policies have always been a good idea, they now are an absolute necessity. Every dealership should have a policy that defines harassment, sets forth the company's commitment to a harassment-free work environment, designates the company officials to whom complaints should be made and assures employees that all complaints will be promptly and thoroughly investigated with due regard for confidentiality. In addition to publishing harassment policies in employee handbooks and on bulletin boards, employees should sign copies and these should be maintained in secure personnel files. It is also advisable to meet with employees and managers at least once a year to review the policy and to restate the company's commitment to preventing harassment.

Finally, many dealerships currently are evaluating staffing levels. If a dealership is considering a reduction in force (RIF) for business reasons, it should carefully consider the employee relations aspects and the many alternatives to a RIF. It also should make sure there is a plan to avoid meritorious discrimination claims that can result from a poorly planned RIF.

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CLE Credit Update

The NADC Workshop: Anatomy of a Buy-Sell took place November 3-4, 2006. We applied for CLE credit to all states requested by attendees. The accompanying table shows the responses to those applications to date.

State	CLE Credit Status
Arizona	Accepts certificate of attendance
California	5.5 hours CLE credit
Colorado	5 hours CLE credit
Florida	5 hours CLE credit
Georgia	4 hours CLE credit
Illinois	Application pending
Indiana	4 hours CLE credit
Massachusetts	Accepts certificate of attendance
Missouri	Application pending
Montana	4 hours CLE credit
New Mexico	Application pending
New York	Accepts credit of jurisdictions with which it has reciprocal agreements*
North Carolina	4 hours CLE credit
Oklahoma	5 hours CLE credit
Oregon	4 hours CLE credit
Pennsylvania	5.5 hours CLE credit
Texas	4 hours CLE credit
Washington	5.5 hours CLE credit
Wisconsin	6.5 hours CLE credit

* including CA, CO, GA, IN, NM, OK, OR, PA, WI listed above

Litigation Hot Points... from page 5

higher for members of a protected class.

We would also be remiss if we did not mention negative equity as another hot point of upcoming litigation, not because the issue is a new one, but because of the attention that the California decision in *Thompson v. 10,000 RV Sales, Inc.*[5] is receiving among the Plaintiffs' bar. Even though the *10,000 RV* decision largely dealt with California state law, the court seized upon the testimony of dealership employees to find that negative equity hidden in the purchase price should be considered a finance charge because the inflated price would not have been paid in a comparable cash transaction.[6]

In addition to potential problems under TILA, hiding negative equity in the cash price of the purchased vehicle may result in the customer incurring sales tax liability that the customer otherwise would not incur. Even in those states where the sales tax liability is determined only after offsetting the trade allowance against the new vehicle's purchase price, a dealership may nonetheless run afoul of advertising restrictions that require sellers to sell vehicles at the price at which the vehicle is advertised. Moreover, it is arguable that increasing the sale price of a vehicle to accommodate an upside down trade is a practice "likely to mislead or confuse a consumer" which could be actionable under many states' DUTPA laws. In light of the press that the *10,000 RV* decision has received and keeping in mind these other potential state law issues, we are recommending that our dealership clients review their trade equity disclosure practices with an eye toward satisfying Regulation Z's down payment disclosure rules.

5 130 Cal. App. 4th 950 (Cal. Ct. App. 2005)

6 *Compare* TILA, 15 U.S.C. § 1605 (excluding from the definition of finance charge "charges of a type payable in a comparable cash transaction").

7 *See* TILA commentary at 12 CFR Pt. 226, Supp. I

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