DEFENDER
THE NADC NEWSLETTER

Do Dealerships Really Need USDOT Numbers?

Brett Richardson

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Three RV dealers in different states reported that in the last year their businesses received fines for driving or towing RVs prior to final sale to a consumer because they did not have US Department of Transportation numbers (USDOT numbers). State motor carrier compliance representatives (often the highway patrol) can and do fine RV dealers for their failure to display USDOT numbers on qualifying RVs. In at least one case, the employee also received a warning for failure to carry a medical card and a warning to the driver for having no annual inspection sticker on the tow vehicle.

The USDOT number is the number that the Federal Motor Carrier Safety Administration (FMCSA) assigns to each motor carrier that transports vehicles across state lines for commercial purposes. A business USDOT number must be marked (at least temporarily) on all vehicles with a Gross Vehicle Weight Rating (GVWR) or Gross Combined Weight Rating (GCWR) greater than 10,000 pounds when the vehicle is being used for a business purpose. This applies to both motorized and towable RVs over 10,000 pounds. Strict interpretations of the federal rules by state enforcement officials have swept RV dealers into a regulatory scheme intended to regulate commercial truck-

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Dealer Liability for Aftermarket Modifications

M. Christina Floyd

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With the popularity of automotive accessories and aftermarket modifications spurred by consumer desire to individualize as well as television shows such as "Pimp My Ride," dealers are now more than ever faced with uncertainty as to who is responsible when issues arise relating to vehicles that have been altered after delivery from the factory.

With the exception of California and Louisiana, state lemon law statutes provide the manufacturer with an affirmative defense where defects result from unauthorized modifications or alterations to the vehicle. In at least one case, an aftermarket accessory installed by the dealer was considered an unauthorized alteration allowing the manufacturer to deny warranty coverage for any defects arising from installation of such accessory.[1] On the other hand, courts have held the manufacturer responsible under its warranty for accessories normally installed by the dealer prior to delivery of the vehicle to a consumer.[2] So, it would appear that a

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1 *See* Alston v. General Motors Corp., 1997 U.S. Dist. LEXIS 14958 (E.D. Pa. Sept. 26, 1997) (warranty coverage not applicable to A/C installed by third party)

2 *See* General Motors Corp. v. Blanchard, 1998 Conn. Super. LEXIS 1452 (Conn. Super. May 19, 1998)(warranty coverage applicable to A/C installed by dealer); Dieter v. Chrysler Corp., 234 Wis. 2d 670, 610 N.W.2d 832 (Wis. 2000)(warranty coverage applicable to factory supplied accessories installed by dealer)

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ers.

Dealerships can run into this problem in several circumstances. Examples include:

• Picking up RVs from a manufacturer's facility;

• Transporting RVs to and from RV shows;

• Delivering RVs to customers or RV parks;

• Transferring RVs to service facilities.

This issue has been around for some time and is not a new federal initiative. The increase in enforcement reports may be due to the big increase in the size of motorized and towable RVs during the past decade, and the fact that some new motor homes even resemble commercial trucks from the front.

Basis for the Problem – Commercial Purpose

The FMCSA has established rules for what it considers Commercial Motor Vehicles (CMVs). According to its rules, "A commercial motor vehicle means any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle – has a GVWR rating or GCWR, or gross vehicle weight or gross combination weight, of 10,001 pounds or more, whichever is greater." State and federal officials have interpreted this to mean that unsold RVs are commercially transported "property," and therefore the vehicles need to display USDOT numbers. In addition to the above definition, other vehicles qualifying as CMVs under the federal rules include vehicles designed to: transport more than eight passengers for compensation; carry more than 15 passengers; or transport hazardous materials.

It appears that some state law enforcement agencies are applying the rule only to RVs used for a commercial purpose. If your dealership permits key employees to take the RV for weekend camping or for other personal (non-commercial) purposes, then the vehicle's use would most likely not qualify as a commercial purpose, and USDOT numbers would not be required. However, evidence of this personal use would probably need to be more than a box of crackers in the cabinet.

Compliance Risks and Penalties

Although FMCSA officials routinely conduct vehicle inspections at a carrier's place of business, federal agency employees are not authorized to stop commercial motor vehicles along the nation's highways to subject them to inspection. Instead, federal officials partner with state personnel who are responsible for enforcing highway safety to compel selected commercial motor vehicles and their operators to undergo roadside inspections. If, upon inspection or investigation, it is determined that a motor vehicle providing transportation requiring registration is operating without the carrier having registered with the agency, or if that vehicle is being operated beyond the scope of such registration, the vehicle will not be allowed to continue to operate and will be placed out-of service. The violating motor carrier may be subject to additional enforcement penalties.

State Variations

Compliance requirements in your state may vary according to how your state has adopted (or exceeded) the federal rules, and whether intrastate travel has been exempted. Some states, such as Florida, have a specific exemption for RV dealers moving units commercially within the state. However, even Florida dealers lose this exemption whenever driving outside of Florida. In addition, some states define commercial motor vehicles as vehicles with different weights – differing from the FMCSA's definition of vehicles in excess of 10,000 pounds. You should check with your state authorities to determine requirements that may be unique to your state, and what effect those requirements have when transporting vehicles in interstate commerce.

How to Obtain USDOT Numbers

A dealership may obtain more information about the regulations for private motor carriers and links for obtaining the appropriate forms from the FMCSA website (www.fmcsa.gov). Form MCS-150 (Motor Carrier Identification Report) and Form MCS-150A (Safety Certification form) will likely be required. Alternatively, your dealership may call (800) 832-5660 to have the forms mailed. Once a motor carrier has filed a completed MCS-150 and MCS-150A accurately, it will receive its USDOT number.

USDOT Number Displayed on Vehicles

A USDOT number identifies a specific business and is not a unique number for each vehicle. Motorized RVs and towing vehicle combinations need to display USDOT numbers on RVs in excess of 10,000 pounds. The number should be affixed on both sides of the RV (or towing vehicle), in a color contrasting with the background of the vehicle. Likewise, the numbers must be large enough to be viewable from 50 feet. The regulations permit temporary displays of USDOT numbers on vehicles – such as magnetic signs. Other states would permit the display of USDOT numbers in the windows of RVs.

Compliance Programs

Unfortunately, dealers have additional burdens under this rule intended primarily for truckers. Once the dealership receives a USDOT number, the dealership inherits the requirements of log books to account for a driver's hours of service. Also, when a dealership registers as a private motor carrier and receives its USDOT number, the dealership enters the FMCSA New Entrant program. The New Entrant program subjects motor carriers to an 18-month safety-monitoring process. During the safety-monitoring period, registered dealerships are subject to a safety audit to monitor a dealership's safety data (pertaining to inspections and crashes), and verify that the dealership has basic safety management controls in place. Failure to have these controls in place may result in loss of the dealership's USDOT number and, therefore, its inability to operate in interstate commerce.

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dealer may avoid general liability for defects arising from installation of aftermarket products so long as such accessories are provided by the manufacturer and installed by the dealer.

Under the federal Magnuson-Moss Warranty Act, installation of aftermarket equipment does not automatically void a manufacturer's warranty, unless such warranty expressly states such or it can be shown that the aftermarket product was the direct cause of a failure. In the latter instance, it is the manufacturer's burden to prove that the aftermarket installation caused the failure or need for repair before it can deny warranty coverage.

Of course, the dealer's challenge of holding a manufacturer to its warranty and indemnity obligations is often colored by the franchise agreement. Most sales and service agreements contain exceptions to the manufacturer's responsibility to indemnify the dealer for product defects where the product has been altered by or for the dealer. And, as you might expect, manufacturers do not hesitate to refer to these provisions when issues arise. For example, several years ago American Honda released a statement to its dealers regarding solicitations the dealers had received from vendors for leather upholstery conversion and add-on seat heaters. Apparently, such aftermarket items have been deemed by Honda to be incompatible with side airbag systems in some of its vehicles because of the risk that they would cause improper deployment of the airbags. In addition to recommending that dealers not install such accessories, Honda noted that dealers would have to assume all liability in any related litigation. In such event, the dealer would also most likely find themselves without insurance coverage, since most liability policies do not provide coverage for denial of warranty claims.

Not to be discouraged, vendors often quickly offer to indemnify dealers in the event of a loss resulting from design or manufacturing defects in the accessories provided. While many dealers may perceive such indemnity agreement as adequate protection against liability, the realities of having to enforce a vendor's responsibility to cover claims arising from installation of their product may compel prudent dealers to avoid the risk. Although there does not appear to be a reported decision relating to the seat accessories noted above, it is not difficult to imagine a dealer ending up on the losing end of a consumer battle. This is particularly true if a consumer is injured due to an aftermarket accessory purchased from and/or installed by a now defunct third party vendor, for which the manufacturer legitimately disclaims liability under the state lemon law and Magnuson-Moss Warranty Act. Conversely, even if the vendor is solvent and has adequate insurance, the dealer is still faced with having to prove that the accessory was defective in order for the indemnity to apply. Thus, it's an expensive proposition for the dealer either way.

One option dealers often pursue in an attempt to find some protection is that of the customer waiver. Everyone is familiar with the typical one-page acknowledgment and release used by dealers in relation to disclosing a variety of information to the consumer (e.g., pre-delivery damage, finance-conditioned delivery, etc.). Such waivers may be helpful when asserting assumption of risk as a defense to a claim arising out of an aftermarket modification as long as the dealer can show that the customer understood the potential impact of the modification. To that end, such waivers should not only include statements as to the scope of the modification, but also a warning as to any known risks that may arise as a result of the modification. For example, with the aftermarket seat accessories discussed above, any consumer waiver would need to include a warning as to the risk that they would cause improper deployment of the airbags. Also, in order to be effective, such waivers would have to be signed prior to performance of the modification so that the customer has the opportunity to decline the alteration in light of the disclosed risk.

Finally, federal law prohibits dealers from altering or modifying any part, design or equipment installed in a motor vehicle in compliance with an applicable safety standard to the extent that such modification would render them inoperable.[3] Consequently, installation of popular aftermarket accessories such as headrest video systems and custom tires and rims may expose the dealer to liability if such installations require or result in modifications to required safety equipment in a way that causes them to be inoperable. Moreover, in such event, any customer waiver in favor of the dealer would most likely be ineffective.

While financial incentives and the competitive realities of running an automotive dealership may encourage an active aftermarket business, dealers need to remain aware of the risks involved and constantly look for areas where legal issues may arise. The cost of resolving such issues may far exceed the revenues generated by installing vehicle bling!

Chris Floyd serves as General Counsel for the Hall Automotive Group primarily located in the Hampton Roads area of Virginia. Hall operates 16 franchises at 19 locations in Hampton Roads, Virginia and Moyock, NC.

3 49 USC § 30122

Executive Director's Message

Jack Tracey. CAE

The date and location for the second annual NADC conference have been set. Mark your calendar for April 23-25, 2006 and plan to come to Chicago, to The Westin Chicago River North. If you thought last year's well-attended event was a great opportunity to meet your peers, just wait and see this year's conference. Membership has increased substantially since our last conference, and we expect attendance to increase proportionately. Remember, only NADC members may attend events (and we are over 360 members and growing). The conference qualifies for CLE credit, too.

Your board of directors is working to build a conference program that will meet the needs and interests of the entire membership. We are looking for speakers now, so if you would be interested in presenting on a topic of interest to the membership, please contact me. In addition, if there are legal issues or areas of interest you would like to see covered, let me know that as well. What better opportunity is there to share views on the myriad legal issues facing a dealership law practice? Your input is valuable and your participation vital to the success of the conference.

Mark Your Calendars!

NADC Member Conference

April 23-25, 2006

The Westin Chicago River North

Visit www.dealercounsel.com often for updated program and registration information.

NADC is all about communication. From the list serve, the on-line forum and monthly newsletter, the Association has developed communication channels on dealership law that didn't exist eighteen months ago, before the NADC was formed. Your involvement in this communication is what makes it so outstanding. So, don't miss the opportunity for face to face communication with other members at the conference.

I look forward to hearing from you and to seeing you in Chicago in April.

Contact Jack Tracey by email at jtracey@dealercounsel.com or call him at 410-712-4037.

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Sometimes Commercial Drivers' Licenses are Required

Although there are very few circumstances under which a consumer needs to obtain a commercial driver's license (CDL) to operate an RV, it is widely recognized that a commercial truck driver requires special skills and knowledge requiring a commercial driver's license. Another unintended consequence of this rule is that dealerships may need to have their employees obtain special licenses if they transport RVs in excess of 26,000 pounds. States are required to issue Class A or B commercial driver's licenses when a CMV is in excess of 26,000 pounds.

The requirements are:

• Class A – Any combination of vehicles with a GVWR of 26,001 or more pounds provided the GVWR of the vehicle(s) being towed is in excess of 10,000 pounds.

• Class B – Any single vehicle with a GVWR of 26,001 or more pounds, or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR.

Dealerships operating such large RVs are also required to comply with additional federal CDL requirements, which include obtaining health certifications for such employees and establishing a program for drug and alcohol testing.

Dealership Alternatives

One way that some dealerships get around this heavy regulatory burden is to place the compliance burden on commercial businesses that are known as drive-away/tow-away operations. These commercial motor carriers will have their employees transport your vehicles, for a fee, and at the same time, be the party responsible for the commercial drivers' licenses, insurance, and the drug and alcohol testing of their employees.

Brett Richardson is the Director of Legal & Regulatory Affairs for the National RV Dealers Assoc- iation. Brett previously worked as a staff attorney for the National Automobile Dealers Association (NADA).

New Members

NADC welcomes the following new members:

Full Members

Robert F. Macdonald
Bernstein Shur Sawyer & Nelson
Portland, ME

Jay O. Millman
Brenner, Evans & Millman PC
Richmond, VA

Patrick Kavanaugh
Hamilton and Hamilton LLP
Washington, DC

Gregory A. Holmes
Wiggin & Nourie, PA
Manchester, NH

Executive

Brett Richardson
National RV Dealers Association (RVDA)
Fairfax, VA

Fellow

Allen Jones
Hamilton and Hamilton LLP
Washington, DC

F&I Litigation Defense Is Not A Game Of Chance!

gvo3 & Associates brings over 80 years combined experience in working with automobile dealerships to coordinate the development and implementation of a ***Litigation Defense Strategy*** for the F&I Office as part of a dealership's overall risk management plan.

Six elements of the **gvo3 & Associates** program:

1. **Conduct a risk assessment**
2. **Develop policies and procedures**
3. **Train on expected behaviors**
4. **Establish a tertiary level audit process**
5. **Implement corrective action and document the changes**
6. **Assist in industry certification**

About Gil Van Over

- Speaker at CPA, CFO, Dealer Association conferences
- Published monthly in *Dealer Magazine*
- Available for expert witness services
- Who's Who – *F&I Management & Technology Magazine*
- Association of Finance & Insurance Professionals mentor

gvo3 & Associates
A Financial Services Risk Management Company

For more information, please contact Gil at 312-961-9065
or visit our website at www.gvo3consulting.com

CLE Credit Update

The NADC Workshop: Anatomy of a Buy-Sell took place November 3-4, 2006. There were 46 people in attendance for the four sessions that covered the spectrum of buy-sell transactions. An open forum provided attendees the opportunity to ask questions and discuss the topics.

We applied for CLE credit to all states requested by attendees and, following the workshop, sent lists of attendees to appropriate state agencies. In addition, attendees received certificates of attendance

Of the 20 states to which we applied, our application is still pending in New Mexico and Virginia.

Of states granting credit, they awarded the following CLE credit hours:

- California 5.5
- Colorado 5
- Florida 5
- Georgia 4
- Indiana 4
- Missouri 4.8
- Montana 4
- North Carolina 4
- Oklahoma 5
- Oregon 4
- Pennsylvania 5.5
- Texas 4
- Washington 5.5
- Wisconsin 6.5

Arizona and Massachusetts accept certificates of attendance, and New York accepts credit of those jurisdictions with which it has reciprocal agreements. Mandatory credit requirements in Illinois start with 2006.

Associate Member Spotlight: Crowe Chizek and Company, LLC

Crowe Chizek and Company LLC has a professional services team that can deliver a wide variety of forensic services specifically for dealerships. The combination of forensic and dealership professionals provides a unique team of experts with an in-depth understanding of dealerships and enhanced knowledge of litigation, dispute resolution, and fraud detection.

As one of the top 10 accounting and consulting firms in the nation, our staff of professionals, dedicated to serving dealerships for over 40 years, has valuable expertise in dealing with accounting and financial transactions, asset and enterprise valuations, breach of contract, breach of fiduciary duty, purchase price disputes, valuations, dissenting shareholder disputes, and economic issues unique to dealerships. Our forensic experts work to create sophisticated reports, damage measurements, and complex data analysis other firms struggle to duplicate.

For more information about Crowe's forensic services or to schedule an executive briefing, please contact: Rick Kotzen, Executive, at 954.489.7430, or e-mail at rkotzen@crowechizek.com; or Marilee Hopkins, Executive Partner, at 312.899.7010, or e-mail at mhopkins@crowechizek.com

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