

# DEFENDER

## THE NADC NEWSLETTER

### "Organized Labor Relief Act" Warrants Serious Attention

*D. Gerald Coker*



*D. Gerald Coker*

#### Sidebar

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A bill entitled the "Employee Free Choice Act of 2007" recently was introduced in the 109th Congress (H.R. 1696 and S.842). This bill, which was passed in the House by a vote of 241-185 on March 1, should be called the "Organized Labor Relief Act" because it would fundamentally and radically change the National Labor Relations Act (NLRA) in three major respects: (1) instead of employees voting on union representation in secret ballot elections supervised by the National Labor Relations Board, an employer would be compelled to recognize and bargain with the union if it merely secures signed

authorization cards from the majority of employees in an appropriate unit; (2) there would be mandatory arbitration if the parties are unable to reach agreement on a first contract after 90 days of direct bargaining and 30 days of mediation; and (3) employers would suffer stiffer penalties for violations of the Act, including provisions for double back pay for employees who suffer discrimination during an organizing drive or negotiations for a first contract, and civil penalties for willful or repeat violations.

If this bill were to become law, the negative  
**continued on page 6**

### Am I Psychic?

*Oren Tasini*



*Oren Tasini*

At the end of 2005, Rob Cohen asked me to predict the legal trends in the buy-sell arena for 2006. I wrote then about the troubles at General Motors and the possible ramifications to the domestic automobile industry. Looking back, was I right? The answer is, maybe. (Do lawyers ever give a yes or no answer?)

During the past year, Ford changed management and went outside the industry to hire Allan Mulally from Boeing, as its new Chief Executive Officer, to right the ship. The new "way forward" includes a plan to trim jobs and dealers and, for the first time in the company's 103-year history, to pledge the Ford brand as loan collateral. Daimler-Chrysler is in the process of

deciding whether it should be just Daimler and dump the Chrysler. And now the Big Three are not the Big Three anymore, Toyota having surpassed Ford as the second largest seller of cars in the United States. As for General Motors, it seems to be doing something right. It did not seek bankruptcy protection as some had predicted, its stock price has risen from less than \$20 to \$35 a share, it is being mentioned as a suitor for Chrysler and it still holds the top spot for sales volume in the United States. But it also continues to lose money and how long can you lose money and hope to make it up in volume?

So, what will happen in 2007? As my  
**continued on page 5**

## President's Message



*Jonathan P. Harvey*

It is with just a touch of sadness and a great deal of pride that I write my last President's letter to all of you who have so generously and enthusiastically embraced and supported the NADC. We are not often given the opportunity to create a professional association with such lasting value and, particularly, one so important to our daily work life. I have enjoyed every minute of my time with the NADC and its members, starting with the first phone call to Jim Moors at NADA about the possibility of such a concept, the first organizational meeting and continuing with the many new and significant friendships I have made while together, we built this group.

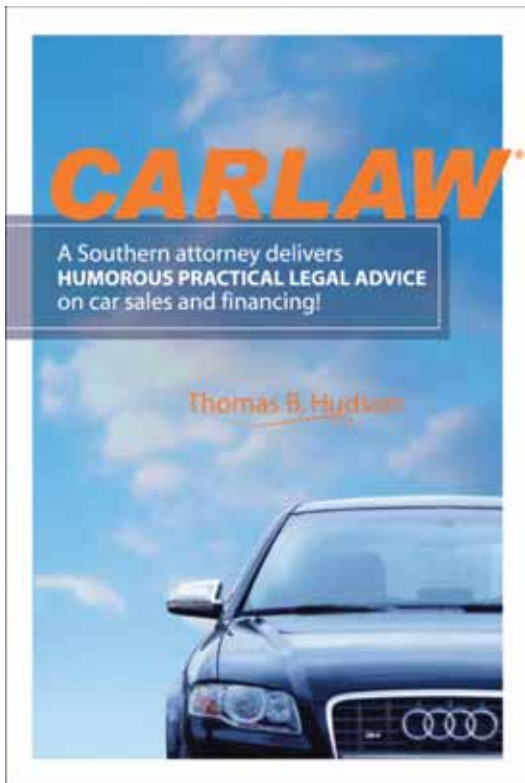
The NADC is now a strong, well-rooted professional society, and I know it will prosper and grow as long as there is an

automobile industry. It will, however, require continued vigilance in a number of areas, the most important of which are duty to our craft and obligation to those we serve. We must never let this association become unprofessional, and we must guard against indifference. The NADC should always be seen as a gathering of proud lawyers who serve a valuable function and who strive for excellence in their area of concentration for the benefit of their clients. While it is true the automobile business is a tough and, sometimes, a rough arena, that does not mean we are obliged to abandon our principles. There are rules, and there are codes of professional responsibility. Let it always be said that the members of this association have maintained the highest awareness of what it is to do the right thing and have undertaken to do so.

Finally, our new President, Mike Charapp, is the perfect person to take the NADC, as we say in the car business, to the

next level. He is a smart, dedicated, hard-working lawyer with a sense of how to get things done. Assisted by an enlarged board, with new and fresh ideas, he will lead us well during this time of great upheaval in the industry. But, he will need our help, and I am confident we will honor the call. I know you all join me in wishing him great success and hearty congratulations as he takes on the Presidency of the National Association of Dealer Counsel. So too must we congratulate and wish well the new officers and board. As for me, I do not intend to be silent. Rather, I will have some time to stir up controversy from the back benches and create turmoil. I wish all of you great success and take great pride in leaving you with an association which is alive and well.

*Jonathan P. Harvey of Harvey and Mumford LLP is Past President of the NADC and can be reached by e-mail at: [jpharvey@harveyandmumford.com](mailto:jpharvey@harveyandmumford.com)*



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## Message From Executive Director



*Jack Tracey, CAE*

Those who attended the 3rd annual conference in March, know that it was time well spent. The evaluations of the conference as a whole and of the individual sessions prove that the conference planners were right on target. Those who did not attend can get a taste of the conference by logging in and going to the events page where slides and handouts from some of the sessions are available to download.

Conferences and workshops are opportunities for learning and sharing, and we've

been fortunate to experience speakers who are experts in the topics they present. The free exchange of information and ideas is a valuable benefit of NADC membership, but we want to emphasize that speakers do not necessarily reflect the position of the NADC. After you log in and go to the events page, you can read the statement that gives more detail.

The NADC board of directors was expanded this year, and new officers were elected at the annual membership meeting held during the conference. Jonathan Harvey, who served as the founding president, was lauded for his years of service and will continue on the board. A list of

board members is found on page three of this newsletter.

California members of NADC have expressed interest in forming a California chapter. Members who practice in California are invited to join. If you are interested, go to the website, log in and scroll down the information form and indicate your interest in joining. Andrew Weill of Benjamin, Weill & Mazer is chapter chairman and Rob Cohen of Auto Advisory Services is vice chairman. Membership is \$100 annually. A California list serve is also available.

Contact Jack Tracey, CAE, NADC executive director, at: [jtracey@dealercounsel.com](mailto:jtracey@dealercounsel.com)

## CLE Update Annual Conference

We applied for continuing legal education credit to all requested states that grant credit and submitted rosters of attendees to those states. Not all states accredit educational programs, and educational requirements and CLE record keeping vary from state to state.

The table to the right summarizes the status of those applications for credit.

Please include your state bar identity number when requesting CLE credit for an NADC program

If you have questions about your CLE credit, please contact:

[jtracey@dealercounsel.com](mailto:jtracey@dealercounsel.com)

### STATE

### CLE CREDIT

Alabama	.....10.6
Colorado	.....13.0, including 1.2 ethics
Florida	.....12.5, including 1.0 ethics
Georgia	.....10.5, including 1.0 ethics
Illinois	.....application pending
Indiana	.....10.5, including 1.0 ethics
Kansas	.....12.5, including 1.0 professional responsibility
Kentucky	.....10.0, including 1.0 ethics
Louisiana	.....application pending
Minnesota	.....9.25, including 1.0 ethics
Mississippi	.....application pending
Missouri	.....12.7, including 1.2 ethics
Montana	.....10.5, including 1.0 ethics
New Mexico	....8.5 general, plus 1.0 ethics

### STATE

### CLE CREDIT

North Carolina	..10.5, including 1.0 ethics
Ohio	.....10.5, including 1.0 ethics
Oklahoma	.....12.5, including 1.0 ethics, professional responsibility or malpractice prevention
Oregon	.....11.25, including 1.0 ethics
Pennsylvania	...10.5, including 1.0 ethics
Tennessee	.....application pending
Texas	.....10.5, including 1.0 ethics
Vermont	.....9.5, general 1.0 ethics
Virginia	.....10.5, including 1.0 ethics
Washington	....9.75, including 1.0 ethics
West Virginia	...12.7, including 1.2 ethics
Wisconsin	.....12.5, including 1.0 ethics

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Psychic ...  
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teenage children tell me in response to every question I ask, "I don't know." This is just in front of "nothing" and "why do I need to tell you." What I do know is that my clients who own domestic franchises seem a lot less happy than those owning import franchises. I also know the domestic manufacturers are in a state of confusion. The executive office may have a plan, but the employees and dealers are not clear on what it is. When your client receives an unpleasant letter about its CSI score from the home office threatening franchise termination and gets an apology from someone else within the same office when your client pushes back, you know the right hand does not know what the left hand is doing.

Uncertainty breeds insecurity. That is the vibe I am getting. For our dealer clients the fact is they are in a symbiotic relationship with the manufacturers, both domestics and imports. Each needs the other and indeed the legal framework mandates they work together. The answer as to what will happen in 2007 depends on predicting human behavior. How will the employees at the Big Three respond to buyout offers (initial response, get me out of here)? Will the manufacturers attempt to reduce their dealer body using a carrot or a stick? How will dealers react to the plans? So, I predict that in 2007, I will again be partly right, which is the same as saying human behavior is unpredictable. It will be an interesting year.

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

## 3rd Annual Members Conference

More than 150 attorneys who represent automobile dealers convened in Dallas in March for the third annual conference of the National Association of Dealer Counsel (NADC). The NADC exists to keep its attorney members up-to-date on legislative and regulatory issues that affect their clients' businesses. This year's conference covered topics as diverse as franchise relations, employment law, accounting and electronic discovery rules. A session on ethics discussed methods of providing counsel over multi-state territories.

"An ounce of prevention is worth a pound of cure" could have been the motto of the conference as speaker after speaker extolled the value of having written policies in place and records of promulgation of those policies in relation to compliance and employment issues. The policies and written record proving their promulgation protect dealerships and, in some cases may prevent damages being assessed.

Federal regulators focus on F&I issues, and there is mandatory jail time for some offenses. Those attending the conference learned how to help their clients stay on the right side of the law. Employment practices are also scrutinized by federal officials and, again, having policies in place provides some protection for dealerships.

Dealers are increasingly feeling the threat of the loss of their franchises, and good legal counsel is critical during negotiations with manufacturers from the very beginning of the relationship. It is always important to understand the franchise agreement

manufacturers "getting rid of dealers."

The ethics of practicing law across state borders was especially pertinent for attorneys who handle multi-state dealership groups. Advice from the podium was simple: when handling an out of state legal concern, one needs to be certain the legal team includes lawyers admitted to the bar in the states concerned.

A session on electronic discovery brought those in attendance up-to-date on disclosure rules. With about 93 percent of forms stored on computer, a reasonable and consistently enforced information retention program for electronic files makes sense. Disclosure rules vary by state, and one needs to understand the procedures should litigation become an issue.

Discussions both during and following the sessions were lively as those in attendance asked questions and shared their experiences. NADC members value the opportunities to network with other attorneys.

Those in attendance were reminded that the speakers were sharing their knowledge and expressing opinions that are their own and not necessarily views shared by the NADC. The NADC does endorse, however, the right to express opinions. The free flow of ideas is a valued benefit of membership.

Evaluation forms will be used to help plan future educational programs. The ratings given topics and speakers prove that the work the conference planning committee did was appreciated. CLE was available.

The conference program and the presentations and handouts of those presenters who permit it are available after log in on the events page of the NADC website, [www.dealer-counsel.com](http://www.dealer-counsel.com).

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and even more important when manufacturers plan to reduce the number of dealerships. The attorneys present shared their own experiences of what one speaker called

## **"Organized Labor ... "** **from page 1**

tive consequences for dealerships and other employers would be enormous. The NLRA was designed to safeguard the right of employees to form, join and assist unions or to refrain from doing so. While not perfect, the present system has worked well for employees, unions and employers since 1935. Unions – not employees – want these radical changes, and they are flexing their political muscles in an attempt to get them. This is so despite the fact that unions win 57% of all NLRB elections.

### **How It Works Now**

Currently under the NLRA, if a union gets cards signed by 30% or more of the employees in an appropriate unit at a dealership (e.g., service technicians), it can file an election petition with the NLRB. An agent of the Board conducts an investigation and holds a hearing if necessary in order to resolve disputes about the composition of the unit. A decision is made and a secret ballot election is conducted by the Board, usually in a dealership conference room. The union is not certified as the collective bargaining representative of the employees unless it receives a majority of the votes cast. The entire process, from the filing of the petition to the holding of the election, usually takes 40 to 50 days.

If a union wins an election, the parties enter into contract negotiations a short time later. Both the union and the employer must bargain in good faith. But a company can bargain hard for a deal that

makes business sense. If the parties desire assistance, they can request a mediator from the Federal Mediation and Conciliation Service. The mediator's job is to help the parties bridge their differences; however, neither side must accept his recommendations. Rather, if a union is dissatisfied with the employer's position on the issues, it can call a strike in an attempt to pressure the company to alter its stance. By the same token, the employer is free to resort to economic pressure by locking out employees. The side with the greater "economic strength" prevails. There is no such thing as mandatory arbitration.

### **Employees Already Are Protected**

What unions conveniently choose to ignore is that the NLRA already protects workers' rights to support or not support a union. When employers are alleged to have violated the law, both employees and unions have the right to file charges with the Board. Employers may not take any disciplinary action against workers based on their feelings about union representation. Likewise, employers may not threaten workers based on their union sympathies or lack thereof. If an employer is found to have violated the law, the Board has a variety of "make-whole" remedies at its disposal. For example, if the Board determines that an employee has been discharged unlawfully, it can order the employer to reinstate him with full back pay plus interest. For lesser discipline, such as an unlawful warning, the Board can order the employer to remove the warning from his

file and not to rely on it for any future discipline.

### **Radical Changes**

The proposed bill would stand the NLRA on its head. Card checks do not ensure employee freedom of choice. To the contrary, cards often are signed in front of other employees and even union officials; thus, the whole process is subject to intimidation, coercion and manipulation. Unlike a secret ballot election, the union would know exactly who signed a card and who did not. Experience has shown that many workers sign cards due to peer pressure or because they do not want to incur the union's wrath, not because they support the union. But unions love card checks. Why? Because studies show that when an employer agrees to a card check, the union will be recognized as the employees' collective bargaining representative 78% of the time.

But as bad as the mandatory card check recognition provisions are, employers would have no leverage at the bargaining table under the proposed bill, and a union would have absolutely no incentive to bargain in good faith for a first contract. This is because the union would know that it could get a two-year contract imposed by an arbitrator within a few months time. Think about it: an arbitrator telling a company what wages, benefits and other terms and conditions of employment it must provide for its employees! This would be a seismic change to the bargaining process,

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**"Organized Labor ... "**  
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and one that is completely one-sided in favor of unions. Dealerships and other employers would be faced with the Hobson's choice of agreeing to a first contract with unfavorable terms or putting the fate of the company in the hands of an arbitrator who has little or no familiarity with the employer, its business and the competitive demands it faces in the marketplace.

**Conclusion**

The present system is not "broken." The "Employee Free Choice Act of 2007" would be a disaster for dealerships and other employers while giving unwarranted assistance to organized labor. The simple fact is that the popularity of unions is at an all-time low because unions have not delivered a product (representation) that U.S. workers believe is necessary or value added in the 21st century. Observers who discount the chances of this bill ever becoming law should think again. Even it fails this time around, another version of the bill is likely to resurface and it could have the support of the next President, particularly if he or she is beholden to organized labor.

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## New Members

*NADC welcomes the following new members:*

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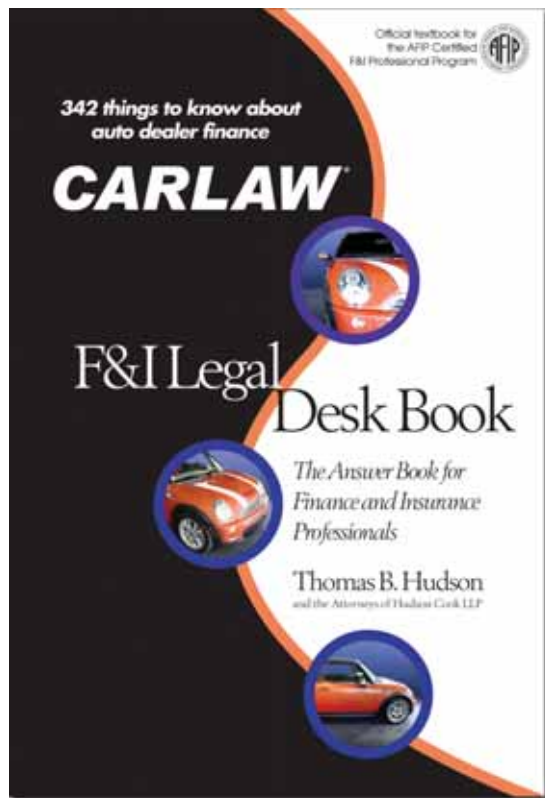
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