DEFENDER
THE NADC NEWSLETTER

If You Read This Article, I'll Give You $1,000,000!*

Rob Cohen

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I know times are tough for a lot of dealers. Whether it's the economy, the factory, law enforcement, or plaintiff attorneys, there's always someone or something trying to prevent dealers from making money. But, trust me when I say, now is not the time to allow your clients to resort to misleading advertising in an attempt to increase traffic.

I have reviewed hundreds, if not thousands, of dealer advertisements through the years. Many are good, compliant ads and many are not. By and large, though, the worst ads I have seen are not those created by dealer or newspaper personnel. The most problematic ads I see are created by promotional companies (a.k.a. "mail houses").

Repeatedly, dealers are approached by promotional companies selling products that could easily be used as an Attorney General's example of everything NOT to do in an advertisement. We regularly see mailers that contain glitzy drawings, sweepstakes, "scratcher" cards, "spin to win," and giveaways. I can honestly say that in the 13 years that I have been reviewing these pieces, never once have I said, "Looks good, go ahead and run with it." Under most circumstances, I could create a two or three page laundry list of compliance issues. Yet, this is the stuff that is

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* Just kidding. This is not a real offer. Statement made only to illustrate the point of this article. Void where prohibited by law (like everywhere). See author for details. And, by the way, don't let your dealer clients use asterisks and small print (like this) to contradict bold headlines in ads.

Sidebar

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Most dealerships in the U.S. are "union free," meaning a labor union does not represent any of their employees for the purpose of collective bargaining under the National Labor Relations Act. Also, most dealers are aware of the renewed effort of the Machinists Union to unionize dealership technicians in south Florida and other areas of the country. For any dealer or manager who thinks "it couldn't happen in my store," here are two sobering facts: (1) a recent Gallup poll found that 60% of Americans "approve" of labor unions; and (2) according to the most recent government statistics, unions win 63% of the elections conducted by the National Labor Relations Board.

The beginning 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; and (3) review benefits policies (particularly health insurance) to make sure that they are competitive and that employees understand the value of these benefits.

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President's Message

Michael Charapp

These Are the Good Old Days

As the years go on, I find myself grasping for the benefits of the aging process. Aside from the cliché that it beats the heck out of the alternative, every once in a while I find something I like. For a lawyer, it's the wisdom that is supposed to come from experience. Or, in the case of a dealer lawyer like myself, at least the perspective to put into context the lamentations about today's car business.

We spend a lot of time as dealer lawyers trading tips to help our clients stay out of trouble. By exchanging emails, or attending seminars, or using the other opportunities to share information that NADC affords, we can get the impression that dealers just can't seem to stay within the white lines. That's where the perspective of age comes in handy.

I have been around the car business for nearly 50 years. When I think about first starting to learn about my family's Dodge dealership in the late 50s and 60s, I realize that the times were different, and not in a good way. Dealers were just starting to come to grips with the requirements that they provide information to customers. APR instead of a meaningless add-on rate? Ridiculous! A sticker on the window telling the customer what the factory recommends the retail price to be? Sacrilege! My late father blamed it all on Ralph Nader. I remember him whacking me once when I had the temerity to suggest that the window sticker was actually the idea of some Congressman named Monroney.

I started representing dealers as a lawyer in the mid-70s, and I took an in-house counsel and management position with one of the early so-called megadealers in the mid-80s. Folks, car dealerships in those days were the last bastion of laissez faire business theory. Some examples:

- When I first went to work for the megadealer, I got a call from a customer complaining that he couldn't get his other two doors. I couldn't understand what he was talking about except that he had a "we owe" slip. I asked him to send me a copy. Sure enough, he had wanted a four door car, and the dealership only had a two door in that model. So a salesperson who knew he was leaving to work for another dealer sold the customer a two door and gave him a we owe slip for the other two doors.
- College grad finance programs were a big deal in the late 80s. The F&I department of one of our dealerships decided to invent a university and print diplomas for those who didn't get the benefit of a higher education. When I asked for an explanation, the F&I director used a pre-O.J. turn of phrase to explain that "it's unfair to discriminate against those who did not matriculate." Interestingly, a number of years later I was representing a dealer in a personnel dispute with a manager who misrepresented his qualifications. He tried to use one of those diplomas to support his claim that he was a college grad. Nice try!
- It was a tradition to ring a bell after completing a deal with a customer who was "properly protected." What's that? Selling a car with all the protection items, after-sale items, and five points of reserve. There are customers today who are still paying off the negative equity that keeps rolling over from the 80s.
- Do you think that the stories about trade keys being thrown on the roof of the showroom are apocryphal? Think again. Ditto for blocking in the trade and sending it down the street for the six hour evaluation and clean up.

I could go on for pages about these memories, but I think you get the picture. Most dealers today do not allow these tactics. Critics attribute that to the impact of the internet, or plaintiffs' lawyers, or CSI surveys, or any number of factors. But I think it's a little bit of all of the above, and a lot of something else – most dealers are good folks. They just don't want their businesses conducted that way. That's why a lot of the cases we fight over today involve technical questions of whether a dealer should have sent an adverse action notice in addition to that sent by the proposed creditor or whether the dealer should have disclosed the paint work on the right fender of the six year old used car.

We dealer lawyers played a major part in this transformation. Our efforts to educate dealer personnel have helped a lot.

But there is one other thing about getting "experienced" as I like to refer to myself today. There is a temptation to be nostalgic about the good old days. Then I remember the 3 AM call because of the drug overdose in the dealership of a sales manager who was just trying to "relax" after a long, stressful night or the 2 AM call to bail out a sales manager arrested for false imprisonment because he refused to let a customer leave until he agreed to buy the car. The sales manager told me confidentially that his only real mistake was turning his back on the customer so that he could call 911 on the dealership telephone.

Then I realize that for the car business, these are the good old days.

Michael Charapp, President of the NADC, is a partner with Charapp & Weiss, LLP in McLean, VA.

Plan to Attend:

4th Annual NADC Member Conference

April 6 to 8, 2008

Ritz Carlton, St. Louis

Topics will include:

- **Red Flag & ID Theft**
- **Litigation**
- **Compliance**
- **Labor Law**
- **NADA Update**
- **Factory Relations**

Information will be posted as it develops at **www.dealercounsel.com**

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February 28, 2008

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Registration is $375; $325 for chapter members. Contact the hotel at 949-833-9999 for room rate of $159, plus tax.

Topics include:

- **History of the California 553**
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Workshop Sponsor Reynolds & Reynolds.

New Members

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Newport Beach, CA

Andrew L. Siegel
Shackelford Melton & McKinley LLP
Dallas, TX

Associate

Mary-Beth C. Roselle
AutoStar
New York, NY

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But what about the dealerships where one or more groups of employees are represented by a union? Must it always remain that way? Are there procedures that employees can use to become "union free?" Good news: "no," it does not always have to stay that way and "yes," there are procedures for "decertifying" a union.

What is Decertification?

The National Labor Relations Board is a federal government agency with regional offices in most major cities. The NLRB administers the National Labor Relations Act, the federal labor law that covers dealerships. The Board will entertain the filing of a decertification petition between the 60 and 90 days prior to expiration of the labor contract (this is called the "window period"). If a dealership is part of a multi-employer bargaining group, it must make a timely withdrawal from the group before a decertification petition is filed. In order to be "timely," the withdrawal must occur before the beginning of contract negotiations. If no decertification petition is filed during the "window period" prior to contract expiration, a petition can be filed after the contract expires, provided no agreement has been reached on a new contract.

An employee can file the petition with the NLRB if at least 30% of the bargaining unit employees have signed a document stating their desire not to be represented by the union. The dealership can file the petition if more than 50% of the bargaining unit employees have signed a document stating their desire not to be represented by the union and this document is presented to management.

By law, management can neither solicit employees to file a decertification petition nor render assistance; however, as a general rule it is permissible for management to answer employee questions about decertification procedures and to provide an employee (who has voluntarily expressed an interest in decertification) with the telephone number of the closest NLRB regional office, where an agent will provide the necessary information.

In the event a decertification petition is filed, management is free to conduct a lawful, aggressive communication campaign with its employees, but management cannot make explicit promises to improve wages, benefits or other terms and conditions of employment (Marvyn's, 240 NLRB 54 (1979); however, it is lawful for an employer to compare wages/benefits in the unionized departments to the wage/benefits package in non-union departments at other dealerships under common ownership. Langdale Forest Products Co., 335 NLRB 602 (2001); TCI Cablevision of Washington, 329 NLRB 700 (1999). Moreover, in the factual setting in Langdale, the NLRB said it was lawful for the general manager to assure employees that if the union was voted out, the company would not cut wages or take away any benefits.

The NLRB usually conducts a secret ballot election at the dealership four to six weeks after the filing of the petition. In order for the union to win a decertification election, it must receive a majority of the votes cast in the election. (For example, if 25 employees are eligible to vote and 23 cast valid ballots, the union must receive at least 12 votes.) The company wins a tie vote. After a company victory, there is a one-year bar to another election being held.

Strategy

If employees voluntarily evidence an interest in decertification, a lawful strategy should be developed. Some key matters for

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being sold to dealers. Their pitch is usually something to the effect of, "This one generates tons of traffic!"

Well, yeah, misleading advertising works! That's right, if dealers say stuff that is not true and make great offers that will not be honored, they are bound to get lots of people to come to their dealership. Including people such as DMV investigators and District Attorney office personnel. Plaintiff attorneys are more likely to send a letter, though.

Much like the title to this article, misleading advertising "hooks" the consumer by piquing his or her interest. "Hmm, maybe I really could win $1,000,000." Even the most savvy consumer is more likely to read a letter that has an outlandish offer at the top. Let's be honest, when you started reading this article, you really didn't think that I would give you $1,000,000 for doing it, yet your curiosity caused you to keep reading.

Dealers must understand that all advertising, be it print, radio, TV or direct mail must contain truthful statements. And, it doesn't stop there. Not only do the statements have to be true, but they also cannot be misleading. Can a statement be literally true but still be misleading? Absolutely. One example is the following statement: "No one buys cars from the factory for less than us! That's why we can make you the best deal." Since manufacturers are, for the most part, required by law to sell cars to all franchisees for the same price, this would normally be a true statement. However, the implication is that the dealership is able to buy cars for less than other dealers. The statement is true, but misleading.

Considerable guidance on what constitutes deceptive advertising (as well as a discussion regarding the "reasonable consumer" standard) can be found in the FTC Policy Statement on Deception (Appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984)), www.ftc.gov/bcp/policystmt/ad-decept.htm (accessed January 10, 2008).

Generally, I recommend steering clear of most gimmicky mailers. But, here are some commonly promoted concepts that I recommend dealers avoid:

1. "You've Been Preapproved for Auto Financing of up to $30,000" (Prescreened offers). Put simply, these types of mailers invite class action lawsuits. Prescreening is a concept whereby a list of consumers is derived from credit report information based upon specified criteria. Various mail houses offer this service and they work directly with the credit reporting agencies to get the list. Prescreening is legal so long as very specific procedures are followed. The most important of which is that a "firm offer of credit" be made to each recipient. The problem is the law is a bit unsettled in this area and the mail houses don't seem to understand or care about the risks.

Based on the FTC's position, and at least one court case that adopted it, a "firm offer of credit" is just what it sounds like. In order to get a list of consumers based upon credit report criteria (i.e., credit score, inquiries, etc.), you have to offer each and every consumer on that list specific credit terms (monthly payment, interest rate, downpayment, term, etc.) for a meaningful amount financed. The offer cannot be an advertisement in disguise.

Making a true, firm offer of credit may be difficult (and risky) in a vehicle financing context. This is largely due to the fact that these types of mailers are generally sent to consumers with marginal credit histories. People with low credit scores get hooked when they see "You have been preapproved for auto financing of up to $30,000." However, the fine print in such a mailer may indicate that the "guaranteed financing" is actually less than $1,000. This practice is what got an Illinois Chevrolet dealership in trouble and is what

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started much of the litigation in this area. (See *Cole v. U.S. Capital, Inc.*, 389 F. 3d 719 (7th Cir. 2004)) True, there have been more favorable rulings. But, I still say the practice invites litigation.

2. Fake Checks. Often used in connection with prescreened offers, simulated or "facsimile" checks are restricted under federal law. The Deceptive Mail Prevention and Enforcement Act (Pub. L. No. 106-168; 113 STAT. 1806 (1999)) prohibits the mailing of a facsimile check unless it "contain[s] a statement on the check itself that such check is not a negotiable instrument and has no cash value." (39 USC § 3001(k)(3)(C)) State law may even be more restrictive. For example, California law flatly precludes use of simulated checks unless it represents in a "truthful and nonmisleading manner that a person, in fact, unconditionally has won or is entitled or guaranteed to receive a specific prize, gift, or amount of money or credit." (Business & Professions Code § 22433(a))

Note: California restricts the use of simulated checks in all forms of advertising, not just mailers like federal law.

3. "Let's Trade Keys." This is a common theme seen in various mailers. Whereas the phrase "let's trade keys" in and of itself may not be impermissible, the overall impression of the advertisement may be misleading when accompanied by other claims such as "zero down," "keep the same or lower payments," and "we will payoff your trade no matter how much you owe." Is the "net impression" of the ad that the customer can come in, give you their car (negative equity and all), put no money down, get a new car, and have the same or lower payment? Sure it is! That's the hook. And, under most circumstances, it just won't be true.

4. "Liquidation Sale!" This one is easy. Unless you are really going out of business, you can't say "liquidation." No specific legal knowledge is required to reach this conclusion. Just a plain old dictionary will demonstrate that this phrase is untrue under most circumstances. Since I no longer own a "plain old dictionary," I had to resort to the internet. According to dictionary.com, "liquidation" means "the process of realizing upon assets and of discharging liabilities in concluding the affairs of a business, estate, etc." (*Dictionary.com Unabridged* (v 1.1). Random House, Inc.). Anecdotally speaking, Attorney Generals don't like "liquidation sales," particularly when they are conducted every week for a year. (See also, e.g., *New York State Attorney General's Advertising Guidelines for Auto Dealers*, Section III(B)(8), www.oag.state.ny.us/business/adguide.html, accessed January 10, 2008).

5. "We will payoff your trade no matter how much you owe!" This is probably the most common theme found in mailers. These types of claims have a very effective hook. After all, it sure seems like everyone is upside-down in their trade these days. But once again, is this really a true statement? Of course not. For starters, it says "will." That's a promise. Next, it says "no matter how much you owe." Will you really be willing to payoff anyone's trade under all circumstances? Of course not. I have had dealer personnel respond, "Yes, so long as they have enough downpayment." This doesn't fly when the mailer also makes "zero down" claims as they often do. But, in the absence of "zero down" language, my response to them is, "Then you really aren't paying off their trade are you?"

Whatever the case may be, the phrase is problematic. We recommend stating something more truthful like, "We can payoff your trade, even if you owe more than what it's worth." Notice use of the words "can" and "even if." I always recommend avoiding absolutes in advertising. Say "can" instead of "will," "great" instead of "best," and "low" instead of "lowest."

Note: With respect to the phrase "We can payoff your trade, even if you owe more than what it's worth," I generally recommend the following disclaimer: "Must purchase new or preowned vehicle from dealer. Negative equity, if any, may be added to new amount financed. On approved credit."

6. Free stuff. Federal regulations prohibit use of the term "free" or (similar terms) when advertising a product, the price of which is arrived at through negotiations. The *FTC Guide Concerning Use of the Word "Free" and Similar Representations* (www.ftc.gov/bcp/guides/free.htm) states:

> If a product or service usually is sold at a price arrived at through bargaining, rather than at a regular price, it is improper to represent that another product or service is being offered "Free" with the sale. (36 FR 21517, Nov. 10, 1971)

A common misperception is that the term "free" has to be used in order to violate the law. Clearly, this is not the case. Federal law states the prohibition of offering "free" merchandise or services contingent upon the sale of a negotiated item "may not be corrected by the substitution of such similar words and terms as 'gift,' 'given without charge,' 'bonus,' or other words or terms which tend to convey the impression to the consuming public that an article of merchandise or service is 'Free.'" (36 FR 21517, Nov. 10, 1971)

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Note: State law may also chime in on giving away free stuff contingent upon the sale of a vehicle (*see, e.g.*, California Vehicle Code § 11713.1(h)).

7. Miscellaneous Untruthful Phrases. Here is a short list of commonly used, yet generally false (and/or otherwise problematic) statements I see in mailers.

- "This offer is not available to the general public;"
- "Special test market event;"
- "All makes and models available;"
- "Lenders on site;"
- "Millions of dollars in auto loans available;"
- "Prices so low they cannot be advertised so as not to disturb other dealers' business;"
- "We finance your future not your past;"
- "Everything must go regardless of profit or loss;"
- "We have made a special acquisition of vehicles for this event;"
- "Your job is your credit;"
- "Factory Outlet."

Conclusion

In sum, if your dealer clients do decide to utilize the services of a mail house, be sure to ask for legal clearance from the attorney for the mail house. A reputable company should be happy to provide you with such. As I tell dealers, it's illegal to sell unsafe cars to consumers, so why should promotional companies sell unsafe mailers to dealers? Okay, so this parallel won't stand up to legal scrutiny, but it does get the point across. Also, it is a good idea to try and get indemnification from the mail house in the event something goes wrong (keeping in mind that an indemnification is only as good as the company itself and does not protect the dealer from administrative or criminal prosecutions). And yes, I have seen mail houses provide such indemnity (if they want the account badly enough).

Lastly, if all else fails and your client still wants to use a mailer that counsel for the promotional company has not cleared, be sure you brush up on your advertising law because they're going to ask you to bless it!

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management to consider are: (1) management team players, their roles and ensuring their compliance with the law; (2) workplace issues that will influence employee decision-making; (3) how "involved" the union has been in recent months; (4) impact of employee turnover; (5) facts about the union and the bargaining history; (6) whether management is trusted; (7) the attitude of informal leaders; and (8) whether there could be any withdrawal liability under a union pension plan.

Experience has shown that an employer who decides near the beginning of the window period that he would like to see his employees choose to go the decertification route is almost certain to be disappointed. Rather, positive change only happens when steps have been taken to create the proper environment long before the contract is set to expire. Also, experience has shown that management controls one of the things that influences employees the most in deciding whether to remain represented by a union: how have the dealership's non-union employees been treated over the years? If they are relatively stable and happy, enjoy a competitive package of wages and benefits, and trust the management team to consider their best interests when making major decisions, then their union counterparts are much more likely to "take the plunge" and give union-free status a chance.

As the industry continues to evolve and competitive pressures mount, effective employee communication and involvement will be more important than ever in allowing a dealership to maintain good employee relations and to achieve long-term success.

Save the date!

4th Annual

NADC Member

Conference

April 6 to 8, 2008

St. Louis

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