

# DEFENDER

## THE NADC NEWSLETTER

### The Dealership's Supplier Contracting Policy — A Checklist

*Michael Charapp*



*Michael Charapp*

Every dealer should have a contracting policy with suppliers. How often has a dealer come to you to assist in getting out of a contract, but you find that the company is in the third month of a three year contract for simple services? Or that the contract has just rolled over for a new three year term? Or that any dispute must be arbitrated half a continent away, making a challenge cost prohibitive? Or that the contract has any number of other issues that lock in a dealer because a manager signed up without even reading it?

While each type of contract – advertising, uniforms, hazardous waste removal, computers, phone systems, etc. – has spe-

cific substantive terms that are important, all contracts have terms about which dealers must be wary. Here is a simple checklist to guide a dealer in adopting a contracting policy and in reviewing and requiring contractual terms critical to the dealership. While this will not take the place of a lawyer's review of contracts – especially for major commitments such as computer services and the like – it may help the next time a dealer manager gets hot to buy that new fad product without which the dealership simply cannot succeed. And it may just help ring a bell that the company's lawyer should help with the

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### The Buyer Won't Sign the Arbitration Agreement — What Now?

*Thomas B. Hudson*



*Thomas B. Hudson*

One of our young lawyers emailed me last week and asked whether it was legal for a dealer or creditor to refuse to do business with a buyer who refused to sign an arbitration agreement. The short answer is "yes," a creditor – dealer or finance company – can refuse to deal with people who refuse to sign its arbitration agreement, and that refusal doesn't violate the law. The real question is whether for business reasons you will insist on arbitration, or back down when the buyer balks.

The buyer has picked out the car, and has come to terms with you on the price and financing terms. It's time to start sign-

ing documents. As you and the customer begin to work your way down the stack of documents that are required for the transaction, you arrive at the arbitration agreement, and the customer refuses to sign.

Maybe the customer has had an unsatisfactory arbitration experience, or has read that arbitration agreements are unfair to consumers. Or maybe the buyer is a consumer advocate or plaintiffs' lawyer who simply hates arbitration agreements on principle. For whatever reason, the buyer takes a look and says, "nope."

What's your reply? After all, the arbitration agreement is very important to you.

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## Executive Director's Message



The NADC arose out of a need for information and education on automobile dealer law. The lively discussions in the list serve and the strong attendance at programs *Jack Tracey* proves the need and shows we are on the right track. By the time this newsletter arrives, the California Chapter's workshop, Dissecting the LAW® 553-CA Retail Installment Sale Contract, will be in the past, but from pre-registrations we expect another well received program.

The next educational opportunity is the 4th Annual Member Conference to be held April 6th to 8th in St. Louis. The program is strong as you can see on pages 4 and 5 of this newsletter. Go to the events page at [www.dealer counsel.com](http://www.dealer counsel.com) for a detailed program, including information on the speak-

ers. You will find on-line registration and hotel information there too. Contact me if you are interested in the sponsorship opportunities that are still available.

We encourage you to sign up for the conference. There are ample opportunities to ask questions of the speakers and to meet other NADC members. Evaluations following previous conferences show that those in attendance were informed by the presentations and were pleased with the collegiality. Program evaluations, by the way, are an important tool in planning future programs. Your comments and suggestions are heard.

Not only are members consumers of education, they are also providers as was demonstrated at the NADA Convention earlier this month. Emily Marlow Beck, Hudson Cook, LLP; Michael Charapp, Charapp & Weiss, LLP; and Rob Cohen, Auto Advisory Services, presented a work-

shop, "Compliance Exposure That Can Crush Your Dealership." Doug Greenhaus and Paul Metrey of the NADA presented, "Federal Regulatory Developments Impacting Automobile Dealerships." Christopher C. Hoffman, Fisher & Phillips LLP, presented, "Seven Deadly Employment Sins: Which Have You Committed and What Will They Cost You?"

Finally, the conference is open only to NADC members. Every year we hear from people who want to attend but are not members so we know this is a good time of year to build membership. You may know attorneys who could benefit from attending the conference but who have not yet joined NADC. Please invite them to join, or forward names and contact information to me, and I will be glad to contact them.

Contact Jack Tracey, CAE, NADC Executive Director, at: [jtracey@dealer counsel.com](mailto:jtracey@dealer counsel.com)

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### Arbitration Agreement ... from page 1

It's your first shield against class action lawsuits, and a darned effective one at that. It can also get you outside the courtroom and away from nutty juries and huge punitive damages awards. You don't want to give that protection up, right? But you also don't want to lose that hard-earned sale. How do you get both the sale and the arbitration agreement?

First, let's assume that you've taken the advice that you've often seen in these pages, and that your arbitration agreement is one that bends over backward to be fair to the buyer. You haven't tried to eliminate the buyer's right to claim punitive damages, you're letting the buyer choose the arbitration organization from among several that you have listed, you are picking up all, or nearly all, of the costs of filing, and perhaps even some of the arbitrator's fee for the first day or two of proceedings, you're having the arbitration proceeding take place in a place convenient to the buyer, and are implementing all the other

tips about arbitration we've given you for the last few years.

If you've done all these things, your job of persuading the buyer that signing the arbitration agreement is a good idea will be much easier. From this point on, you simply need to put your selling hat back on and go to work. You can, for starters, try the following:

Arbitration is sanctioned by federal law, and by the law of nearly every state;

Your arbitration agreement is balanced and fair, and the costs of arbitration are fairly shared;

The arbitration organizations the customer can pick from are very professional outfits with rules and procedures that the customer can check out online;

The buyer can use arbitration to obtain a quick resolution of his or her problem rather than waiting years for a lawsuit to work its way through the court system; and

In arbitration, it's possible for the buyer to proceed without a lawyer, with signif-

icant cost savings (no 1/3 to ? contingency fee).

If the buyer can't be brought around by sweet reason, and still refuses to do the deal, you'll have a hard decision to make. Do you let the buyer walk, or not? If you let the buyer walk, you'll pay the cost of losing the deal. If you cave in and go ahead without a signed arbitration agreement, there's also a cost – you have just created a member of a class. That's not the only cost, however. There's a reputational cost. If word gets around that an obstinate refusal makes your arbitration requirement evaporate, you will begin to see more obstinate refusals.

So, you have a business decision to make. At least so far, creditors who insist on having the arbitration agreement signed seem to be faring pretty well.

Usually, when we get a panic call from a dealer or finance company reporting that a buyer is refusing to sign an arbitration agreement, the call is followed within an

continued on page 6

## Dealership's Supplier ... from page 1

review and negotiations.

### The Policy

1. Adopt a written contracting policy.
2. The policy must specify who may review and sign contracts.
3. Have a form letter to inform potential suppliers of the policy.
4. Require competitive bidding where possible.
5. Enforce the policy.
6. Train contract reviewers in the critical terms to protect the dealership.

### Critical Terms

7. Minimize long term contracts.
8. Avoid rollover provisions in long term contracts.
9. Consider a provision allowing the dealership to terminate in the event of a sale or close-down.
10. Decide disputes where the dealership is located.
11. Never allow the supplier rights to

own the dealership's information.

12. Require the supplier to protect non-public personal information of customers.

### Explanation

1. A written policy for entering contracts on behalf of the dealership is a must. The dealer should circulate it throughout the company. It should put the policy in the employee handbook. Managers, since they are most likely the folks who will seek to enter contracts, should specifically acknowledge the policy.
2. All managers and employees must know who in the company may review contracts and bind the company. The policy should specifically identify those who may do so. And it must warn those without authority of consequences if they violate the policy.
3. Simply having a policy is not notice to potential suppliers about the contracting policy. Under the law generally, a potential supplier can assume that the person at the dealership who is negotiating the deal has the apparent authority to enter a contract. However, if a dealer gives specific notice to potential suppliers, they

cannot claim that they were not aware of the people in the dealership who can bind it to a contract. A dealer that becomes aware of a potential supplier that is contacting dealership employees should send a form letter to the supplier making it aware of the contracting policy and should state specifically that no contract will be binding unless signed by a person in authority.

4. Busy dealer executives may not want to spend time reviewing competitive proposals, but how does management know that it received the best available terms without shopping?
5. When a manager without authority to do so signs a contract, the dealership must discipline that employee. Like all policies, a contracting policy is only as good as the dealer's willingness to enforce it.
6. Train contract reviewers to look for critical terms and to insist upon protections for the dealership.

### Insist on Critical Terms to Protect the Dealership

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## 4TH ANNUAL NADC MEMBER CONFERENCE

**APRIL 6 TO 8, 2008**

**RITZ CARLTON, ST. LOUIS**



St. Louis Skyline

Join your colleagues in St. Louis for the fourth annual meeting of NADC members. Sessions are planned to reflect the special interests of members. Plan to arrive on Sunday, April 6, for an evening reception and stay until the conference concludes mid-day on Tuesday. Register now on the events page at [www.dealercounsel.com](http://www.dealercounsel.com).

The conference is open to NADC members only. Registration is \$495 per person. Receptions, luncheon and breaks provide ample time for members to get to know each other. CLE credit is available.

Reserve your hotel room by March 5, 2008 for the conference rate of \$200 plus tax. Contact the hotel directly: on-line at

<https://www.ritzcarlton.com/en/Properties/StLouis/Reservations/Default.htm>

using the group code NDCNDCA; or call 800-241-3333 and reference NADC Annual Meeting.

### SUNDAY, APRIL 6, 2008

**3:00 TO 5:30 PM**      **BOARD OF DIRECTORS MEETING**  
**6:00 TO 7:30 PM**      **OPENING RECEPTION**

### MONDAY, APRIL 7, 2008

**7:30 TO 8:15 AM**      **CONTINENTAL BREAKFAST**  
**8:15 TO 8:30 AM**      **OPENING REMARKS**  
                         **EUGENE KELLY, ARNSTEIN & LEHR LLP, CHICAGO**  
**8:30 TO 11:00 AM**      **SESSION 1 - COMPLIANCE**  
                         Moderator: **THOMAS HUDSON**, Hudson Cook, LLP, Hanover, MD  
                         Panel: **ROB COHEN**, Auto Advisory Services, Inc., Tustin, CA; **EMILY BECK**, Hudson Cook, LLP, Hanover, MD; **PHILIP YTTTERBERG**, National Arbitration Forum, Minneapolis; and **RANDALL McCATHREN**, BLC Associates Inc., Nashville  
**11:00 TO 11:15**      **BREAK**  
**11:15 AM TO 12:15 PM**      **SESSION 2, PART 1 - LATEST TRENDS IN FRANCHISE RELATIONS AND LITIGATION**  
                         Moderator & Panelist: **LEONARD BELLAVIA**, Bellavia Gentile & Associates LLP, Mineola, NY  
                         Panel: **RICHARD SOX**, Myers & Fuller, PA, Tallahassee  
**12:15 TO 1:30 PM**      **LUNCH**



1:30 TO 2:30 PM

**SESSION 2, PART 2 - LATEST TRENDS IN FRANCHISE RELATIONS AND LITIGATION**

Moderator & Panelist: **LEONARD BELLAVIA**, Bellavia Gentile & Associates LLP, Mineola, NY  
Panel: **RICHARD SOX**, Myers & Fuller, PA, Tallahassee

2:30 TO 3:30 PM

**SESSION 3 - NADA UPDATE**

**ANDY KOBLENZ**, NADA. McLean, VA; and **ERIC CHASE**, Bressler, Amery & Ross, P.C., Florham Park, NJ  
**BREAK**

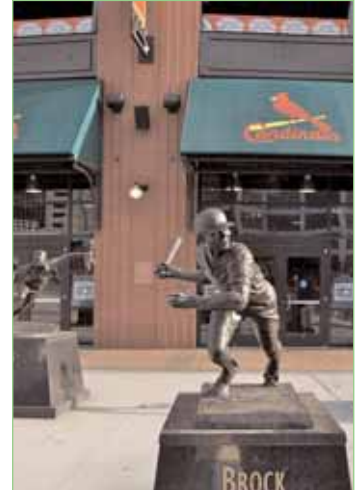
3:30 TO 3:45 PM

3:45 TO 5:00 PM

**SESSION 4 - LABOR LAW: EFFECTIVE JURY TRIAL PRACTICE AND LABOR UPDATE**

**PATRICIA GRIFFITH**, Ford & Harrison, LLP, Atlanta and  
**D. GERALD COKER**, Ford & Harrison LLP, Atlanta\  
**COCKTAIL RECEPTION**

5:00 TO 7:00 PM



Busch Stadium

**TUESDAY, APRIL 8, 2008**

7:30 TO 8:15 AM

**CONTINENTAL BREAKFAST**

8:15 TO 8:30 AM

**OPENING REMARKS**

**EUGENE KELLY**, Arnstein & Lehr LLP, Chicago

8:30 TO 10:30 AM

**SESSION 5 - PREVENTION OF ID THEFT, PROTECTION OF CUSTOMER INFORMATION AND THE RED FLAG RULE**  
**MICHAEL CHARAPP**, Charapp & Weiss, LLP, McLean, VA; **MICHAEL BENOIT**, Hudson Cook, LLP, Washington, DC; and **PAUL METREY**, NADA. McLean, VA

10:30 TO 10:45 AM

**BREAK**

10:45 TO 11:45 AM

**SESSION 6 - BUY/SELL: REPRESENTING CAR DEALERSHIPS DURING AN ECONOMIC DOWNTURN**  
**JOHN GENTILE**, Bellavia Gentile & Associates, LLP, Mineola, NY

11:45 AM TO 12:45 PM

**SESSION 7 - AFFILIATED REINSURANCE PROGRAMS**

**ANDREW WEILL**, Benjamin, Weill & Mazer, San Francisco

12:45 TO 1:00 PM

**CONCLUDING REMARKS**

**EUGENE KELLY**, Arnstein & Lehr LLP, Chicago



World's Fair Pavilion

GO TO THE EVENTS PAGE AT [WWW.DEALERCOUNSEL.COM](http://WWW.DEALERCOUNSEL.COM) FOR SESSION DESCRIPTIONS.

## Dealership's Supplier ... from page 3

7. Whenever a dealer receives a contract from a potential supplier, the dealer should ask why a long term contract is necessary. Why must a janitorial or waste removal contract last for a year? Why must it be anything other than a month to month agreement, cancelable with thirty days notice? There may be reasons why a supplier is entitled to a long term contract, for example if the supplier makes an upfront investment that will be recouped over the course of the agreement. There are reasons why a dealer may want a long term contract, for example if the terms are favorable and the dealer wants to assure that they will continue. However, a dealer should have reasons for a long term contract before agreeing to one.

8. Many suppliers like to include rollover clauses into their term agreements. A rollover clause is one providing that at the end of the contract term, the contract automatically rolls over for another specific term, for example one more year at the expiration of the first year unless either party gives notice. What reason is there for a rollover clause other than to stick the dealer for another year to a contract? Even

when a longer duration is appropriate, the contract should terminate at the end of the initial term. If the parties wish, they can provide that it will extend month to month until either party decides to terminate.

9. One of the major shocks to dealers who seek to sell or close down a store is that they have dozens of term contracts that they must pay out or pay to escape. When entering a contract, a dealer should seek a provision that gives the dealership the flexibility to cancel it in the event the store is sold or closed.

10. Most contracts specify what state's law will apply and where disputes must be determined. While a dealer should seek to have the law of its state apply, that is not the critical term to insist on. The supplier generally comes to the dealer, in the dealer's city or county, in the dealer's state, to do business with the dealer. If there is a dispute, the supplier should come to the city or county where the dealer does business, in the state where the dealer does business, to have that dispute determined. A dealer presented with a contract that establishes a geographical location for determination of disputes outside the city or county in which it does business should

strike through the provision, write in the dealer's city or county and the dealer's state, initial the handwritten terms and tender that contract to the supplier. Dealers will be surprised how often a supplier is eager for the business and will go along with the change without comment.

11. Leads and customers are expensive, and protecting confidential information is important to a dealer's business. A dealer must maintain rights to its own information. Too many suppliers try to make dealer information their own. A dealer should review contracts for provisions making dealer information the property of the supplier and eliminate them.

12. The FTC Information Safeguard Rule requires that a dealer who allows suppliers access to non-public personal customer information obtain an agreement that the supplier will safeguard that information. Such a provision is not only necessary to comply with the law, it is smart business to protect one of the dealership's most valuable assets, its customer information.

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

## Arbitration Agreement ... from page 2

hour or two by a call saying that the buyer had changed his or her mind (that new car smell is awfully powerful stuff). Our experience so far is that the buyer's threat is a bluff that can be called.

*Thomas B. Hudson, Esq. is the Publisher of Spot Delivery™, a monthly legal newsletter for auto dealers, and the editor-in-chief of CARLAW®, a monthly report of legal developments in all states for the auto finance and leasing industry. He is Partner in the Maryland office of Hudson Cook, LLP.*

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**4th Annual NADC Member Conference**  
**April 6 to 8, 2008 in St. Louis**  
*Details on pages 4-5.*

## New Members

*NADC welcomes the following new members:*

### Full Members

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Law Offices of Michael J Flanagan  
Sacramento, CA

**Danielle D. Giroux**  
Harman Claytor Corrigan &  
Wellman, PC  
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**Roger S. Morrow**  
Morrow, Romine & Pearson, P.C.  
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Rochester, MI

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Galpin Motors, Inc.  
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### Fellow

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NADA  
McLean, VA

**Gavin M. Hughes**  
Law Offices of Michael J Flanagan  
Sacramento, CA

### Associate

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Regional Acceptance Corporation  
Arlington, TX

**Gordon G. Wisbach**  
G W Marketing Services  
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**February, 2008**

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