

DEFENDER

THE NADC NEWSLETTER

Adverse Action Compliance Vendors: What to Ask

Paul Metrey, Esq.



Paul Metrey

After a number of lawsuits generated extra scrutiny of adverse action notices last year, a number of vendors began contacting dealers about compliance services. Paul Metrey, NADA's Director of Regulatory Affairs, put together the following non-exclusive list of questions to consider before signing up with a vendor which offers adverse action notice services:

- 1) Does the vendor possess an adequate understanding of federal and state law governing adverse action notices?
- 2) Who determines whether an adverse action notice is issued?
- 3) If the vendor makes this determination, does it have a system in place to respond to

credit applications received in person, by telephone, over the internet, or through other means?

- 4) If the vendor issues the adverse action notice, what are its criteria for determining who receives a notice?
- 5) If the vendor issues the adverse action notice, how does it handle denied applications from co-applicants?
- 6) Who determines the content of the notice?
- 7) Who sends the notice?
- 8) How is the notice delivered (hand delivery, mail, electronically, etc.) and what system is in place to ensure delivery?

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Sidebar

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Can Lawyers Sell Cars?

Rob Cohen, Esq.



Rob Cohen

As I sat at my computer wondering what I was going to write for this month's article, I became frustrated. Not due to the dearth of things to write about, but rather my inability to choose just one. As most NADC members know, the sheer number of laws that apply to the vehicle sales process is staggering. I realized that from the moment a consumer opens the newspaper and looks at a dealer advertisement—yes, from the moment a consumer even considers buying a car—there are laws designed to protect that consumer. Disclosure laws, type size laws, substantive laws, procedural laws. Laws that tell you what you must say and laws that tell you what you must not say. Laws that tell you when stickers go on cars and laws that say when they can come off. The list goes on.

After pondering over the dizzying array of laws with which dealers must already comply, I had another frightening epiphany. It's going to get worse! Each year more laws are passed and more restrictions are placed on dealers. How are dealers going to follow so many rules? How are they going to avoid being subjected to a continuous barrage of lawsuits and government enforcement activity? And then it hit me; Congress and the state legislatures will not be satisfied until dealers replace their entire sales staff with attorneys well-versed in dealership law.

Hmmm, maybe there's something to that. Maybe dealers should hire attorneys as salespersons. Imagine it, each and every transaction treated as a legal "closing" with

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President's Message



You're Never Too Old to Learn

I am not a touchy feely kind of guy, despite my picture. As a lawyer, I always approach negotiations from a position of strength, even arrogance – whether I actually have the case to support my client's position or I am acting as the Wizard of Oz. The state bar rules mandating civility were written for lawyers like me.

I bring this up because I recently spoke at a state dealer association meeting about the steps to implement a Red Flags program. The general theme of my presentation was one that I have written about previously for this publication: while the Red Flags rule is a change that will require training and patience, it is a valuable tool for a dealership as a formalized "know your customer" process. I emphasized the common sense of the rule. I pointed out how a dealer is the true victim in a transaction with an identity thief. During the presentation, the audience was unusually attentive. (I know, the admission that I finally had an audience paying attention is not terribly flattering).

After the presentation, a dealer manager approached me and asked me a question, "Does our dealership have to buy a red flag

compliance program, or can we do one ourselves?" I was stunned by the manager's assumption that he would have to buy a program.

I learned some valuable lessons that day. Generally speaking, when talking to dealer groups, I used to concentrate on the oppressive nature of government laws: the potential penalties and the hardships that can befall a dealership when the government descends on it. You know the drill. I approached it as the not-touchy feely guy. I made a conscious decision that fear would motivate the audience. I also realized that day that I used to do something else unconsciously that negatively impacted the audience. I made the compliance requirements arcane. It was almost as if I treated compliance with government laws and rules as something to be grafted onto the back of an otherwise productive beast.

I did not follow my old recipes in speaking to the group about the Red Flags rule. It's probably because I don't view the rule as some unfunded government mandate blindly imposed on dealers. In fact, I see the Red Flags rule, for the most part, as formalizing a "know your customer" process that dealers should have been using all along to protect themselves from ID thieves and other bad folks.

Explaining to the audience why the government mandate works for them drew their attention. They wanted to know why

it worked for them and what they could do to make it work better for them. When I demystified the process by going through the common sense of the red flags themselves, there was some recognition that the dealership didn't need someone else's program that the dealership staff didn't really understand. I know that many of you who read this column speak frequently to similar groups. Probably, many of you are ahead of me in the proper approaches to enhance the interest of the audience. But capturing the audience's attention without fear mongering and by simplifying the requirements of the law were a revelation to me.

It got me thinking. Maybe I need to be more touchy feely! Maybe I need to be candid about my client's weaknesses in negotiations! Maybe I need to be the number one proponent of the state bar's rules of lawyer civility! Maybe I even need to send my opponents flowers and chocolates instead of motions for summary judgment and in limine.

NAH!!!

But I now know that I am not too old to learn how to better keep the attention of car dealers in an audience.

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

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Can Lawyers... from page 1

the full supervision of a licensed attorney who has nothing but the interests of the dealership in mind. The NADC could become an association of the most well-educated salespeople in the country. Interested? Let's see what it might look like if all salespersons were attorneys.

The Greeting

Salesperson/Attorney: "Hello, and welcome to Compliance Chevrolet, my name is Rob Cohen and I will be assisting you today. Please note that I am a licensed attorney, however, I am not your attorney. Should you require any legal assistance throughout this transaction, please contact your own legal counsel."

Customer: "Great, I was wondering if you had any SUVs I could look at?"

Salesperson: Certainly, however, please be aware that the Department of Transportation has issued various warnings concerning increased rollover risk of certain sport utility vehicles which underscores the need for consumer awareness.

Customer: Are you saying that your SUVs are not safe?

Salesperson: Absolutely not, in fact, all of our vehicles comply with Federal Motor Vehicle Safety Standards and have been safety checked to ensure compliance with Vehicle Code section 11713(i) which incorporates by reference the entire Division 12.

Customer: What does that mean?

Salesperson: Well, Division 12 of the Vehicle Code contains hundreds of equipment requirements pertaining to motor vehicles. And, although we cannot guarantee our vehicles will be trouble free, we can assure you we are in compliance with this Division.

Customer: Okay, so can you show me the SUVs, or what?

Salesperson: No problem. But first, would you care to review the Environmental Protection Agency's Fuel Economy Guide? We are required by Title 40 of the Code of Federal Regulations section 600.405-77 to provide copies of this publication at no charge. You should probably know that SUVs are not generally considered to have the best fuel economy.

Customer: No, I do not want to look at a

fuel economy guide. I just want to look at some cars.

Salesperson: Certainly. We are also required to provide free copies of the National Highway Transportation Safety Agency's Comparison of Insurance Costs booklets pursuant to 40 CFR section 582.1-5. You do know that insurance premiums are often higher on SUVs? But please note that I am not a licensed property and casualty agent and, therefore, cannot offer you any advice as to insurance coverage you may currently have or wish to acquire.

Customer: Would you rather I leave?

Salesperson: Not at all. I would be happy to show you our selection of SUVs. Of course, you know that you are free to leave at any time.

The Walk Around

Salesperson: I would like to call your attention to several notices on the vehicle. First and foremost is the manufacturer's label, otherwise known as the "Monroney." This label is required by Title 15 of the United States Code, sections 1231-1233, commonly referred to as the Monroney Act which is because the act was written by Senator Mike Monroney in 1958, but I digress.

This label sets forth a full description of this vehicle and also contains EPA mileage estimates. Most importantly, however, is the MSRP which stands for manufacturer's suggested retail price. Although this is a recommended price, please note that a considerable number of our sales are made below this price.

Customer: Can I look inside?

Salesperson: Of course. But first you should also note the bumper safety level as well as the parts content labels required by Vehicle Code section 24011.3 and Title 49 of the Code of Federal Regulations, part 583, respectively.

Customer: Do you have a key?

Salesperson: Right here. I would like to advise you prior to entering the vehicle to read this Proposition 65 label which warns you that automobiles contain and emit chemicals that are known by the state of

California to cause cancer and reproductive harm. Are you sure you want to get in?

Customer: I'll take the risk.

Salesperson: Okay. While sitting in the car please notice that this vehicle meets all federal labeling and equipment standards. Please pay particular attention to the air bag warning label which states "Children can be killed or seriously injured by the air bag." Do you have any children?

Customer: No.

Salesperson: Well that's a relief.

Customer: Can I take this for a test drive?

Salesperson: Only if you are properly licensed to operate a motor vehicle.

Customer: I am.

Salesperson: Great. Please allow me to verify your driver's license by swiping it through our electronic reader and make a photocopy prior to our departure. I assure you that your driver's license will be treated as non-public, personal information and protected pursuant to our Customer Information Safeguards Policy. And, pursuant to Civil Code section 1798.90.1, we are not allowed to use information obtained by swiping your driver's license for marketing purposes. Would you care for a copy of our privacy policy at this time?

Customer: No.

Salesperson: No problem. Because we do not share information with non-affiliated third parties, we are only required to provide that notice to you when you become a customer.

Customer: I'm not a customer?

Salesperson: Not according to 16 CFR section 313.3(h).

Customer: What am I then?

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Executive Director's Message



A new tool is available to help promote NADC membership. A brief PowerPoint presentation was created at the request of Johnnie Brown. He and Ruth Lemmon used it for a presentation to the West Virginia Automobile & Truck Dealers Association. The slides will be used in August when I make a presentation to the Colorado Automobile Dealers Association.

The membership message is suited to all general audiences not only dealers. Contact me if you would like a copy of the PowerPoint slides.

Membership was the topic of conversation at the NADC booth at the recent NIADA convention in Texas. We had the opportunity to talk to dealer principals about the value of having their attorneys become NADC members.

The NADC website grows and changes. The new About Us page links to a list of board members, the NADC by-laws and the newly-written list serve policy. An arrow visible following log in also leads to the list serve policy.

A new feature on the NADC website's News page will help you locate a newsletter article. It is now possible to search by author or title through all newsletter issues from November, 2004 to present. There is

a place on the News page to post member news, and you can submit news items to me.

We are in the preliminary planning stage for a workshop in Chicago, October 13-14. Details will be available in the next issue of The Defender, the September issue. Information will also be posted on the events page at www.dealer counsel.com.

Finally, we are reviewing the proposed Risk-Based Pricing Notice Rule under FACTA and considering whether to submit comments.

Contact Jack Tracey, CAE, NADC Executive Director, at: jtracey@dealer counsel.com.

Adverse Action ... from page 1

9) When is the notice delivered?

10) If the notice invites the applicant to contact the dealership for its specific reasons for the adverse action, who handles the phone calls?

11) If the vendor handles the phone calls, what responses does it provide to the applicant in different situations?

12) Who is responsible for documenting the dealership's specific reasons for the turndown and how are the reasons retained?

13) Does the vendor handle incomplete credit applications and, if so, how does it handle them?

14) Who determines whether the customer has withdrawn its credit application and who keeps a record of this?

15) Who retains the adverse action notices or notices of incompleteness, where are they retained, and for how long?

16) Who destroys this information when the dealership no longer has an obligation to retain it or a business purpose for keeping it?

17) Who trains dealership employees on the foregoing responsibilities, how often, and how are the training efforts documented?

18) Does the vendor provide a written adverse action notice program that delineates the foregoing responsibilities?

19) Per the service provider requirements contained in the FTC Safeguards Rule, has the vendor:

a) demonstrated that it is capable of maintaining appropriate safeguards for the customer information entrusted to it; and

b) contractually agreed to implement and maintain such safeguards?

20) Per the service provider requirements contained in the FTC Privacy Rule, has the vendor contractually agreed not to use or disclose the information provided to it other than to carry out the purposes for which it was retained?

21) If the vendor fails to carry out a duty that it has contractually agreed to perform, who is liable for any resulting damages, fines, or other financial loss and how is this guaranteed?

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Salesperson: Well, assuming you are providing us with non-public personal information for purposes of determining your eligibility for financing, then you are a consumer.

Customer: I just want to take a test drive.

Salesperson: You got it. We are required by the Vehicle Code to affix dealer plates on any vehicle prior to taking a test drive. So, please wait while I have someone attach the proper license plates.

The Test Drive

Customer: This feels pretty good. What's this baby got under the hood?

Salesperson: An engine.

Customer: I figured that. What size engine does it have?

Salesperson: To avoid any potential misunderstanding, I would like to know whether by "size" you mean engine displacement, the number of cylinders, or the horsepower rating?

Customer: I don't even know what "engine displacement" is!

Salesperson: Well, engine displacement defines the volume in cubic inches, cubic centimeters, or liters that are displaced as the cylinders are moved from top dead center to bottom dead center. In the case of the vehicle you are driving, the engine displacement is 256 cubic inches or 4.2 liters.

Customer: That's very helpful, now how about the horsepower?

Salesperson: At what RPM?

Customer: What?

Salesperson: Horsepower ratings vary at different engine speeds. However, I can offer pursuant to Vehicle Code section 9950, the SAE J1349 standard for horsepower ratings, which for this vehicle is

285.

Customer: My head hurts.

Salesperson: If you believe you are unable to safely operate this vehicle, I must ask that you pull over when it is safe to do so.

The Close

Salesperson: Will you be paying with cash or credit for this vehicle? Of course, both federal and state law preclude us from charging you more for this vehicle if you choose to finance it. Therefore, please note that your decision will not affect the price of this vehicle.

Customer: I would like to apply for a loan.

Salesperson: We cannot offer you a loan as we are not licensed as a finance lender in the state of California. However, we do offer vehicle financing.

Customer: What's the difference?

Salesperson: Well, our vehicle financing is made pursuant to a conditional sale or "credit sale" whereas a loan is an actual disbursement of money pursuant to a promissory note or other loan agreement. You see, since we are the initial creditor, we are able to set the interest rate ourselves and then ultimately sell your contract to a third party financial institution, sometimes at a premium. This premium is often referred to as "dealer reserve" or "dealer participation." The appellate court decision of *Kunert v. Mission Financial Services* confirmed the legality of reserve payments to dealers. If we were to arrange for a loan rather than conduct a conditional sale, we would not be able to legally receive any reserve payment or commission from a lender pursuant to Civil Code section 2982.5(d)(5).

Customer: I shouldn't have asked.

Salesperson: Please fill out this credit application. You will be happy to know

that by filling out this credit application, you are offered the protection of the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Gramm-Leach-Bliley Act, and the Motor Vehicle Sales and Finance Act, not to mention a whole host of federal regulations which implement these acts, including Regulation B and the Federal Trade Commission's Safeguards and Privacy Rules. And, I am proud to say that this dealership has already implemented an Identity Theft Prevention Program pursuant to the FTC's Red Flags Rule notwithstanding the fact mandatory compliance with that rule is not until November 1, 2008. How's that for service?

Customer: I don't know what you're talking about. So what is your best price for this vehicle?

Salesperson: I am unable to give you a "best price" insofar as that term contains no temporal restrictions.

Customer: Temporal what?

Salesperson: In other words, there is no way to determine whether any price I give you will be at least as low as prices in the past or prices offered in the future. However, I am happy to offer you a price of \$25,999. This is the price of this vehicle as advertised in the Korea Times LA newspaper over two months ago. We forgot to include an expiration date in the ad, so pursuant to section 11713.1(e) of the Vehicle Code, the offer is still good. We must sell the vehicle to you at or below this price regardless of whether you were aware of the ad.

Customer: Well that seems like a good price. What will my payments be?

Salesperson: I cannot quote you a payment at this time. An attorney in the finance department will have to do that.

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We can be reached at 800-950-6060 and www.protective.com.

Can Lawyers ... from page 5

Customer: You mean I have to deal with another attorney?

Salesperson: Oh yes. The finance department is where you can become a customer!

Customer: You know, on second thought, maybe I'll just keep driving my old car for a little while longer.

Salesperson: No problem. Just remember to keep us in mind when you are ready to buy.

Conclusion

Well, we didn't quite make it to finance on this one, but you can't close them all. Hopefully, you will agree that by hiring attorneys, dealers will dramatically reduce their exposure to lawsuits and governmental enforcement actions. An unpleasant side effect, of course, may be a dramatic reduction in sales. But, fewer sales means fewer problems, right?

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

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