DEFENDER
THE NADC NEWSLETTER

Cash Management Accounts and Risk of Captive Bankruptcy

Bert Rasmussen

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In recent years (and, even more critically, during the past three months), the declining fortunes of the domestic manufacturers, the loss of GMAC's status as a true captive following acquisition of 51% of its stock by Cerberus Capital, and related bad news have raised serious questions concerning the financial viability of the captives and the possibility that one or more of them may become subject to bankruptcy proceedings. Among those questions: is a dealer's investment in a captive's cash management account (CMA) safe? This question is often answered "yes" too quickly, under the belief that the CMA deposit can always be offset against the flooring balance. For example, a dealer with $5 million deposited in a CMA and a $15 million flooring balance might believe that if the captive cannot or refuses to cash out the CMA, the dealer will simply offset the CMA against the flooring and immediately cut the flooring balance to $10 million, which cuts his or her interest expense by a third.

Unfortunately, the ability to effectively and assuredly offset the CMA deposit is subject to significant legal

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Sidebar

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Buying Dealerships in Tough Times: Protecting Your Clients' Interests

Erin Tenner

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Buying a dealership when times are tough is full of potential pitfalls. Making sure your client does not end up paying the seller's taxes, losing the assets to tax liens or losing the property because the landowner did not pay the mortgage are just a few of the things you need to be thinking about to protect your client. I started practicing law shortly before the last economic recession in the late 1980s and learned a lot about how to protect my clients from losses early on. Below are some specifics on how you can provide your client with the protection they need in these trying times.

Taxes.

Knowing how tax laws affect your client is critical if you want to save your client money and headaches.

•Sales and Employment Taxes. Whether your client is buying or selling a dealership you need to pay particular attention to sales and employment tax. If sales and employment taxes are not paid in full as of Closing, at least in some states, the buyer and seller can both be held

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President's Message
Dissing Car People

Michael Charapp

At the end of 2008, we all witnessed some of the most notorious hazing in secret society history. What? You don't recall it? It was in all the newspapers. It occurred when the CEOs of the Detroit three automakers had the audacity to suggest that they wanted to enter the secret society of recipients of federal bail out largesse.

To some, the hazing may be mysterious. After all, the Detroit three automakers control what's left of the industrial heart of the United States. While they asked for a lot of money, it was only 5% of the funds that had been granted to Wall Street barons and banks. And the Wall Street and bank CEOs never lowered themselves to go to Washington to face a single question. They simply sent one of their people, the Secretary of the Treasury.

Of course in one of the trips, the Detroit three CEOs flew in on the private jets that every Fortune 100 CEO has at his or her disposal. They were roundly criticized by the Speaker of the House who came in from her district on her private jet furnished by the taxpayers. The other members of Congress criticized these CEO perks after driving to the Capitol from their special parking spaces at Reagan National and Dulles Airports and after special flight arrangements to Washington, which often include private jet travel provided by corporate contributors.

So why were the Detroit three CEOs treated so harshly? I believe it's because they are seen as car people.

Of course they're not really car people. Not one of them has actually ever really sold a car. Two of the three of them have less time in the car business than your typical dealership greeter.

Nevertheless, to the Congress and to the major media, the CEOs are the face of the car industry. Car dealers – the folks who really make the auto industry work -- are invisible to Congress (except when Congressmen want campaign contributions) and to the media (except when it is time for auto ads to fill the classifieds and airtime). So when the bail out requests gave Congress an opportunity to engage in the national ritual of dissing car people, it fell to the Detroit three CEOs to take the mistreatment.

Why are car people dissed? I can't tell you. I can only tell you I have experienced the phenomenon. I have personally been the victim of car dealer mistreatment – that mysterious force that unleashes average Americans to abuse their local car dealers in ways they would never treat folks in other occupations.

In my life, I've had two careers that are at the bottom of the list in every public opinion poll of most respected jobs. I've been a car dealer. I am a lawyer.

As a car dealer, I have suffered abuse that no thinking American would let loose on a lawyer, let alone a teacher, an accountant, or even an insurance salesperson. I have had unhappy clients as a lawyer, but I have never received death threats as I did when I was a car dealer. As a lawyer, I have experienced a cold shoulder or two at a cocktail party. As a car dealer, I experienced customers – otherwise normal appearing folks like lawyers, businessmen, and in one case a doctor -- tell me at dinner parties what crooks my employees were and how all car dealers deserve to rot in the lower regions. My kids have never been told by others what scum lawyers are, but they have heard it about car dealers.

I fully supported the auto industry

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hurdles if the captive files (or otherwise becomes subject to) bankruptcy. And it is very clear that an offset cannot happen quickly, since bankruptcy court motions and legal wrangling are virtually guaranteed by the applicability of the automatic stay to efforts to exercise setoff rights in bankruptcy.

For bankruptcy purposes, in most cases, it is unlikely that the CMA will be considered part of or related to the flooring line and, as such, any attempted setoff will be subject to the general rules and limitations applicable to setoffs of unrelated debts in bankruptcy. This might not make sense to many dealers who have been led by the captive's marketing efforts to view the CMA as a substitute for the virtually abandoned practice of self flooring. It is true that dealers can reduce flooring expense by depositing cash into the CMA; the deposit earns interest at the flooring rate, and this effectively offsets flooring interest. However, a CMA arrangement is virtually never established or documented as a simple paydown of or deposit against flooring principal. Instead, the CMA is virtually always subject to a separate deposit agreement which, at its core, simply provides for the captive to accept the deposit and pay it back with interest. The distinction, between a flooring pay down on the one hand and a deposit agreement on the other, is important and highlights the distinction in bankruptcy law between a right of recoupment and a right of setoff.

Section 553 of the Bankruptcy Code preserves the common law right of a "creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case..." 11 U.S.C. §553(a). A setoff under §553 is available only if (1) the creditor holds a claim against the debtor that arose before the commencement of the case, (2) the creditor owes a debt to the debtor that also arose before the commencement of the case, (3) the claim and debt are mutual, and (4) the claim and debt are each valid and enforceable. While the second element, mutuality, is satisfied simply if the claim and debt involve the same two parties, *Sherman v. First City Bank of Dallas (In re United Sciences of Am. Inc.)*, 893 F.2d 720, 723 (5th Cir. 1990), many CMA programs allow deposits by not only the dealer entity itself, but the dealer principal and related entities as well and, to the extent such third party deposits exist in the CMA, the mutuality element may be difficult to satisfy.

Even if mutuality and the other elements discussed in the preceding paragraph are satisfied, setoff rights in bankruptcy are subject to additional limitations. For example, the right to setoff is limited by the provisions of the automatic stay under 11 U.S.C. §362; that of course means no setoff may take place absent a motion for relief from stay. Other limitations to the right of setoff include a strict rule against prepetition claims being used as an offset against post-petition obligations owing to the debtor; such a setoff would improperly accomplish a post-petition payment of a pre-petition claim in violation of 11 U.S.C. §549. In addition, pursuant to 11 U.S.C. §553(a)(3), the creditor can lose its right to setoff if the debt owed to the debtor was incurred during the preference period-i.e., in the 90 days preceding the bankruptcy filing. *In re Patterson,* 967 F.2d 505, 509 (11th Cir.1992). This applies primarily where the amount being setoff exceeds the debt owing to the debtor.

A significant limitation of setoff rights (and a major source of litigation) arises when a secured third party is granted a security interest in the obligation against which setoff is sought. For example, if the dealer owes the captive a flooring balance and if the captive had granted a security interest in that flooring receivable to a lender, the dealer's right to setoff against the flooring balance could be subordinate to the lien of the third party lender. While not purely a bankruptcy issue (the rules of the UCC in each state would govern), this type of litigation is much more common once a bankruptcy is underway. The UCC rules, governing priority between the secured party and a dealer seeking to assert the right of offset, provide in many respects that the final outcome will be determined by the terms of the flooring agreement itself. *See* UCC §§ 9-403 (relating to no-defenses-against-assignee clauses) and 9-404 (providing secured party with priority against setoff claim of account debtor if "authenticated notice" received). For purposes of this article, it is sufficient to note that these rules leave open the real possibility that an "all assets" or other UCC filing against a captive finance company in its state of organization may prove disastrous to a dealer seeking to setoff a CMA claim against a flooring obligation.

Perhaps even more troubling is that the availability of setoff rights in bankruptcy appears subject to unpredictable bankruptcy court discretion based on authority that views setoff as an equitable defense and not a legal right. *In re Braniff Airways, Inc.*, 42 B.R. 443 (Bankr. N.D. Tex. 1984). Among other examples, setoff may be denied where the creditor acted inequitably; where the setoff would jeopardize the debtor's ability to reorganize; or in a liquidation context where the setoff would result in either a preference or priority over other unsecured creditors. *In re Lykes Bros. S.S. Co.*, 217 B.R. 304, 313 (Bankr. M.D. Fla. 1997).

In contrast to the cumbersome rules and uncertain outcome applicable to

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Executive Director's Message

Jack Tracey

• A new feature on the NADC website offers members the opportunity to advertise openings for attorneys to work with dealers. Other attorney positions and non-attorney positions will not be posted. Openings will be posted for 30 days, or until the poster contacts me to say the position has been filled.

The job postings will link from the news page. Follow the link now at www.dealercounsel.com to read the terms and conditions governing the postings. Send me your notice, and it will be posted as a pdf.

The job posting feature is the result of member requests, and we look forward to providing a way for members to find qualified candidates for job openings.

• As the economy continues to plunge, and major U.S. auto dealers seek bailout funds, NADC members are handling unprecedented matters with their dealer clients. The list serve is a forum for questions, suggestions, advice, referrals and general sharing of experiences. Most NADC attorney members are on the list serve, but if you are not, consider signing up to partake in the discussions at this critical time.

The list serve is used, as well, to distribute pertinent information. Members generously share items that may be of interest or assistance to other attorneys.

• Finally, the 5th annual conference will be held April 1-3, 2009 in Dallas. See page 6 for preliminary information on program content. Register on the events page of the website and revisit often to see program updates.

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

NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

Save the dates —

April 1 – 3, 2009

5th Annual NADC Member Conference

Four Seasons Resort and Club
Dallas at Las Colinas
See page 6 for details.

New Members

NADC welcomes the following new members:

Full Members

Michelle R. Dudley
Shayne Nichols LLC
Columbus, OH

James R. Hardt
Hardt, Stern & Kayne, P.C.
Riverwoods, IL

Edwin A. Stoutz, Jr
Stoutz & Stoutz Law Firm, LLC
New Orleans, LA

Christine C. Waldschmidt
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NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

5th Annual NADC Member Conference

April 1 to 3, 2009

Four Seasons Dallas at Las Colinas

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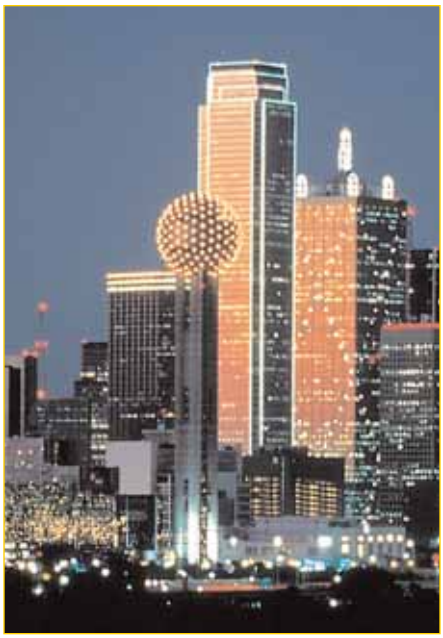

Dallas Skyline and Texas Stadium used with permission of Dallas Convention & Visitors Bureau

Join your colleagues in Dallas for the fifth annual meeting of NADC members. Sessions reflect the special interests of members. Plan to arrive on Wednesday, April 1, for an evening reception and stay until the conference concludes midday on Friday. Register now on the events page at 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, 2009 for conference rates, Superior $250 plus tax; Deluxe $275 plus tax, pending availability. Contact the hotel by calling 972-717-2499 and referencing NADC.

Conference topics will include:

- Compliance – 2 hours
  - The new Affiliate Marketing Rule (under FACTA)
  - The Affiliate Sharing Rule (under FCRA)
  - NPI sharing (under GLBA)
  - Opt-out requirements under FACTA, FCRA, and GLBA
  - Taking advantage of the joint user exception
  - Using credit applications for disclosures and/or opt-outs
- Franchise & Bankruptcy – 5 hours
  - Warranty audits
  - Incentive audits
  - Line make termination
  - Dual franchising
  - Bankruptcy
- Personnel – 1.5 hours
  - Free Choice Act
  - Family Medical Leave
  - Paid sick time
  - Reduction in force
- Master Dealer Agreements/Supplier Contract Policy – 1.5 hours
- UCC Panel – 1.5 hours
  - Titling issues
  - 50 state survey
  - Buyer in ordinary course
- NADA Update – 1 hour

Program details will be posted on the website as they develop.
www.dealercounsel.com

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personally liable for payment. A holdback at Closing is the only practical way to fully protect a buyer. If a buyer does not hold back enough to pay all unpaid taxes, interest and penalties, the assets purchased could be confiscated to pay the tax, and in California, where I practice, the buyer could be held personally liable for the taxes. Tax clearance certificates will provide some protection, but they cannot always be obtained prior to Closing. Check the statutes in your state to make sure you follow the procedures set out to avoid liability for the seller's unpaid sales and employment taxes. If you do provide for a holdback account in your transaction documents, make sure it provides for enough money to cover any unpaid taxes that may be discovered during an audit. I usually ask for one and a half times the last year's taxes unless it is well established that the seller has not gotten behind and is a good operator. Even then, one and a half times the estimated tax due is appropriate.

• Sales Tax on Fixed Assets. Whether or not a dealership collects sales tax from the buyer when it sells a car, it has to pay the sales tax on the vehicle to the state. The same applies when a dealership sells substantially all of its assets - not to inventory - but to fixed assets. Furniture, fixtures and equipment are all subject to sales tax and if you don't negotiate who will pay for it as part of the purchase price, the seller will be stuck paying the tax whether or not he or she is able to collect it from the buyer.

• Recapture of Depreciation. Often first time sellers don't realize that after selling the assets of the dealership the corporation is going to have to recapture some or all of the depreciation it took and pay taxes on it. Just like a 1031 exchange, depreciation is just a tax deferral method. Unless the value of the asset actually declines, depreciation does not reduce or eliminate taxes permanently. Make sure your client discusses this with his or her accountant to make sure they know what the tax liability will be upon sale of fixed assets.

• Income Tax or Capital Gains Tax on Assets. The most obvious tax is the income or capital gains tax your client will have to pay on sale of the dealership or land. Remind your client to discuss the likely cost with their accountant to make sure they take it into consideration when deciding to sell. If your client has a lot of fixed assets a stock sale could save a lot of money, not only in sales tax, but also in income tax—which your client will pay on the difference between the book value of the fixed assets and the sale price up to the original cost of the fixed assets. In addition, if you can finagle a stock sale, your client will not have to incur the cost of winding down the business.

• Tax Liens. Another not so obvious concern is whether a seller is subject to any income tax or other tax liens. Income tax liens can attach to assets. The good news these days is that most corporations are Subchapter S corporations. Income taxes on S corps are assessed on the person who owns the stock rather than on the corporation. If a lien attaches, it will attach to the capital stock ownership interest rather than the assets of the business. Nonetheless, a tax lien search should always be part of due diligence, especially if land is being purchased.

Protecting Real Estate.

• Leasing. If your client is leasing land as part of the purchase of a dealership make sure you obtain a non-disturbance and attornment agreement from the lender on the land. This will protect your client if the lessor defaults on the loan payment on the land. The lender will typically agree not to disturb the lease if the tenant agrees to pay the landlord directly in the event of a default by the landowner, provided the land owner consents. The land owner will be motivated to consent if he or she wants the sale of the business to go through as long as you ask for it from the start. The lender is motivated by this arrangement because it gives the lender rights they did not otherwise have – to collect directly from the tenant if the borrower defaults. This will protect the tenant from being in the position of having to pay rent to the landlord when the loan on the

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setoff, the doctrine of recoupment can be a much more powerful tool, as recoupment is not constrained by the above limitations. However, for the recoupment doctrine to apply, both obligations must arise out of a single "integrated transaction." *University Med. Ctr. v. Sullivan (In re University Med. Ctr.),* 973 F.2d 1065, 1081 (3d Cir. 1992). A simple example is a payment against a loan received by the debtor, but that was overlooked or otherwise not properly credited against the loan. Because recoupment does not involve separate debts, it is an exception to the automatic stay and thus does not require relief from the automatic stay. *See In re Malinowski*, 156 F.3d 131, 133 (2d Cir. 1998). Clearly, a creditor would be better served by framing its offset of a debt owed to a debtor as a recoupment rather than as a setoff under the Code. However, almost all CMA programs are governed by agreements and transactions not directly related to the flooring agreement making it extremely difficult to support a claim that amounts on deposit in the CMA may be recouped against the flooring balance. The answer to this problem could be to withdraw the CMA funds and use them to pay down the flooring. This approach would, however, be subject to the dealer's willingness to deal with certain negatives, including the commitment of capital to the flooring line (and the risk that the limit on the line will be reduced to match the current outstanding obligation), management of flooring balances, and properly tracing and documenting the ownership of former CMA funds if, as in most cases, they included funds of the dealer and his or her real estate and other affiliates.

If and when a captive finance company becomes a debtor in bankruptcy, the above demonstrates that we can advise our clients with funds in CMA accounts that the Bankruptcy Code preserves (conditionally) the right of setoff and that there is a good, fighting chance of eventually netting the CMA funds against the flooring balance. However, the opportunity exists today to provide much more useful assistance to our clients by making them aware of the significant risks and uncertainty involved in preserving and exercising their rights to their CMA funds in the event of the captive's bankruptcy and in exploring the immediate redeployment of those funds to a more secure deposit or investment vehicle.

Bert Rasmussen is a partner in the Los Angeles law firm of Manning, Leaver, Bruder & Berberich. He represents new automobile, motorcycle, and truck dealers throughout California. His practice focuses on franchise issues between dealers and manufacturers and includes representation of dealers before the California New Motor Vehicle Board. He also regularly presents educational seminars for automotive and motorcycle dealers on legal compliance issues and is one of the authors of the Dealer Management Guide *and* F & I Compliance Manual, *publications of the California Motor Car Dealers Association.*

The NADC website www.dealercounsel.com is an importaqnt source of information for members:

- *Member Directory, searchable by name, firm, state, area of interest and dealership type*
- *List Archive, a collection of messages shared by those members who sign up for the List Serve*
- *Events, conference information and downloadable materials from conferences and workshops*
- *Banners that link to associate member websites for information on products and services*
- *Forum, an online discussion of timely issues*
- *Those wishing to apply for membership will find an online application*

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President ... from page 2

bail out, because I recognized the disaster that the failure of the domestic auto industry would cause. However, I have a confession. Even I took some secret delight in watching the Detroit three CEOs endure their hazing.

If you have ever interacted with any of them – or even a senior Vice President of a manufacturer for that matter -- at a public event, you know that they live in a world apart. They travel with an entourage larger than most pro basketball players. The President of the United States sometimes travels with a smaller retinue (but only to non-combatant allies and domestically to exurbs and rural areas). I suspect that this is the real reason the Detroit three CEOs took their private planes to Washington. They couldn't fit their hangers on in the typical hybrid. In fact, they wouldn't even fit in a fifteen passenger van.

So I was amused that the CEOs suffered some of the mistreatment that their dealers endure regularly. For just a short time, they experienced how real car people are mistreated, often because of some substandard practices in vehicle manufacturing over which the CEOs presided.

My amusement at the plight of the CEOs was short lived, however. I quickly realized that my silly emotional satisfaction was no basis for a policy for the most important industry in our country. I just wish the United States Congress would come to the same realization.

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

NADC Job Posting Available!

Looking for an attorney to work with your dealer clients? Post the job ad for 30 days on the NADC website.

Send the posting to: jtracey@dealercounsel.com.

Postings, policies and procedures at:

dealercounsel.com/news.php

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property is not being paid by the landlord. Most lenders will have a form of agreement if you do not. The agreement should provide that the tenant can rely on the lender's notice of default in making payment directly to the lender and will not be in default under the lease by doing so.

• Purchasing. During hard times you have to be more careful than ever about buying liability when you are purchasing real property. People tend not to make needed repairs, taxes may go unpaid, and even personal tax liens could become a lien against the land. Generally, people tend to be distracted from the things to which they should be paying attention when times are tough. A diligent attorney is more important than ever. Every state is different, but a tax lien search against the individual seller should be part of every dealership purchase. This should be done whether or not the land is being purchased. If a tax lien shows up on a tax lien search but does not show up on the preliminary title report, do not assume it does not affect the land. Make sure the title insurance policy your client is purchasing will protect against such liens if they are not in the exceptions to title. The only way to do this is to read the fine print on the policy that is being issued. Ask for a copy of the policy in advance of issuance. If coverage you want is not included in the policy, ask the title company what endorsements are available and review them with your client to see if there is any coverage for which your client wants to pay extra, that is not part of the standard policy. If coverage is not available notice of the sale may be required to protect your client's assets. If your client will be building, make sure an ALTA policy of title insurance with a survey is obtained and have your client deliver a copy to the builder. This will tell you where the lot lines are so your client doesn't inadvertently build over a lot line and later have to tear down the part of the building that is over the lot line. Inspections are another important tool to protect your client. Make sure an environmental audit is done on the property. Environmental issues are waning, but they can be very costly if they come up. A building inspection is always a must. Make sure your client's building inspector is a structural engineer. A faulty foundation will only be noticed by a trained eye. Also inspect HVAC, electrical, roof and plumbing since repairs in these areas could be costly.

Protecting Against Seller's Obligations to Creditors

• Buy Assets Instead of Stock. In times like these buying assets instead of buying capital stock is the best practice. In very rare cases a stock purchase may be warranted or even the only option, but generally speaking, an asset purchase is preferable because your client can pick and choose which liabilities they want to assume and avoid liability for the rest. In a stock purchase they are getting all the assets and liabilities. Although an asset purchase is much more complicated, it is the best way to protect your client against liability he or she does not want.

• Bulk Sales Law Compliance. Compliance with the Bulk Sales Laws for the state in which the transaction is taking place is critical. Failure to comply will expose the buyer to all of the seller's unsecured creditors. Compliance with the bulk sales laws cuts off the rights of creditors against a buyer who has complied with the Commercial Code provisions governing bulk sales. Some states require giving notice to each creditor while others require only publishing a notice in compliance with the Code. Check the Commercial Code provisions for the state in which the sale will take place and make sure you comply. With purchase prices falling, more and more transactions are subject to the notice requirements of the Uniform Commercial Code's bulk sales laws.

• UCC Search and Tax Lien Searches. In every state, liens can be filed against personal property. Conducting a UCC lien search including tax lien search in the state of the seller's incorporation and in the state in which the property being sold is located is a must in every transaction. Any lien against assets being purchased that is not released prior to closing an asset purchase will follow the assets and become the buyer's problem. If less than all of the assets are being purchased that are covered by a lien, a partial release can be obtained releasing just the assets being purchased. Lien releases should not be left for after closing. Making sure all liens are released simultaneously with closing is essential to clear title.

• Conduct a Litigation Search. Litigation surges when times are bad. Doing a litigation search early on will tell you whether there are any law-

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suits that are of a nature that could kill your deal. Along the same lines, making sure you have a warranty and representation that the seller has not entered into any other agreements for the sale of the business, whether or not terminated, could be critical. Even if a seller thinks a deal is dead, the buyer may not agree and could stop a sale dead in its tracks after your client has invested a lot of money in legal fees putting an agreement together. If another deal was signed, even if it died, make sure the prior buyer has signed a clear agreement giving the seller the right to sell. If you are representing a seller, make sure your purchase agreement provides that if either party gives notice terminating the deal under the terms of the purchase agreement, the seller has the right to sell to a third party. Failing to include such a provision could be very costly to your client.

There are many other tools to protect your client and save them money including warranties and representations, indemnity agreements, deeds of trust, security agreements and even accounting tools like cost segregations analysis, but the above are at least a few to get you going in the right direction.

Erin Tenner is a partner at TennerJohnson LLP and a member of NADC. Erin has handled over 200 buy/sell transactions for auto dealers. In addition to her transactional practice she is also available as a private mediator and expert witness. She can be reached at 818-707-8410 or toll free at 888-501-0040.

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