DEFENDER
THE NADC NEWSLETTER

Selling Real Estate – Managing Environmental Issues

Pamela K. Elkow, Esq.

Pamela K. Elkow

So, your client has decided to retire… or sell the dealership … or, worst of all, close the dealership. As if your client doesn't have enough to deal with, they must also figure out what to do with the real estate if they own it. Historic operations associated with dealerships have the potential to adversely impact the environment. This article briefly discusses how to manage environmental issues that may be associated with disposing of real estate associated with a car dealership.

What Are The Potential Issues?

Environmental issues fall into two broad categories – environmental conditions resulting from operations or spills, and environmental compliance issues, such as obtaining and complying with permits. If your client is selling the real estate alone, the buyer's focus will be on the environmental conditions. In contrast, if the business is being sold with the real estate, a buyer will also focus on compliance issues, even in an asset only deal. While the case law is different in each state, courts may broadly interpret environmental laws to find that entities, which purchase a "business" or certain operations, are liable for

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Scott Jakust, Esq.

Scott Jakust

As of February, 2009, violations of the Federal Trade Commission's Used Car Rule governing Buyers Guides could conceivably bring civil penalties up to $16,000 per violation in an FTC enforcement action. Now, we aren't aware of any dealers actually getting fined by the FTC for having non-compliant Buyers Guides (at least not within the last 15 years), but the law is the law, and I am a compliance attorney.

Compliance-minded dealers should exert every effort to, first, obtain Buyers Guides in the proper form and, second, complete those Guides in a manner that is consistent with regulatory requirements. As a compliance consulting company, Auto Advisory Service's (AAS) field auditors examine literally hundreds of Buyers Guides on a daily basis. To protect our clients, we have always taken a very conservative position when evaluating whether format and completion requirements have been met.

That conservative stance led us to debate two real-world scenarios involving the format and completion of the Buyers Guide. The two scenarios involved, respectively, the presence or absence of two columns of horizontal lines within the body of the Guide, and use of the Guide as a medium for disclosing the prior history of the used vehicle. To resolve these uncertainties,

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Dealers and the Credit Repair Organizations Act

Michael G. Charapp, Esq.

Michael G. Charapp

The Credit Repair Organizations Act (CROA), 15 U.S.C. §1679a, et seq. provides consumers with a federal cause of action against "credit repair organizations" ("CROs") which either defraud consumers by charging for services not delivered or defraud creditors by abusing the mechanisms provided by the Fair Credit Reporting Act. Credit repair organizations, as defined in CROA, generally offer advice or assistance for the express or implied purpose of improving a consumer's credit record, history, or rating, in return for the payment of money or some other valuable consideration.

Plaintiffs' attorneys around the country are attempting to use CROA as a means to establish federal court jurisdiction over vehicle sales disputes and as a basis for recovery of damages and attorneys fees against vehicle dealers. They offer advertisements by dealers claiming the ability to provide credit to buyers who might not otherwise get it or to help buyers reestablish their credit as a basis for the assertion that CROA applies. They allege either that dealers are CROs or that, even if they are not, they are in violation of the fraud prohibition of the CROA.

Dealers that make credit representations during the course of advertising and selling vehicles on credit are not CROs, and they should not be subject to CROA. Despite some contrary decisions in cases decided by the U.S. District Court for the Northern District of Illinois, the majority of courts considering this issue have ruled against applying CROA to dealer retail installment sales.

The stated purpose of the federal Credit Repair Organizations Act, and the available legislative history, clearly indicate that Congress intended CROA to protect consumers from credit repair businesses that erroneously and intentionally lead consumers to believe that adverse information in their consumer reports can be deleted or modified regardless of its accuracy. Despite a rather unambiguous statement of Congressional intent to that effect, a small minority of courts have misconstrued a provision of CROA to apply it broadly to all persons and entities, regardless of whether they provide credit repair services or are affiliated with a credit repair organization at all. These decisions are almost completely exclusive to the courts of the Eastern Division of the Northern District of Illinois in the Seventh Circuit, and are apparently the result of an erroneous extension of an overly broad statement of the rule in that jurisdiction.

The confusion originated in *Vance v. Natl. Benefit Assn.*, No. 99 C 2627, 1999 WL 731764 (N.D. Ill. Aug. 30, 1999), in which the court stated, not incorrectly, that the provisions of CROA extended beyond "credit repair organizations" to "any person." While true, this statement neglected to qualify the application of CROA to "persons" by noting the additional requirement of the involvement of a "credit repair organization" in the facts of the case. Despite this omission, it should be noted that the *Vance* case itself involved a credit repair organization, and the "persons" held liable were entwined with its fraudulent activities. The holding of the court in *Vance*, therefore, was actually consistent with other jurisdictions interpreting CROA to apply to entities which were involved in the fraudulent practices of a credit repair organization. Since that time, however, several cases in the Eastern Division of the Northern District of Illinois have ignored the facts of *Vance* and painfully stretched the court's ruling to extend liability to "all persons" under §1679b(a) without the involvement of a credit repair organization. *See, e.g., Rodriguez v. Lynch Ford, Inc.*, No. 03 C 7727, 2004 WL 2958772, at *6 (N.D.Ill. Nov. 18, 2004) (stating that §1679b "applies to 'any person'" and "reaches more broadly than §1679a" but applying it to a defendant who actually advertised credit repair services to the plaintiff); *Costa v. Mauro Chevrolet, Inc.*, 390 F. Supp. 2d 720, 725 (N.D. Ill. 2005) (finding liability under §1679b where an auto dealer represented that a credit arrangement would help the consumer's credit).

This overly broad and incorrect interpretation is based on an incredibly narrow reading of a subsection of CROA's anti-fraud provision, §1679b(a)(1), which is easily clarified contextually by a reading of the entire section. When 15 U.S.C. § 1679b(a) is read as a whole, it is clear that the anti-fraud provisions *presume* the involvement of a credit repair organization, referring to "*the* credit repair organization" in key portions of the section. It is also clear that the legislative intent of § 1679b was simply to ensure that persons and organizations who worked in concert with credit repair organizations would be included in CROA's anti-fraud restrictions (even though they themselves might not offer credit repair services or qualify as a credit repair organization).

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prior liabilities.[1] This article focuses on the real estate issues.

Adverse environmental conditions can be caused by spills or releases, and leaking underground storage tanks, compressors, lifts, dumpsters, floor drains, oil/water separators, and drywells and septic systems into which contaminants were discharged. Some states mandate the investigation and remediation of certain real estate. For example, Connecticut requires real estate at which a "vehicle body repair facility" has operated any time since May 1967 to be investigated and remediated when it is sold.[2]

Knowledge is Power, and a Lack of Knowledge is a Lack of Power

While many different factors can affect the parties' relative leverage in a negotiation, the person with more knowledge usually is at an advantage. Furthermore, one who lacks knowledge may have a serious lack of negotiating leverage. For example, absent a definitive understanding of the condition of a site, a buyer is in a strong position to use the potential for environmental impacts to negotiate a much lower purchase price and a less favorable allocation of post-closing responsibilities. To combat such techniques, a seller should consider doing its own due diligence, so as to be in a position to correct curable defects, or at least to be in a position to better define the costs of addressing the conditions.

The disadvantage of investigating is that, in some jurisdictions, the mere discovery of historic releases can trigger the requirement to investigate and remediate. However, knowing the conditions and the cost to address the conditions usually can significantly improve the seller's leverage, and therefore the benefits usually outweigh the risks. Obviously, the more a seller knows about its property and its history, the less likely unknown, adverse conditions will be discovered and have to be addressed.

So… Now You Know: Allocating Responsibilities and Liabilities

Knowledge enhances the ability of the seller to negotiate the environmental provisions of any purchase agreement – it is much easier to negotiate over certainties than over guesses or fears. But no matter how much information is available, there is really only one critical issue – who is going to be responsible?

Whether environmental conditions are known or there is an obligation, perhaps from a lender or under law, to investigate and/or remediate discovered contamination, the responsible party, seller or buyer has only two options. A seller who retains responsibility has control: control over the scope, nature, timing and method of remediation,[3] and control over the costs associated with each of those factors. In addition, if the seller retains responsibility and pays the associated costs, there should be no discount of the purchase price for environmental issues. A significant disadvantage of retaining responsibility is that the seller is "stuck" dealing with the property, likely at a time when the seller most wants to just move on.

Obviously, then, a major advantage to the seller having the buyer perform the work is the ability to move on. That ability must be secured, however, by a strong indemnity backed by a financially viable entity or some other mechanism to ensure that the work is properly performed. This is because a seller may remain liable to an environmental agency or even a third party if the buyer fails to perform. A truly bad result for a seller would be to sell at a discount, and then find itself on the hook for the environmental conditions because the buyer disappears, is not financially viable, or simply refuses to perform.

Even if there is no present obligation to investigate or remediate, the parties should allocate responsibilities for liabilities that might come to light later. When allocating these responsibilities, the value of the due diligence becomes even more obvious. It is not uncommon for the parties to divide responsibilities as follows: seller indemnifies for pre-closing conditions, and buyer indemnifies for post-closing conditions. However, if there is no baseline as to the environmental conditions on the property, and the entities are engaged in the same business, it can be difficult to distinguish pre-closing and post-closing conditions, whereas the use of the property is changing, such as a dealership becoming a big box retailer or residential development, the conditions are usually easily distinguishable.

Which brings us to indemnities. Good deal lawyers know that an indemnification is only as good as the entity giving it. It is even more true in the context of a sale

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1 You should research how sales of assets/businesses are treated in the applicable jurisdiction; state courts and federal courts have dealt with this issue differently. In addition, these cases are often very fact specific, and the facts of any given situation can dictate a different outcome, particularly in the context of state-specific corporate and environmental law.

2 *See* Conn. Gen. Stat. §§ 22a-134 et seq.

3 If the seller retains responsibility, it is *critical* to also retain the right to conduct the remediation in any manner and to any appropriate standard the seller determines. In general, the buyer (who will be the owner after the closing) will have the final say on any institutional controls such as environmental covenants or activity and use limitations and can often hold the seller to a more stringent standard, unless the purchase and sale agreement explicitly acknowledges the standards to which the seller will be remediating the property.

Executive Director's Message

Jack Tracey

The pace of membership growth has slowed during the past year. Membership stands at 486, a net gain of five over 2008. Of those, 281 are full members, 170 fellow members, 11 executive members, 21 associate members and three dealer members.

The Board of Directors hopes that all members will be ambassadors to spur growth. Is there someone in your practice who would benefit from being a member? A colleague whose practice includes dealer clients? A supplier or dealer whose business could be improved by membership?

Contact me at 410-712-4037or jtracey@dealercounsel.com and I will send an invitation to membership, or have prospective members go to http://dealercounsel.com/membership/join.php to apply on-line.

Here are the categories of membership and what each entails. Please note that trade association executives who are not lawyers are eligible.

Full Member - Practicing attorneys who serve the needs of auto, truck, motorcycle, boat, motor home and all terrain vehicle dealers. Annual dues: $585. Benefits are:

- Member only meetings
- Members only e-mail list serve
- Members only on-line forum
- Subscription to *Spot Delivery®*
- *NADC Defender*

Trade Association Executive Member - Those Executives of the trade associations that represent the industry who are not lawyers. Annual dues: $585. Benefits are:

- Member only meetings
- Members only e-mail list serve
- Members only on-line forum
- Subscription to *Spot Delivery®*
- *NADC Defender*

Fellow Member - Subsequent member of same organization as full member or trade association executive. Annual dues: $200. Benefits are:

- Member only meetings
- Members only e-mail list serve
- Members only on-line forum
- *NADC Defender*

Associate Member - Companies and organizations interested in furthering NADC goals. Annual dues: $1500. Benefits are:

- Member only meetings
- The right to advertise in NADC publications and exhibit at NADC events
- Subscription to *Spot Delivery®*
- *NADC Defender*

Dealer Member - Vehicle dealers who are interested in attending NADC meetings. Annual dues: $585

- Member only meetings
- Subscription to *Spot Delivery®*
- *NADC Defender*

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

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National Association of Dealer Counsel

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Details will be posted as they develop at:

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and at the behest of a forms provider who objected to our critique of their product, we communicated with Mr. John Hallerud, an attorney in the FTC's Midwest Regional Office, to whom questions about the Used Car Rule are to be directed, according to a cover letter which accompanies the online publication, *A Dealer's Guide to the Used Car Rule. FTC, A Dealer's Guide to the Used Car Rule (visited Nov. 3, 2009)* <*http://www.ftc.gov/bcp/edu/pubs/business/autos/bus13.pdf*>. A discussion of the issues follows.

Buyers Guides Missing Horizontal Lines

For what seems like forever, AAS has been advising dealers that a series of horizontal lines must be printed immediately beneath the "Systems Covered" and the "Duration" column headers on the bottom half of the front of the Buyers Guide for two reasons.

First, those lines are included in the Buyers Guide depicted in the Used Car Rule (16 C.F.R. §455.2(2009)), and in every FTC publication dealing with Buyers Guides that has ever included an illustration of the front of the Guide itself. The regulations even state that the lines be printed in "10 point Baseline Rule," whatever that is. If the regulations specify the printing specifications, how could the lines be optional?

Second, the admonishments previously issued by the FTC regarding adherence to format requirements are the very essence of inflexibility. Section 455.2(a)(2) states, "capitalization, punctuation and wording of all items, headings, and text on the form must be *exactly* as required by this Rule" (emphasis added). FTC Staff Compliance Guidelines, which offer commentary on this regulation, provide:

> The Rule requires dealers to use the exact format for the Buyers Guide that is shown in the Rule. The text of the Rule contains a model Buyers Guide, in both English and Spanish, and also provides specific printing instructions. …all Buyers Guides must comply *exactly* with the standardized wording, type style, type size, and format required by the Rule. 53 Fed. Reg. 17660 (1988) (emphasis added)(final staff compliance guidelines).

In consideration of these things, when faced with Buyers Guides which did not have the lines in question, though the absence might have seemed to be a trivial, technical violation, we couldn't simply ignore it, and eventually, we presented the following questions to Mr. Hallerud:

> Is it the enforcement position of the FTC that the lines in question MUST appear on the Buyers Guide dealers post in the windows of used vehicles? Alternatively, is it the position of the FTC that the lines in question are purely optional, and no enforcement action will be taken against dealers who use Buyers Guides which do not have those lines?

Here is his response in its entirety:

You have asked whether the Buyers Guide

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involving environmental issues. A buyer of real estate is often a single-purpose entity with no assets other than the contaminated property. A solution may be a corporate or personal guaranty, which has more substance. Another solution may be carefully drafted environmental insurance that backstops the single-purpose entity's indemnity. This is particularly important if the buyer agrees to assume responsibility and/or liability for pre-existing environmental conditions, in return for a discount to the purchase price.

The Value Of Environmental Counsel, Or Why Your Client Should Hire Another Lawyer

No client wants to pay for one lawyer, let alone two. And environmental lawyers have the reputation for being deal killers – pointing out all the things that can go wrong and why the deal can't be done. In reality, a good environmental lawyer is a critical part of any team involved in the sale or purchase of commercial or industrial real estate, and can often provide creative solutions to problems that seem intractable. As shown by the discussion above, however, these are complicated issues and it's a good idea to have someone involved who works with these issues on a regular basis. There are few deals that must be killed. However, if both parties are motivated to do the deal, a good team can and should make the deal happen.

Conclusion

Closing a business and selling property can be stressful for a client, particularly if the decision was made for them. Add environmental issues into the mix, and it can be even more stressful. The best way to manage what is likely an already difficult situation is to have as much information as practical and to have a good team to advise the client early in the process.

Pamela Elkow is a partner in the Environmental and Utilities Practice Group at Robinson & Cole LLP in Stamford, CT. She can be reached at pelkow@rc.com.

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NADC welcomes the following new members:

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may be prepared without the lines provided for text that appear beneath the Systems Covered/Duration sections of the Buyers Guide. Commission staff has no objection to omitting the lines for text as needed to provide the systems covered and duration information more clearly. It is my understanding that, by omitting the lines, dealers will be able to print the warranty coverage that they offer more legibly than if the information is printed over the lines.

Please note that the views expressed in this letter represent those of the staff of the Federal Trade Commission and are not binding on the Commission. They have not been reviewed by and do not necessarily reflect the views of the Commission as a whole or of any individual commissioner.

Sincerely,

John C. Hallerud

A refreshingly definitive statement that makes life a little easier, both for our clients and our Field Consultants, who no longer have to defend the call to incredulous dealer personnel in exit interviews.

Buyers Guides as History Disclosure Forms

California is one of many states which requires dealers to disclose certain prior vehicle histories or conditions to the purchaser of such a vehicle, i.e., prior rental, dealer demonstrator, lemon law buyback, insurance salvage, etc. Most dealers make the required disclosure on a written form, signed by the customer, and a copy is retained by the dealer as proof of the disclosure. A separate issue is the timing of the history disclosure. To be effective, the disclosure must be made prior to contracting. However, the written history disclosure form is typically not prepared and presented until the customer is nearing the end of the purchase process; most likely just as the contract is about to be signed. Many dealers would prefer to make the disclosure at an earlier stage in the sales process, by way of some type of labeling *on the vehicle itself* while it is displayed for sale. Not only does vehicle labeling help prevent the possibility of a consumer claiming some type of fraud or unfair dealing by reason of a "late" or "delayed" disclosure, it saves everyone's time if that customer would not purchase a vehicle having that history anyway.

The Buyers Guide is an obvious medium whereby history disclosures might be effected. It is in writing; it is (hopefully) displayed on the vehicle at all times; dealers frequently ask purchasers to sign the form to authenticate it and confirm distribution; and a copy of the signed form is retained by the dealership in its files. What a great way to disclose histories! That is, unless it's not permissible.

The arguments *against* marking Buyers Guides with history disclosures are at least as persuasive and are based on the *original* version of the FTC Staff Compliance Guidelines published in Volume 52, No. 95 of the Federal Register on May 18, 1987. The "Buyers Guide Format" discussion states, "No additional information or printing may be added to the Buyers Guide, such as a dealership logo, consumer signature line, or the price of the vehicle." Later, in Illustration 3.1 the FTC says a dealer may NOT put a logo or other vehicle information, such as price, features, color or service contract details on the Guide. "No changes, additions or deletions are permitted, except as noted in the Rule." Interestingly, this commentary does not appear in later versions of the Guidelines. But the spirit of the "No extraneous or distracting information allowed" stance remained.

Notably, in 1987 a customer signature line was seen as a violation. As we know, however, the regulations now specifically provide for an "Optional Signature Line" See 16 C.F.R. 455.2(f)(2009).

In August, 1996, the FTC on a vote of 5-0, denied a request from the California Air Resources Board for a conditional exemption from the Used Car Rule. The petition sought approval for inclusion of a "smog index" and other language on the front of the Buyers Guide. The Commission responded stating that the smog index is unrelated to the purpose of the Rule, which is to provide warranty information to purchasers of used vehicles. They went on to state that inclusion of this unrelated information on the Buyers Guide by some used car dealers would defeat the goal of standardizing the warranty information on the Guide and could thereby diminish its effectiveness.

Those of you having either an excellent memory or an excellent filing system, may recall a posting on the NADC list serve in May of 2006 in which one of our members related that their dealer group had been cited by the FTC for a violation consisting of printing a border around their Buyers Guides. Famous last words: "No modifications at all."

We here at AAS have been of two minds regarding the practice of disclosing relevant vehicle histories on Buyers Guides. On the one hand, the FTC admittedly designed the Buyers Guide for disclosing warranty information and extraneous "non-warranty" information on the Guide could be considered distracting content which would be rightfully prohibited. On the other hand, we thought it almost

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In keeping with this interpretation, the Federal Trade Commission has never attempted to apply the anti-fraud provision of CROA 1679b to any situation in which a credit repair organization is not involved. *See FTC v. Gill*, 265 F.3d 944, 955 (9th Cir.2001). The vast majority of federal court jurisdictions have held consistently with the view that Congress' intent in §1679b(a) was never to expose all "persons" involved in credit transactions to potential liability, but to ensure that individuals involved in perpetuating fraudulent activities *by credit repair organizations* would be included in CROA's restrictions. The court in *Nixon v. Alan Vester Auto Group, Inc.*, No. 1:07CV839, 2008 WL 4544369, at *9 (M.D. N.C. Oct. 8, 2008), recently explained this majority position, stating:

> The language of the statute speaks to actions in conjunction with using the services of a credit repair organization. That would appear to be the intent of Congress and the better reading of the statute. Thus, courts have held that "[t]he plain language of the statute dictates that the CROA applies to a person's indirect fraudulent actions taken in connection with the offer of credit repair services."

2008 WL 4544369, at *9, *citing Stith v. Thorne*, No. CIVA 3:06-CV-00240-D, 2006 WL 5444366, at *10 (E.D. Va. Oct. 30, 2006) (stating "CROA applies to a person's indirect fraudulent actions taken in connection with the offer of credit repair services"). Similarly, basing its ruling on stated Congressional intent, the court in *Henry v. Westchester Foreign Autos, Inc.*, 522 F. Supp. 2d 610, 613 (S.D.N.Y. 2007) stated:

> Congress' focus in enacting the CROA was on the credit repair industry, and specifically for regulation of credit repair organizations. Although this section uses the word "person," it is clear that it was not Congress' intent to have the CROA apply to all persons, whether they are associated with credit repair or not. Thus, only a credit repair organization or a "person" associated with a credit repair organization can violate the CROA.

Further, courts recently considering the extent of CROA's application have explicitly rejected the expansive interpretation of the court in the Northern District of Illinois in favor of the opinion held in the majority of other federal jurisdictions. Dismissing with prejudice the plaintiff's attempt to apply CROA to a car dealership uninvolved with credit repair services, the court in *Berry v. Cook Motorcars* recently stated, "some judges in the Northern District of Illinois appear to have accorded the Act an extraordinarily expansive scope, but the better reasoned cases reject those as outliers." *Berry v. Cook Motorcars*, No. 09-426, slip op. (D. Md. May 19, 2009) (Davis, J.). The court specifically referenced the opinion of the Nixon court (noted above), as well as another recent ruling in the Northern District of Florida holding that "the reference to other 'person' means another person connected with a credit repair organization ... when the Act is considered as a whole and in light of its explicitly stated purposes, it is clear that it applies only in the credit repair context." *Lopez v. ML #3, LLC*, --- F.Supp.2d ----, 2009 WL 997015, *5 (N.D.Fla., April 15, 2009) (Hinkle, C.J.).

Thus, the "extraordinarily expansive scope" afforded CROA by the court in the Northern District of Illinois is clearly an outlier, and CROA's application is correctly and better limited to the fraudulent activities of credit repair organizations and those acting in conjunction with them to perform credit repair services.

Assuming that federal courts follow the majority interpretation of CROA, rather than the tortured interpretation of the courts of the Northern District of Illinois, we may see a reduction on CROA actions by plaintiffs' attorneys suing motor vehicle dealerships. However, there are still state CRO statutes with which dealer defendants may have to contend. But at least those cases will be decided in state courts (unless a more traditional basis for federal jurisdiction is claimed) rather than in federal courts where the jurisdictional provisions of CROA are relied upon by car-buyer plaintiffs whose attorneys want to find a way into federal court.

Michael Charapp, a partner with Charapp & Weiss, LLP in McLean, VA, is Editor of Defender, The NADC Newsletter, and Chairman Emeritus *of the NADC.*

We are always looking for submissions to publish in the Defender. Please send your contributions or proposals for articles to
mike.charapp@cwattorneys.com

Buyers Guide Update ...
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inconceivable that law enforcement would take action against a dealer who made such a consumer-friendly (history) disclosure on a Buyers Guide. After all, it is a disclosure which is truthful, material and does relate to the condition of the vehicle. (Additionally, what would be the consumer's damages resulting from such "violation?") Bottom line: We at AAS were OK with using a Buyers Guide for making history disclosures (at least in California), but only if a written history form—signed by the customer—was also used.

But there was no need to live in doubt. Having established a relationship with Mr. Hallerud we approached him with another question:

> What would be the position of the FTC if a dealer was to type or stamp (in approximately 12-point font) the words 'Prior Rental,' for example, in the area beneath 'Systems Covered'/'Duration,' perhaps following the warranty term disclosures the dealer would otherwise be making in that area?

He responded as follows:

> *Although not strictly speaking proper, because, as you know, that section is supposed to list warranty coverage information and prior use of a vehicle is not a warranty term, I do not think that we would be concerned about it. I think that we could take a different view if so much extraneous information is printed on the Buyers Guide that it obscures or confuses the underlying warranty information that the Buyers Guide is intended to convey.*

So there you have it. A vehicle prior history disclosure, printed in not greater than 12 point font, following any warranty terms disclosed under "Systems Covered"/"Duration," that does not "obscure or confuse the underlying warranty information," would not be of concern to the FTC. Common sense prevails again.

Scott Jakust is an attorney and the vice-president of consulting for Auto Advisory Services. Scott is highly knowledgeable in all areas of both federal and state law as it applies to dealer operations.

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Michael Charapp, Editor
mike.charapp@cwattorneys.com
Trudy Boulia, Assistant Editor
tboulia@jpharveylaw.com
Defender, The NADC Newsletter is published by the National Association of Dealer Counsel
7250 Parkway Drive, Suite 510
Hanover, MD 21076
410-712-4037
Fax 410-712-4038
www.dealercounsel.com