DEFENDER
THE NADC NEWSLETTER

Lender Bad Faith: The Mente Case

Leonard Bellavia,Esq.

Leonard Bellavia

Introduction

Recent years have seen an increase in litigation between automotive dealers on one hand and automobile manufacturers and/or automotive financial services institutions on the other, no doubt prompted at least in part by the nation's credit crisis and recession. In a federal suit commenced in 2008, a jury awarded a dealer a multimillion dollar verdict, prompting alternative motions (now pending) by a bank holding company for judgment notwithstanding the verdict and for a new trial.

Plaintiffs, Mente Chevrolet Oldsmobile, Inc., Mente Chrysler Dodge, Inc., and Donald M. Mente (collectively "Mente") comprise a family-owned automotive group located near Allentown, Pennsylvania. Mente filed a complaint in the United States District Court for the Eastern District of Pennsylvania against GMAC, Inc., Case No. 08-cv-2403, stating claims for, inter alia, breach of contract. The resulting litigation considered claims with a common genesis -- an audit of Mente by GMAC in July 2007. GMAC deemed Mente "out of trust"—a determination that forced Mente down a treacherous and ultimately fatal (or nearly so) financial path.

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Sidebar

Contents:

Your Ethical Obligations Relating to Metadata

Oren Tasini, Esq.

Oren Tasini

Be forewarned, there are secrets lurking in your Word documents and they could come back to bite you.

Welcome to the world of metadata. Computers, like people, keep little notes about documents, such as where it belongs, who it belongs to and what is in the document. These notes are metadata. Metadata is just data about data. See for yourself if you like. Open a Word document, and find the "Properties" tab. There you will find the name and initials of the person who created the document, when it was created, information about the origin of the document, and how long the document was edited. (As an aside, if you typically reuse forms, the Properties tab will reveal the name of the original form, something a savvy client might quiz you about.)

No big deal, right? Well, there is more. In addition to basic information about the document, metadata can reveal significant privileged and confidential information.

Metadata can contain information about the author of a document, and can show, among other things, the changes made to a document during its drafting, *including what was deleted from or added to the final version of the docu-*

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President's Message

Rob Cohen

On April 12 and 13, the NADC held its 6th Annual Member Conference in Dallas. Technically, it was held in Irving, Texas, but no one knows where the heck Irving is. There were over 100 attendees, 17 great speakers, and nine detailed sessions. With the Four Seasons Resort – Dallas as our host venue, I think we may have achieved a near-perfect balance of business and pleasure.

Clearly, the most anticipated discussion topic was rejected dealer arbitration. Mike Charapp and Eric Chase led a roundtable-type discussion and provided keen insight into arbitration strategies. Those in attendance who had their own arbitrations scheduled walked away with new tactics and, perhaps more importantly, some comfort. Since Congress-ordered arbitrations are novel (to say the least) and the law that created the right to arbitrate is not exactly comprehensive (to say the least), even seasoned dealer attorneys may be feeling a bit like first year law students (ready to take on the world, but with very few weapons). From my perspective, the arbitration session armed members with something that every litigator needs plenty of—confidence.

All of the speakers at the conference were prepared and energetic. Andy Koblenz, general counsel of NADA, kicked off our conference with an update on the NADA's efforts on a variety of regulatory and legislative matters. NADA has always been a big supporter of our group and we sincerely appreciate the intellectual contributions made by Andy and his legal team.

We branched out a bit this year into what I believe are some fringe issues for dealer attorneys. Ron Sompels and Jodi Kippe, partners of Crowe Horwath (an NADC Associate Member), gave an elucidating presentation on dealer financial statements and Roger Beery of Austin Consulting (also an NADC Associate Member) educated attendees on the convoluted world of dealer insurance policies. Lastly, Randy Henrick of DealerTrack and Aaron Davies-Morris of McAfee/Foundstone shed considerable light on the mysteries of credit card compliance and the card merchant "interchange."

Several first-time NADC speakers were featured this year, including Chris Hoffman of Fisher and Phillips, LLP, Michael Dommermuth of McGloin, Davenport, Severson and Snow, Meghan Musselman of Hudson Cook, LLP, Christina Floyd of Vandeventer Black, LLP, and Tim Sparks of Sonic Automotive, Inc. Of course, we had some veteran speakers as well, including Doug Greenhaus of NADA, Patty Covington of Hudson Cook, LLP and yours truly.

Based upon the feedback I received personally from members, I think I can safely declare the conference a resounding success. I would like to thank the Program Committee, Mike Charapp, Patty Covington, Russell McRory, Eric Chase and Michael J. Dommermuth for helping put together such a great conference. I would also like to thank Jack Tracey and Mary Ellen Tracey for doing the leg work.

Be sure to stay tuned for announcements regarding upcoming webinars, the launch date for our new website and list serve, and dates and location for our Fall conference.

Rob Cohen, Esq., President of Auto Advisory Services, Tustin, CA, is President of NADC.

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Metadata
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ment, as well as comments of the various reviewers of the document. Metadata may thereby reveal confidential and privileged client information that the sender of the document or electronic communication does not wish to be revealed.

Professional Ethics of the Florida Bar, Op. 06-2 (Sept. 15, 2006).

Yikes! Now that sends chills down your spine. It gets worse. Even if you take some very basic steps to eliminate metadata, an unscrupulous lawyer (yeah, I know, no such thing) can use software and computer commands to examine, i.e. "mine" your Word document and discover changes that were made by you, or your client as you exchanged drafts, but which were not included in the final document. You may not see them on the screen, but they are there.

So what is a lawyer's ethical obligation to ensure that a document does not include metadata? Does a lawyer have a duty to not mine a document to find metadata? Upon inadvertent receipt of confidential information in the form of metadata, what is a lawyer's duty? Lastly, what practical steps can one take to remove, i.e. scrub metadata from documents?

The ethical parameters are not entirely clear. Different states which have addressed the issue, as well as the ABA, have reached differing conclusions. The states that have considered the issue of what obligations, if any, a lawyer has to prevent the disclosure of metadata have concluded that an attorney must exercise reasonable care to ensure that metadata is not sent. See e.g. Pennsylvania, Formal Op. 2009-100 (stating "transmitting attorney has a duty of reasonable care to remove unwanted metadata from electronic documents before sending them to a third party"); New Hampshire Bar Association Ethics Committee, Op. 2008-2009/4 (stating "a sending lawyer who transmits electronic documents or files has a duty to use reasonable care to guard against disclosure of metadata that might contain confidential communication"). The ABA has taken a contrary position, and places no obligation on the sending attorney. See American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Op. 06-442. However, states differ in the ethical obligations of the recipient attorney upon receiving metadata. Some have concluded that the recipient may not mine, or review the information, and use it to his or her advantage, see e.g. Arizona Bar, Ethics Op. 07-03 (stating "a lawyer who receives an electronic communication may not examine it for the purpose of discovering the metadata embedded in it"), while other states allow a lawyer to mine and examine metadata, see e.g. Vermont Bar Association

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Mente Case
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Factual Background

Mente had a floor plan lending arrangement with GMAC, and as such Mente had agreed to remit funds to GMAC with the sale of each car sold as Mente received those funds. According to the agreement between the parties, Mente's failure to remit funds both "timely" and "in good faith" could result in GMAC declaring Mente in default. It bears noting that the parties' agreement did not provide a specific period of time after the sale of a vehicle in which Mente was to remit payment to GMAC; rather, Mente was guided by the express provision in the parties' earlier Wholesale Agreement that payments to GMAC were to be made "faithfully and promptly." Eventually, there came a time when GMAC exercised its prerogative to perform a "routine" audit of Mente, and GMAC concluded—by inspecting the collateral—that in fact Mente had not promptly made payments under the parties' financing agreement. GMAC accordingly deemed Mente "out of trust."

GMAC's determination prompted the execution by the parties of certain new agreements. One of these was a Forbearance Agreement, providing in essence that in return for the ability to continue in business (and for a loan of $59,000 to cover operating expenses), and for being granted a definite period of time and manner in which it could remedy its earlier default (i.e., payment of $300,000), Mente granted to GMAC additional security interests in Mente's automobile inventory as collateral. GMAC was given the right to take immediate possession of every automobile in Mente's stock (subject to their respective financing agreements) in the event that Mente defaulted under the Forbearance Agreement—a remedy available to lenders under Article 9 of the Uniform Commercial Code.

Unfortunately, the additional time to cure its default ran without Mente returning to the good graces of GMAC, whereupon GMAC declared Mente in default of the Forbearance Agreement and exercised its rights thereunder demanding immediate payment of the total amount due in connection with all vehicles that Mente had sold but for which it had not accounted to GMAC, and GMAC took possession of the remaining vehicles in Mente's stock. Without vehicle stock, Mente was unable to continue in business as a dealer, and therefore rendered unable to meet the requirements of its franchise agreements, which Mente's franchisors, General Motors and Chrysler, then promptly terminated.

Lawsuit and Outcome

Mente's lawsuit was tried before a jury over the course of two weeks. The jury returned a unanimous verdict that included, among other things, findings of fact that Mente had not been "out of trust," and that Mente's execution of the Forbearance Agreement had been the result of exertion of "undue influence" on Mente by GMAC, which had dealt with Mente with "unclean hands." Mente contended at trial that GMAC had been on a witch hunt, so to speak, to enable it to eradicate Mente's dealerships. Mente asserted that GMAC had methodically broken down the dealer's 40-year-old family business. Indeed, Mente vehemently contended that the circumstances discovered by GMAC's audit (and upon the basis of which GMAC had declared Mente in default in the first instance) were not "abnormal" in light of how Mente had paid GMAC in years prior, and that Mente had not been unable to account for its debt to GMAC; rather, Mente had been prevented from doing so by GMAC once it had, in Mente's counsel's words, "embarked on its premeditated mission to shut Mente down." Mente's

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New Members

NADC welcomes the following new members:

Full Members

Alison E. Bethel
AutoNation, Inc.
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presentation was persuasive, at least to the jury.

Post-trial Motions

GMAC, after the jury returned a verdict of $4 million for Mente, argued to the court that the jurors were inappropriately and unfairly moved by Mente's appeal to their emotions and that, in any event, the issues presented to the jury as questions of fact should have been decided by the court as questions of law. GMAC submitted a motion under FRCP Rule 50 for entry of judgment as a matter of law and a separate motion under FRCP Rule 59 for a new trial.

GMAC argues that whether GMAC breached the contract(s) at issue turns upon interpretation and application of the plain and unambiguous contract terms, which represents a determination reserved to the court alone; that is, only a question of law exists, that the Forbearance Agreement contained clear and unambiguous terms, that Mente fully understood and agreed to the terms of the Forbearance Agreement, with the advice and consent of counsel and, therefore, the jury's determination regarding the validity and enforceability of the Forbearance Agreement was outside the jury's province and must be disregarded. (Moreover, the doctrine of unclean hands, being an equitable defense, may not be asserted by Mente as a "sword" rather than a shield.)*

Mente's opposition asserts essentially that implied in the Wholesale Security Agreement (by which GMAC initially secured its interest in vehicles in Mente's stock) is a covenant of good faith and fair dealing (which notion is expressly imposed by the UCC), that GMAC breached its duty to deal with Mente fairly and in good faith when GMAC "falsely declared a default", that it is proper and necessary to submit to a jury a claim that an agreement was not entered into "knowingly" or "voluntarily," as determination of such a claim requires consideration of a "totality of the circumstances," leading up to and surrounding the agreement—a factual, not legal, inquiry, and that the assertion of GMAC's "unclean hands" (sullied when GMAC falsely first declared Mente in default) was properly asserted by Mente in opposition to an equitable (affirmative) defense asserted by GMAC in its answer to the complaint.

Prognosis

The Rule 50 and Rule 59 motions, filed in January, are, as of this writing, sub judice. Some prognostication of the outcome is possible, however.

Both parties' arguments seem to run counter to established contract principles of both law and equity. Had no question of fact been submitted to the jury, it seems unlikely that the court would have found that Mente had not been "out of trust." Under the circumstances, however, the standard of review on GMAC's motions greatly favors Mente. And, whether Mente was "out of trust" does appear to be properly a question of fact, if only because the parties' original agreement contained no terms providing for a time to pay. Yet, even if the court were to agree with GMAC and take the question from the jury, to conclude ultimately that GMAC as a matter of law dealt with Mente fairly and in good faith, the court would have to ignore both the prior course of dealings between the parties and the obvious one-sidedness of the Forbearance Agreement—an improbable result in light of the requirement that, on motions under Rule 50 and Rule 59, the court draws all reasonable inferences from the evidence in favor of the nonmoving party.

Leonard A. Bellavia, Esq., founding partner of the law firm of Bellavia Gentile & Associates, LLP, is a nationally recognized authority in the field of automotive franchise law.

* GMAC presented other arguments as well, but the question whether Mente was "out of trust" was the foundation of all claims and arguments presented during the litigation.

Professional Responsibility Section, Ethics Op. 2009-1 (stating "the Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file's content, including metadata"). Notwithstanding, most states have concluded, if the receiving lawyer has knowledge that the disclosure was inadvertent, he or she must advise the sender of the inadvertent transmission. In contrast, the ABA places no prohibition on the receiving lawyer's use of metadata, unless the lawyer knows or reasonably knows that the transmission was inadvertent. For a chart of each state's position go to: http://www.abanet.org/tech/ltrc/fyidocs/metadatachart.html.

Given the state of ethical opinion, and because a lawyer is required to avoid disclosure of confidential and privileged client information and the negligent disclosure of metadata could lead to liability for malpractice, every lawyer needs to take steps to guard against unknowingly transmitting metadata. If you are reusing documents for different clients or transactions, the "Save As" new file command leaves behind significant metadata. You should, therefore, cut and paste the entire document into a new document. The "Track Changes" feature in Word also leaves behind significant metadata and is particularly dangerous, as it can leave behind sensitive client data about one client, which another client may see, or allow another lawyer to see comments that you or your client have made and information that you did not want them to see. Using "Version Control" through a document management software program to compare versions is a better solution to create redlined documents. In addition, there are programs that scrub metadata. Microsoft has released one such program called Remove Hidden Data Ad-In, which is available on its website. Finally, whenever possible, send documents in PDF format. Although PDF does leave some metadata, it is much less significant.

And remember, depending in what state you practice, you may have an obligation to refrain from seeking to review metadata and to advise opposing counsel if he or she inadvertently sends it to you.

Lastly, a caveat: Don't rely solely on this writer for technical support. You need to investigate this thoroughly with your IT professional.

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