NADC
National Association of Dealer Counsel

DEFENDER

The National Association of Dealer Counsel Newsletter SEPTEMBER 2010

In this Issue:

Save the Date:

Fall Workshop
October 3-4, 2010
Chicago, IL
Trump International Hotel & Tower

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Executive Director's Message

Erin K. Hussey
NADC Executive Director

It's officially fall and that means back to school time! Sharpen those pencils and head out to Chicago for the 2010 Fall Workshop being held October 3-4 at the Trump International Hotel & Tower. We have a great agenda lined up with timely sessions and expert speakers. To register for the Fall Workshop, please visit our website at www.dealercounsel.com.

2010 Fall Workshop Sessions include:

MONDAY, OCTOBER 4

8:15 to 9:45 AM

Update and Lessons Learned for Dealers from the Bankruptcies, Arbitrations and Industry Turmoil

Leonard Bellavia, Bellavia Gentile & Associates LLP
Michael Charapp, Charapp & Weiss LLP
Eric Chase, Bressler, Amery & Ross, PC

The panelists will review briefly the historical bankruptcies of GM and Chrysler, the rejections of dealers and the arbitrations and outcomes. They will bring current the post-arbitration events, including an overview of the settlements and reinstatements, as well as comments on post-arbitration litigation. Mr. Bellavia will discuss his initiative concerning an omnibus case against the federal government. The panel will handicap the near-term future of the automotive industry, and especially the prospects for dealers and specific brands. Examples: What are the prospects for further brand terminations (note Mercury's demise)? What is in store for GM and Chrysler, and should dealers of certain brands (e.g., Buick, GMC, Chrysler, Dodge) be especially wary? When dealers are asked to invest substantial resources (as in new points, relocations, renovations, imaging and inventory), how should dealers respond and what are the legal ramifications? What have we learned from the Chrysler form of letter of intent ("LOI")?

10:00 to 11:30 AM

The Bureau of Consumer Financial Protection – What does this mean to dealers?

Michael Benoit, Hudson Cook, LLP
Patricia E.M. Covington, Hudson Cook, LLP (Moderator)
Ryan McKee, U.S. Chamber of Commerce
Paul Metrey, NADA

On July 21st 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act. Title X provides for the BCFP, of which motor vehicle dealers are specifically exempted. However, how that exemption will play out for dealers is still unknown. Finance companies that buy installment contracts from dealers are covered by Title X, and will be subject to the BCFP's reign. In addition, the FTC has been given specific rulemaking authority to govern the activities of dealers. This panel will outline the BCFP, it's powers, structure, functionality and charge, as well as the new rulemaking authority of the FTC. In addition, we'll attempt to scope out what these new provisions will mean to dealers.

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From the Editor:

Does Your Client Have a Succession Plan?

Michael G. Charapp, Editor of the Defender

I am not an estate lawyer. I don't even play one on TV. But lately, I find that I am urging my clients to pay a lot more attention to their estate planning – particularly the succession plan for their businesses.

Companies important to dealers' businesses – notably franchisors and lenders – are spending a lot more time worrying about dealer succession plans. If a dealer steps off a curb and gets hit by a bus, who will be in control of the dealership? Will the dealership continue to successfully sell and service the franchisor's products? Will the business have the financial strength to continue to pay its debts and pay back its lenders?

Franchisors and lenders are less willing than they have ever been to guess the answers. So a dealer without a succession plan may find that franchisors and lenders have less confidence to support a dealer's future endeavors.

Every dealer should have a succession plan. There is no one-size-fits-all solution. Coming up with a solid plan is hard work.

Planning Team

Sound succession planning requires teamwork. The team should include an estate/tax attorney, the dealership's accountant, the dealer's insurance agent, and you as the dealer attorney.

Estate Plan

A dealer must have a will! To whom will the dealer leave the estate? Will trusts be part of the plan? How will the estate be structured? Should there be a present strategy of gifting ownership. Only a qualified team can design this. With estate taxes returning with a vengeance in 2011, a state-of-the-art estate plan is a necessity.

Funding

If something happens to a dealer, how will the transition to a new control and management structure be funded? Will unencumbered business and personal financial resources be sufficient so that there are no critical funding shortages during the transition? Will there be insurance funds available to help overcome short term financial dislocation? More importantly, how will the estate fund the payment of estate taxes that return as a major concern in 2011? The plan should provide for this.

Operating the business immediately after death

Who will be in charge immediately after the dealer's death? A dealer should have a successor designated by the franchisor. That person will be in a position to step in as dealer. To list a dealer successor, most franchisors require that the designee have some equity interest in the dealership. Structuring an ownership interest for the successor should be part of the overall plan.

It is not enough for a dealer to simply name a successor. The dealer successor must understand deceased's wishes and should have a plan to keep management in place. What steps must be taken to calm fears resulting from the dealer's death? What incentives can be used to prevent loss of managers and employees during the transition to new management? These issues should be addressed in the succession plan.

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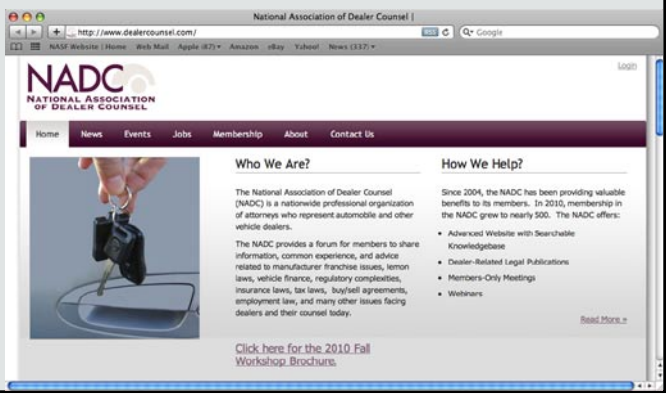
New Website Launched!

Please visit www.dealercounsel.com to check out our new and improved website!

Here you can download a website user guide or a video tutorial to familiarize yourself with all of the new features that the website has to offer. Please do not hesitate to contact NADC staff with any questions or concerns regarding the new website. *We hope you enjoy it!*



Signatures on Privacy Notices

By Rob Cohen, President of Auto Advisory Services, Inc., Tustin, CA
NADC President

A question I regularly receive is whether the privacy notice has to be signed. I typically answer "No, but it is a really good idea."

It is true that nowhere within the Gramm-Leach-Bliley Act, the Privacy Rule, or any of the commentary does it state that a signature is required on a privacy notice. The law simply requires dealers to "provide a clear and conspicuous notice that accurately reflects your privacy policies and practices…." (16 CFR § 313.4(a)) So, what better way to demonstrate that such a notice was provided to a customer than to have a copy with the customer's signature on it?

Sounds reasonable enough, right? Well, some attorneys don't agree. Some attorneys argue that since the GLB doesn't require signatures, dealers shouldn't get privacy notices signed. To bolster their point, they remind me that all the privacy notices I receive in the mail from finance companies aren't signed either. Lastly, they argue that by getting signatures as a policy, it opens up the dealer to exposure on that one deal where a privacy notice was not signed by a consumer.

Let me politely shoot down each of these arguments:

1. GLB Doesn't Require Signatures

So what? Consumer disclosure laws often do not require the consumer's signature. This is true even for really important disclosures such as Regulation Z and Buyers Guides.

What? Regulation Z doesn't require a signature? Yep, 'tis true. Regulation Z merely requires creditors to make the required disclosures "clearly and conspicuously in writing, in a form that the consumer may keep." (12 CFR § 226.17(a)) Now, this point is largely academic since auto finance TILA disclosures are typically built into retail installment sale contracts (which do have to be signed assuming you want to have an enforceable contract). But, I'm just making the point that no one could argue effectively that it isn't a very good idea to get a signature (or "acknowledgement of receipt") on Regulation Z disclosures.

2. Mailed Notices are Not Signed Either

Of course they're not signed. Credit card companies have a hard enough time getting people to respond to a bill let alone a privacy notice. But, personally, I find it to be rather silly to get a dozen signatures from a customer in the finance office on a bevy of other documents and yet choose not to get one signature on a privacy notice. With the attention that consumer privacy is given these days, I think that a privacy notice may soon be almost as important a disclosure as TILA or Buyers Guide disclosures.

3. Increases Dealer Exposure When One is Not Signed

So let's see, if a dealer doesn't get any privacy notices signed, then you may have to prove the notice was, in fact delivered to the customer. If a dealer gets all privacy notices signed, but misses one signature, then you still may have to prove the notice was delivered to the customer, only now you have strong pattern and practice evidence to help you. The fact is, if the notice was not given, there is exposure. If the notice was given and you can prove it, you have no exposure. I'd prefer to play the odds on this one and bet that if finance people are told to get the notices signed, that the vast majority of the notices will be signed; thus making proof of delivery a non-issue for at least the vast majority of deals.

My recommendation remains firm. Dealers should obtain, whenever possible, a customer's signature on a privacy notice. Keep in mind, however, that if a customer is uncomfortable with signing a privacy notice early on in the transaction, then so be it. Just write "Customer refused to sign" on the signature line and still provide a copy to the customer. If that customer eventually purchases a vehicle from you, you should have no problem obtaining his/her signature on the privacy notice at that time.

I'm not exactly alone on this one. NADA raised this issue in comments made in response to the FTCs earlier version of the recently adopted privacy regulations. Paul Metrey, an attorney and the Director of Regulatory Affairs for NADA, submitted comments to the FTC as follows:

> The model form does not contain or permit an entry for a customer to acknowledge receipt of the privacy notice. Although the FTC Privacy Rule does not require financial institutions to obtain such an acknowledgement (and it would be impractical to do so for many financial institutions that do not deliver their privacy notices in person), the Privacy Rule places the burden of delivering privacy notices on the financial institution, 16 C.F.R. § 313.9(a), and identifies hand delivery as a reasonable form of delivery, 16 C.F.R. §313.9(b)(1)(i). To demonstrate compliance with this requirement, many dealers presently (i) request that their customers sign an Acknowledgement of Receipt of the privacy notice; and (ii) retain a copy of the signed privacy notice. To accommodate this sensible practice, the rule should permit financial institutions to include an acknowledgement of receipt box on the privacy notice.

The FTC accommodated the FTC's request and included the following commentary along with the final rule:

> Third, a new box has been provided at the bottom of page two titled "Other important information." This box can

be used in only two ways: (1) to discuss state and/or international privacy law requirements; and (2) to provide an acknowledgment of receipt form. (This use was provided in response to a request by the National Automobile Dealers Ass'n, whose members routinely ask customers to sign an acknowledgment of receipt on a copy of the dealer's privacy notice and retain this record verifying delivery of the notice. (Comment letter of the National Automobile Dealers Ass'n (May 29, 2007)).

Therefore, in developing privacy notices for my clients, I elected to add signature lines to the "Other important information" box. ■

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

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NEW MEMBERS

NADC welcomes the following new members:

FULL MEMBERS

R. Lee Stephens, Jr.
Spotts Fain PC
Irvington, VA

Douglas Thomas
Atlas & Hudon, LLP
West Hartford, CT

FELLOW MEMBERS

Catharine S. Andricos
Hudson Cook, LLP
Washington, DC

Buying and Selling Car Dealerships in the Post-Bankruptcy Era

By John Gentile, Bellavia Gentile & Associates, LLP

In the late spring and early summer of 2009, the world was turned upside down for General Motors and Chrysler dealers. Bankruptcies filed by each of these manufacturers resulted in the termination of over 1,000 dealerships nationwide. For those who have survived the bankruptcies and remained dealers for General Motors and Chrysler, struggles still exist regarding shortages of vehicles, negative consumer perception and oftentimes difficult manufacturer relationships. In many respects, these are the residual effects of the bankruptcy filings. For those dealers who have survived, they have been left with the difficult task of resurrecting two (2) American icons while also facing the difficult challenges set forth above. Adding to these challenges is the prospect of buying or selling a General Motors or Chrysler franchise and the possible impact the bankruptcies may have upon completing these transactions. For the most part, I am reminded of the old adage: "The more things change, the more they stay the same".

In this post-bankruptcy era, the process of buying and selling an automobile dealership has remained essentially the same. Manufacturers, including General Motors and Chrysler, require that an executed buy/sell agreement be submitted to the manufacturer for review. Furthermore, these manufacturers still require proposed dealer candidates to complete a detailed application package including information regarding qualifications, capital and character. Perhaps most significantly, even in this post bankruptcy era, State franchise laws still serve to protect selling dealers and prospective purchasers regarding what a manufacturer can reasonably seek to impose upon the respective parties as conditions of approving the transaction. It is perhaps this last point which is most important to focus on for potential sellers and purchasers of General Motors and Chrysler franchises.

Specifically, General Motors and Chrysler may attempt to take the position that the bankruptcies have somehow modified or negated prior dealer agreements. In the alternative manufacturers may seek to persuade potential purchasing dealers that the bankruptcies have somehow given either General Motors or Chrysler the right to impose additional and otherwise unlawful requirements as conditions of approving transactions. Simply stated, the bankruptcy filings have not given the manufacturers any additional rights in any respect as it relates to the buy/sell process. Accordingly, if a manufacturer seeks to obtain a general release from the selling dealer as a condition of approving its transaction or in the event that the manufacturer seeks to impose site control upon a proposed dealer candidate as a condition of its approval, the parties must look to their individual state's franchise laws to determine if such demands from the manufacturer are in fact legal.

Another question raised by many of our General Motors and Chrysler clients is whether site control agreements and real property leases entered into with either General Motors or Chrysler (or their related real estate entities) are now void by virtue of the bankruptcy filings. While many dealers would rejoice over the ability to avoid such site control and/or lease agreements, the reality is that these agreements have, for the most part, been assumed in the respective bankruptcies of General Motors and Chrysler and as such, remain in full force and effect.

Similarly, those dealers who were not rejected in bankruptcy remain subject to the terms and conditions of their Sales and Service Agreements from the respective manufacturers and all provisions contained therein remain in full force and effect. It is my opinion that the continued validity of these agreements is beneficial to both manufacturer and dealer. From the dealer's perspective, they are provided with a comfort level regarding the continuity of their franchise and the knowledge that a manufacturer cannot unilaterally seek to change the terms and conditions of their relationship.

Thus, for those General Motors and Chrysler dealers who have survived the events of last year and remain General Motors and Chrysler dealers, the bankruptcies have had little impact upon the manufacturers' obligations to dealers in the buy/sell setting nor have they eliminated the protections that dealers are afforded pursuant to their respective state's franchise laws on a go forward basis. This should be very comforting for dealers.

RECENT TRENDS

While manufacturers continue to seek site control regarding desirable locations, it appears that manufacturer owned real estate is becoming a thing of the past. In several recent transactions involving General Motors, for example, the manufacturer has expressed a willingness to sell manufacturer owned real estate. Of course, acquiring this real estate is not without conditions. As a matter of course, General Motors seeks site control in exchange for the transfer of real estate. In today's post-bankruptcy era, seeking site control, as opposed to ownership of real estate, makes good sense for manufacturers. By avoiding ownership, manufacturers can avoid potential liability for real property taxes and repairs to facilities. Conversely, site control provides a manufacturer with all the protection it needs to ensure the property continues its use as an automobile dealership for an extended period of time.

Manufacturers such as General Motors have been acquiring site control using a

"lease/lease back" approach. Under this scenario, the manufacturer becomes the main tenant under a lease of real estate typically owned by an entity which is related to the automobile dealership entity. In turn, the manufacturer subleases the property to the automobile dealership. The rent paid by the subtenant/dealership to the manufacturer is essentially a "pass through" to the landlord. Thus, the manufacturer does not seek to gain any monetary advantage pursuant to the sublease arrangement. Rather, the manufacturer is happy that it has gained control of the property for the entire term of the lease which is typically twenty-five (25) years.

Automobile dealers should be careful before entering into any such lease/lease-back arrangement. While at first blush these arrangements appear benign due to the fact that the dealership and real estate owner are related entities, a problem arises if and when the dealership is compelled to shut its doors. Oftentimes, the sublease includes a cross guaranty from the principal of the company or some other form of indemnification pursuant to which the related landlord entity is compelled to lease the property to the manufacturer at a reduced rent. Furthermore, the lease agreement between the landlord and manufacturer does not guarantee that the landlord will be able to collect rent directly from the manufacturer if the dealership is compelled to close its doors. In fact, it is quite the opposite. The manufacturer/tenant's obligation to continue to pay rent is strictly contingent upon the ability of the sub-tenant/dealership to remain in business and pay rent in full.

Accordingly, dealers who are offered the opportunity to acquire real estate from the manufacturer need to be careful to review the conditions upon which the manufacturer will sell the property. Typically, if a manufacturer is offering it to you, there must be strings attached. ■

John G. Gentile, partner of the law firm of Bellavia Gentile & Associates, LLP has personally handled hundreds of buy/sell transactions over his years in practice.

Executive Director's Message
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11:45 AM to 12:45 PM
Defending Product Liability Actions: Pertinent Issues Affecting Dealerships
Donald St. Denis, St Denis and Davey, P.A.
This session will focus on the pertinent steps involved in defending a dealership in a product liability action. The discussion will involve the interplay between the dealer, the manufacturer of the automobile, the component part manufacturers and the suppliers in the chain of distribution. The focus of this session includes defenses that can be raised by the dealer, preservation of evidence/discovery, effective methods to avoid liability, efficient methods to extract the dealer from a lawsuit early in the litigation, and how a dealer can prevail at trial.

2:00 to 3:00 PM
Washington Update
Michael Harrington & Andy Koblenz, NADA
NADA's Legal and Regulatory Vice President and General Counsel Andy Koblenz and Chief Legislative Counsel Michael Harrington will provide insights on (1) the status of the fall elections (including both federal and key state races); (2) implications of possible electoral outcomes for activities in the next Congress; (3) pending legislation affecting the auto industry; (4) prospects for a potential "lame-duck" session this year; and (5) anticipated regulatory actions affecting dealers.

3:00 to 4:00 PM
Dealership Acquisitions in Tough Economic Times
Joseph Aboyoun, Aboyoun & Heller LLC
Erin K. Tenner, Tenner Johnson LLP
Learn from the best how to navigate the purchase and sale of an automobile dealership including key provisions to protect your clients in challenging economic times. Erin Tenner and Joe Aboyoun have handled hundreds of dealership transactions and will be joining us to share their experiences and expertise. Erin Tenner will take a buyer's perspective and Joe will take a seller's perspective in a back and forth discussion that will give you a better understanding of the key issues to address in an asset purchase agreement, and when a stock purchase is appropriate.

4:00 PM **Adjourn**

From the Editor
... from page 2

Continuing Operations
How will the business be operated for the long run? Is the designated successor qualified to successfully operate to maximize returns? Will the franchisor have the faith in that person based on experience? Will lenders have faith in that person so that they will continue to advance necessary funds? If the successor is not one of dealer's heirs, will the surviving spouse or other heirs be qualified to oversee the successor or will that lead to friction?

Selling by Necessity
There is no worse time to sell than when others think that the owner has no choice. Consequently, a succession plan should not presume a sale, unless necessary. If possible, the succession plan should be geared around continuing operations. This will allow the dealer's heirs to best determine when a sale can take place at the most effective price and terms.

Operating as if a Sale is Imminent
Some of the best advice that you can give to a dealer client is that from an administrative standpoint the dealership should be run as if it will be sold at any time. That will help the dealer minimize uncertainty about encumbrances on the business and other problems – long-term supplier contracts, environmental issues, unfunded liabilities for promised customer services, and the like – that cause reductions in offers in the event of a sale and headaches even if there is no sale. The will eliminate a lot of anguish if exploring a sale then becomes necessary – either for the dealer or for the dealer's heirs. ■

Michael G. Charapp is a lawyer in the Washington, D.C. metro area who represents car dealers and dealer associations. He is editor of the Defender. ***He encourages submissions for publication, and he can be reached at:*** *mike.charapp@cwattorneys.com.*

We are always looking for submissions to publish in the Defender.
Please send your contributions or proposals for articles to:

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