NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

DEFENDER

The National Association of Dealer Counsel Newsletter OCTOBER 2010

In this Issue:

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Executive Director's Message

Erin K. Hussey
NADC Executive Director

The NADC Fall Workshop held October 3rd and 4th in Chicago was by all accounts a great success! Attendees of the Fall Workshop enjoyed a first class venue at the Trump International Hotel & Tower and five informative, timely educational sessions. There were over 85 members in attendance . . . record breaking numbers for the workshop!

NADC members who were not in attendance can benefit from the workshop materials that have been uploaded to our website at www.dealercounsel.com. Please look under the Conference, Workshop and Webinar Handouts section in the eLibrary (NADC Fall Workshop – October 2010).

All NADC educational programs rely on members' suggestions for topics and speakers. If you have a suggested session and/or topic you think should be covered at future meetings please email me at ehussey@dealercounsel.com.

I would like to thank all of our event sponsors for their contributions to the Fall Workshop. Many thanks to Anderson Economic Group, CNA National Warranty Corporation, CounselorLibrary, Dixon Hughes PLLC and The Fontana Group, Inc.

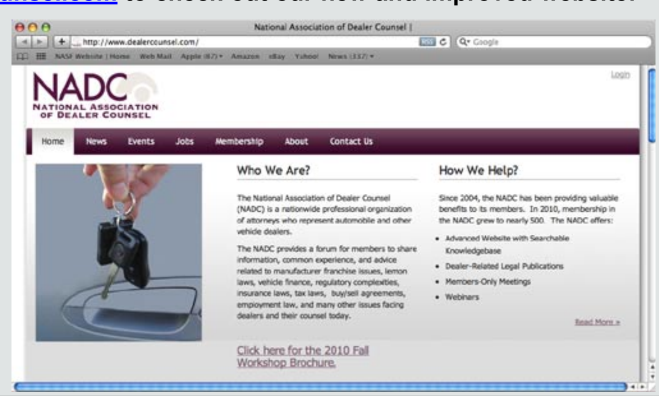
I would also like to thank the Program Planning Committee for putting together an excellent line up of sessions. Thank you to Diane Cafritz, Mike Charapp, Eric Chase, Rob Cohen, Patty Covington, Michael Dommermuth and Donald St. Denis. Well done all!

Be sure to stay tuned for announcements regarding upcoming webinars and dates and location for the 7th Annual Member Conference. ■

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!*



From the Editor:

Michael G. Charapp,
Editor of the Defender

Who Will Tell the Story?

Like many of you, I have been reading the books that try to explain the events surrounding the GM and Chrysler bankruptcies. While the authors' viewpoints and perspectives on the causes and treatments of those near fatal events differ, one thing is constant – lack of sympathy for the positions of dealers.

This lack of consideration usually manifests itself in a simple observation: the dealers are problems for all manufacturers because of their clout in state legislatures where they have been successful in obtaining protective legislation. There is never any analysis of why that legislation is necessary and fair. There is never a word mentioned about the hundreds of billions of dollars dealers have saved franchisors who have not had to build their own systems of vehicle distribution and warranty service. There is no discussion of the billions of dollars dealers pay for vehicles before they even have orders for them – and before they even arrive at dealerships. There is never any analysis of the importance of state laws in preventing a franchisor from wiping out millions of dollars a dealer has invested and the dealer's livelihood simply because he or she gets on the wrong side of the franchisor's executives. There is never any consideration of the dozens, or hundreds, or thousands of jobs that are just wiped from the slate if a franchisor unencumbered by state laws simply decides to change its dealers the way it changes models.

After thinking about this for a while, I realized that I should not be surprised. I learned this lesson years ago when I was in the car business.

The local newspaper (with national exposure because of its location) had and still has a car reporter. I used to get aggravated because it seemed that the reporter never had a good word to say about car dealers. The reporter would test drive vehicles for weeks at a time, sometimes criticizing them but often liking them. The reporter would sometimes travel to Detroit to interview auto manufacturer CEOs or CFOs, those folks that earned millions for so deftly operating their companies that they would only lose hundreds of millions of dollars instead of the billions in losses that would come later.

Those folks were heroes to the reporter. They operated their bloated bureaucracies while holding the losses below ten digits. Their products were sometimes surprisingly good. But those dealers? To the reporter, the manufacturers were to be lauded for their success and importance despite the barnacles the franchise laws made the factories carry -- despite the fact that those barnacles spent millions each year advertising in his newspaper.

I asked myself: "Why laud these captains of industry who let him drive their cars instead of the car dealers who support his newspaper?" I realized that the question contained the answer. It was because he could drive their cars for weeks at a time; to crush them continually would cause the gravy train to stop. It was because an interview with a CEO would grab national attention – and the more money the CEO's company lost, the more attention it would get. And the dealers? Well dealer profiles are the stuff of community advertising rags, not important newspapers with a national reputation.

And so it is with the financial and auto reporters who sometimes wind up writing books. (Even the auto czar author was once a financial reporter.) The manufacturers occupy the world where they wannabe. That is where one finds and develops the stories that get national attention. Those CEOs and CFOs climbing aboard their highly leveraged private jets are the folks with whom they aspire to rub elbows. The top of the line, fully-loaded cars that the reporters sometimes drive for evaluation purposes are really nice rides that beat the heck out of the 12 year old Volvo wagon parked in the driveway.

So they don't tell the dealers' story because they don't take the time to know it. They have no clue about the 14 hour a day, seven day a week jobs that dealers do to build their businesses. They know nothing about the family sacrifices and contributions involved in the businesses. They don't concern themselves with the many employees who rely on the businesses (and the many more employee family members), not to mention the millions of customers.

So who will tell the dealers' stories? I don't have many answers, but I do have one – the members of NADC. We are the dealers' advocates. It is up to us to tell the story in the trials about the franchisors' unreasonable business practices, and before state legislatures, and to state DMVs. That's the only way the story will be told in arenas that matter. ■

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 and encourages submissions. Email: mike.charapp@cwattorneys.com.

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Martinez

Silverman

"Term" Agreements and Facility Demands
What it really means when your manufacturer only re-ups you for a year.

By Josefina Martinez and Scott Silverman, McCarter & English LLP

Every franchise relationship is a constant negotiation with the franchisors as they increasingly attempt to push more financial burdens onto their dealers. The "re-up" time is a perfect excuse to address issues and make demands. At least in the Northeast, the issue is rampant as Nissan, Audi, Toyota, Infiniti and Mercedes Benz make huge pushes for facility upgrades, and the option of selling is unappetizing due to blue sky values discounted by the cost of the upgrades demanded. Whether seeking to increase a dealer's sales through benchmarks or increase branding through dealer financed facility improvements, manufacturers generally perceive ***Renewal Time*** as the most ripe opportunity to wield the threat of the term agreement as a "sword" to extract concessions and commitments they could not otherwise obtain.

What is a "term agreement?" As dealer counsel, we likely know the answer to this question, however, the concept of term agreements is a common misperception for our dealer clients. The phrase is used frequently in the automotive industry, but it can have all sorts of negative connotations. "Term Agreement" is industry jargon that is generally misused or misunderstood, almost always to the detriment of dealers. It generally refers to any franchise agreement that is for a period of time less than that which is offered to other same line make franchisees. Historically, it was the exception to a perpetual agreement, yet there are few perpetual agreements remaining so term agreements have become the norm. This begs the age old question - is a short term deal or "term agreement" any different than a long term agreement?" The simple answer should be "no." However, make no mistake, the general misunderstanding of this concept is why manufacturers continue to use term agreements as a weapon during negotiations between manufacturers and dealers.

How many dealers have been faced with the dilemma or the offer: "Either do the renovations, or we are only giving you a 2 year deal" or "Your penetration needs to hit #% or we can't give you the typical 6 year extension?" As counsel, we cannot count the number of times we have expressed to a dealer that the rights of a dealer under a 1 year agreement are exactly the same as those of a dealer operating under a 15 year deal. The hoops a manufacturer must jump through to terminate a dealer that is operating under a "perpetual" agreement are exactly the same hoops it must jump through if it is seeking to simply non-renew a dealer that has operated under a franchise agreement for a defined term of years or months. In most states, if a manufacturer seeks to terminate or non-renew a dealer, it must provide at least sixty (60) days notice to the dealer of its intentions. In either case, a court or tribunal evaluates the various elements that go into whether or not a dealer should be removed from the market. This requirement and process are the same whether the manufacturer is attempting to terminate a short-term agreement or a long-term agreement.

Unfortunately, because all leverage is "perceived," it is the perceived idea of a short window that usually gets dealers to cave on the manufacturer's demands when in reality, operating under a term agreement, in and of itself, does not place a dealer in any position different than its same line make competitors. Accordingly, while the reality of the similarities between a term agreement and a perpetual agreement are far different than the perception, it is the perception and/or the stigma that goes along with the former that normally drives dealers to concede to various demands from manufacturers that are not economically justified.

More recently, "term agreements" have included hard line performance metrics or construction deadlines that seriously distinguish them from the typical agreement that manufacturers hand out. These benchmarks, deadlines and detailed obligations must be reviewed and analyzed like the terms in any other contract outside the context of the dealer-manufacturer relationship. Unless there is no reasonable alternative, dealers should always avoid agreeing to such terms as a condition to their continuation as a franchised dealer. Dealers almost universally believe that their manufacturers inaccurately assess their performance (whether reviewing market penetration numbers, in sells, out sells, etc.). However, when a dealer agrees with the manufacturer on benchmarks that must be achieved for sales performance, many times the dealer has eliminated its ability to argue that the manufacturer does not properly evaluate its performance or value in the market.

Many unprepared dealers are signing LOI's with construction schedules and little understanding of the consequences for missing hard-deadlines. Their "friends" and "relationships" at the factory that historically guaranteed leniency are all gone and have been replaced by executives with no sympathy for dealers that are stalling investments into whatever the current brand image. As one client recently said "No dealer should make what he feels is a questionable investment in a branded facility, unless he is completely comfortable with the fact that his

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Protecting Against the Enemy Within–
How Employers Can Protect Themselves from Sexual Harassment Lawsuits

By Johnnie Brown, Pullin, Fowler & Flanagan, PLLC

What a year! Our clients have all been focused on surviving outside forces threatening them, such as manufacturers, floor plan lenders and most significantly, the economy. However, we should never forget that some of the largest "enemies" to dealers come from within -- the employees. While the topics can be wide ranging, let's just talk about one, preventing sexual harassment.

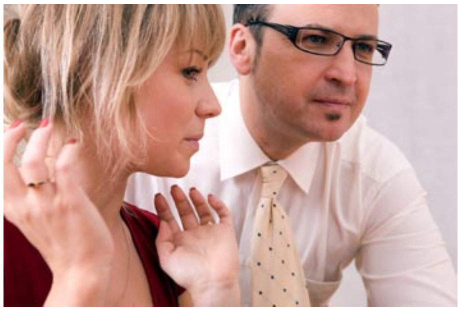
What can our clients do to prevent sexual harassment lawsuits from occurring within the workplace? And if a claim should arise, how should our clients properly handle claims of sexual harassment brought by employees?

Generally, the EEOC defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." These requests constitute sexual harassment when submission to such conduct is made a term or condition of employment; submission to or rejection of such conduct is used as a basis for employment decisions that affect the individual; or when the acts have the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment. Sexual harassment claims are categorized into two types.

The first is *quid pro quo* sexual harassment in which a supervisor conditions an employment benefit or continued employment on the employee's acquiescence in sexual behavior. Strict liability for the employer is associated with *quid pro quo* sexual harassment if a "tangible employment action" has been taken against the employee by a manager/supervisor. Tangible employment action means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." If an employee does not allege that a tangible employment action took place, the employer can seek to avoid vicarious liability if it can show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and, that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

The second type of sexual harassment liability can arise from a "hostile work environment." This is by far the most common type of claim and is factually driven. Sexual jokes, suggestive comments, sexually derogatory comments, or cartoons used by either management or any other individual entering the business environment, can create a "hostile work environment." It is also very important to understand that a court's focus is on the work environment, and inappropriate actions from any source can create a "hostile work environment." This can be extremely difficult to control when the source comes from the outside, such as vendors, and even customers.

Contrary to general understanding, sexual harassment based upon a hostile work environment claim is a term of art. A manager or employee asking someone out for a date or making a one-time offensive remark is



not sexual harassment. It may certainly be inappropriate work behavior, but not "sexual harassment." The employee must show (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and, (4) whether it unreasonably interferes with an employee's work performance. In order to satisfy the four part test set forth in *Harris v. Forklift Systems*, the harassment must be "severe and pervasive." A single incident, or isolated incidents over a period of time, will not likely create a "hostile environment harassment." Generally speaking, the courts will review the questionable conduct using a sliding scale, the more offensive the conduct, the less frequency will be needed to create a hostile work environment. Less offensive conduct needs to occur more frequently. The time frame in which the alleged offensive conduct is also important. If the events occurred over a longer period of time, the less likely it is to create a hostile work environment. Importantly, the term "severe and pervasive" is based upon a reasonable person standard, not a sensitive person standard.

A number of defenses are available to employers depending on the type of harassment alleged. If an employee unreasonably fails to use the harassment policy in place, the employer can use that as a defense to the harassment claim. Another affirmative defense is when the sexual advances are welcome. Although it may be difficult to prove, courts have allowed defendant employers to ask probing questions into personal romantic relationships between the plaintiff and defendant and sometimes even other coworkers. It is also not unheard of for the plaintiff to engage in the joking and conduct that they now complaint about. This type of evidence can influence the jury's perception of the plaintiff, although too much of this type of evidence can leave a jury wondering what type of business the management is operating.

In order to effectively defend claims of sexual harassment arising under a hostile work environment theory, employers can take simple steps to create a system that lessens the chance of harassing behavior occurring in the workplace, and increases the likelihood of a successful defense.

1. Employers need to have an active anti-harassment policy in place. The policy should include complaint procedures that are thorough and easily understood. While it should encourage complaints in writing, it should not require them since oral complaints can trigger the requirement to investigate.

2. The policy must be effectively communicated to supervisors and employees. Every employee needs to know that the policy exists and what it says. And, the employer should establish proof that the policy has been disseminated by retaining a signed copy from each employee, or placing the policy in a pay check stuffers.

3. The employer should conduct consistent sexual harassment training (at least every other year and with all new employees) in the workplace. Employees need to understand how to follow the procedures of the policy, and managers should know how to initiate investigations. Failure to train supervisors about how to follow procedures set forth in the sexual harassment policy can cost employers one of their most valuable defenses to sexual harassment claims.

4. If a claim of harassment does arise, it must be reasonably and promptly investigated. Individuals in charge of investigating claims need to take the claim seriously, investigate promptly, and reassure the complaining employee that the procedures of the harassment policy are being followed. In conducting the investigation, accurate and complete documentation is the key to success if litigation should arise.

5. If inappropriate harassment has occurred, the employer must take prompt remedial action against the individual responsible. Any action taken needs to be done with the purpose of preventing future harassment – it must be effective in stopping the harassment. Employers should be sensitive to preventing any type of retaliatory action against the complaining employee.

6. Last, monitor the situation. Monitoring includes following up with the complaining employee to determine if the problem has been resolved or if there is any other necessary action that needs to be taken; reaffirming the harassment policy with affected employees; and, perhaps, holding another training session to reinforce the policy. Again, the supervisor or human resource employee should document all occasions of re-training.

It is always better to be aggressive to prevent these types of issues. Once the claim is made, damage is done. Sexual harassment claims negatively impact morale and impact overall work performance of all employees. Competing groups may develop once a claim is made and the investigation begins. Alleged sexual harassment victims can be quite emotional, understandably so, and can even demand unwarranted disciplinary action against accused employees. It is always difficult to control these emotions through the process, and I recommend that a company's time and effort be spend preventing these types of claims instead of litigating them.

Hopefully with a strong sexual harassment policy, timely and consistent training, and a strong team in place to communicate and enforce your clients' policies, your clients will not have to worry about the "enemy within." ■

Johnnie Brown is an equity member of the law firm of Pullin, Fowler & Flanagan, PLLC. For the last ten (10) years, a significant part of Mr. Brown's practice has consisted of representing automobile dealers.

TERM AGREEMENTS
... from page 3

manufacturer is already working on the image two versions ahead of what he is building."

The bottom line is that unless a dealer has an up to date facility and has regularly hit the manufacturer's sales performance goals, it should be surprised to receive a renewal agreement *without* any additional terms and conditions. Instead, what can and should be expected in this market is a battle over the dealer's "commitment to the brand" and a test of the dealer's willingness to invest capital or agree to performance metrics for the perceived long term security of a multi-year or perpetual agreement. As counsel, we need to de-mystify term agreements so that dealers understand what they really are and are not and to advise our dealer clients to be wary of the strings attached to term agreements. ■

Josefina Martinez and Scott Silverman are both Partners with the law firm of McCarter & English LLP in Boston, MA.

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