NADC
National Association of Dealer Counsel

DEFENDER

The National Association of Dealer Counsel Newsletter OCTOBER 2011

In this Issue:

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BHPH Basics

By Tom Hudson

I'm always surprised when I attend conferences for buy-here, pay-here dealers and see so many franchised dealers in attendance. When I give legal presentations at these conferences, I'm often asked how dealers going into BHPH need to change their forms and procedures in order to stay compliant with state and federal law. Here are a few thoughts about that topic.

Originating BHPH Contracts. The "front end" of a BHPH transaction is identical in most respects to the origination of retail installment contracts that the dealer sells to Ford Motor Credit or to a bank or credit union. There can be a few differences, though. A lot of BHPH programs involve weekly or biweekly payments, and the use of starter interrupt and/or GPS units to help with collection is fairly common. The documentation for the BHPH transactions can be, and usually is, similar to non-BHPH deals. BHPH dealers tend to charge more for their cars, which creates problems when a dealer tries to run a BHPH business from its franchised (or non-BHPH) location. We generally recommend that a franchised, or non-BHPH dealer who wants to do a BHPH business do it using a separate corporation operating from a separate location where the cars are priced the same for all potential customers.

There IS one origination aspect of BHPH for dealers just getting into this area. Franchised and non BHPH dealers moving into BHPH will be required, for the first time, to develop underwriting standards - a "secret sauce" for approving a customer's credit. The best of intentions and the most common sense underwriting practices could result in huge Reg B violations. Having those underwriting standards and any credit applications (paper and online versions) reviewed by counsel is a must.

Holding and Servicing BHPH Contracts. Dealers who sell all of their retail installment contracts generally have not encountered the "back end" of the vehicle financing business. Dealers holding and servicing their own contracts are regulated in several ways. First, of course, as a matter of contract law, they are governed by any provisions of the retail installment contracts they hold. We frequently see BHPH dealers using "precomputed" retail installment contracts who then service the contracts as "simple interest" (really "interest-bearing") contracts. That's a breach of contract, and a no-no. BHPH dealers usually are subject to Article 9's provisions relating to the creation and enforcement of security interests. Article 9 provides certain rights to debtors and imposes certain duties on creditors, especially when it comes to repossession and sale of vehicles serving as collateral for retail installment contracts. In some states, there is a state retail installment sales act that either supersedes or complements the UCC requirements.

If a dealer actually holds its own retail

installment contracts instead of selling them to a related finance company (see below), the dealership ends up with some duties that it avoids when it sells its contracts to, say, GM Financial. As an example, under the federal privacy laws, the dealership would be obligated to send each customer a copy of the dealership's privacy notice annually.

RFC or No RFC? Despite the "buy-here, pay-here" name, many BHPH companies do not hold and collect their own retail installment contracts. Instead, for tax and accounting reasons, they form a so-called "related finance company". The RFC is a separate business entity that buys, holds and services the dealer's retail installment contracts. An RFC is frequently regulated by state laws as a "sales finance company". The RFC may be subject to state law licensing and other requirements, and will be required to comply with all the federal laws and regulations that apply to these entities. Those laws and regulations sometimes impose requirements on sales finance companies that are a bit different from the requirements that dealers are accustomed to. The RFC should be separate from the dealership, if at all possible. Some state dealership laws may prohibit the operation of another business on the dealership's premises, but even if that isn't the case, the RFC and the dealership should maintain as much of an arms' length relationship as possible, with all of their dealings, such as the agreement for the RFC to buy retail installment contracts from the dealership, reduced to writing.

The RFC will be collecting the obligations that it acquires from the dealer, which might implicate debt collection laws. The RFC should be exempt from the federal Fair Debt Collection Practices Act if it acquires retail installment contracts from the dealership at a time when those contracts are not in default, but that handy little exemption does not appear in some state debt collection laws. Some state debt collection laws require licensing but do not regulate the conduct of debt collectors; others are broader and address conduct as well.

Other Issues. I've heard some BHPH dealers say that they aren't in the car sales business but are, rather, in the collections business. Collecting from the customer certainly appears to be the most important part of BHPH operations. BHPH customers usually are BHPH customers because their financial situation isn't good. Many live from paycheck to paycheck. What is the dealer going to do when the customer's car breaks down? If the car doesn't work, the payments don't get made. Repossession and the subsequent sale of the collateral will result in a large deficiency. Does the dealer offer a warranty with every sale? Finance repairs? Those issues offer enough material for another article.

Getting Started. A dealership contemplating expanding into the BHPH business needs a top-to-bottom review of its originating process, and needs to create the necessary underwriting, servicing, collection and repossession forms and procedures that the new business will require. Because of the tax and legal implications of operating a BHPH business (especially the tax issues arising from using an LLC), the dealership will need BHPH-experienced and knowledgeable accounting and legal advice. And one of the best pieces of advice I can offer is that anyone considering going into BHPH should find a successful BHPH dealer to serve as a mentor. BHPH really is, in many ways, a bit of a jungle, and it never hurts to have a guide. ■

Tom Hudson (tbhudson@hudco.com) has written several books, which are available at www.counselorlibrary.com. He also publishes Spot Delivery®, a legal newsletter for auto dealers, and is Editor in Chief of CARLAW®, a monthly report of legal developments in all states for the auto finance and leasing industry. He is a partner in the Maryland office of Hudson Cook, LLP. Spot Delivery, CARLAW and the books are published by CounselorLibrary.com LLC. For information, call 410-865-5411 or visit www.counselorlibrary.com.

NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

Volume VII, Number 9
OCTOBER, 2011

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Defender,
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NADC Top Contributor Award

NADC is halfway through the campaign for Top Contributor. This campaign will last until March 31, 2012. The NADC Top Contributor will be announced at the 2012 April Conference. The winner will not only receive an award, but will also be given a free registration to the 2013 Annual Members Conference.

Here's how you win. You will be awarded:
3 points for submitting an article to be published in the *Defender*.
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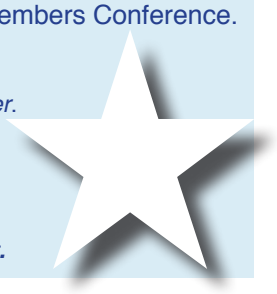

Executive Director's Message

Erin Murphy
NADC Executive Director

The NADC Fall Conference held October 9th and 10th in Chicago was by all accounts a great success! Attendees of the Fall Conference enjoyed a first class venue at the Trump International Hotel & Tower and six informative, timely educational sessions. There were over 90 members in attendance….record breaking numbers for the conference!

NADC members who were not in attendance can benefit from the conference materials that will be uploaded to our website at www.dealercounsel.com. Please look under the Conference, Workshop and Webinar Handouts section in the eLibrary (NADC Fall Conference – October 2011).

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 emurphy@dealercounsel.com. If you are interested in speaking at future conferences please send me a presentation proposal to include session topic, session title, proposed speakers, proposed length of time and a brief description of the session.

I would like to thank all of our event sponsors for their contributions to the Fall Conference. Many thanks to:

- Anderson Economic Group
- Auto Dealer Law
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2011 NADC Fall Conference

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It is with the help of our sponsors that we are able to elevate the quality of the conference while keeping the cost low for members.

I would also like to thank the Program Planning Committee for putting together an excellent line up of sessions. Thank you to Mike Charapp, Rob Cohen, Patty Covington, Jeff Ingram, Shawn Mercer, Paul Metrey and Andy Weill. Well done all!

Be sure to stay tuned for announcements regarding upcoming webinars and dates and location for the 8th Annual Member Conference. ■

NADC National Association of Dealer Counsel

Welcome New Members

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Environmental Issues Facing Auto Dealers

By John B. King, Partner, Breazeale, Sachse & Wilson, LLP

Feature Article

Automotive dealerships face numerous challenges in the current economic climate. An ongoing challenge, in good times and bad, is ensuring that environmental liability and the associated costs are minimized as much as possible so that capital is not needlessly expended. The risk of liability may be minimized by taking several pro-active steps.

Limiting Liability for Past Contamination

It should not come as a surprise that the owner of an automotive dealership will be held liable for spills and releases of spent solvents, used oil, gasoline, or other pollutants or contaminants into soil, surface water, or groundwater that occur when the owner is in control of the property. Compliance with the regulations and good housekeeping, discussed in greater detail below, may limit the risk of these spills or releases. Unfortunately, however, environmental practices or controls were not as stringent in the past as they are today. Spills and releases of pollutants that occurred many years ago continue to persist today in soil and groundwater at or under the property.

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), a purchaser of property may become liable for contamination existing on or in the purchased property. Under CERCLA, then, the purchaser of an automotive dealership may become liable for the acts of his predecessors and contamination that exists upon purchase. This liability includes the costs of remediation of that contamination, which can become quite expensive. While the purchaser may have some recourse against his seller under state law theories, the government has a cause of action against the purchaser for remediation under CERCLA, which imposes strict liability on the owner of contaminated property.

Recognizing that concerns regarding potential liability were inhibiting the sale of real property, Congress provided a defense under CERCLA (called the 'bona fide prospective purchaser' defense) for a purchaser who conformed to strict guidelines before and after the sale. 42 USCA 9607(b)(3) and 9601(35). EPA published a rule that provided specific guidelines for a purchaser to obtain the protections afforded by the defense. 40 CFR Part 312; 70 Fed. Reg. 66072 (Nov. 1, 2005). As a result, property may be purchased with knowledge of prior contamination while the new owner protects himself from liability to the government if the purchaser fully and completely follows and fulfills each and every requirement of the rule.

The centerpiece of the defense is the performance of "all appropriate inquiries" (AAI) prior to the purchase. AAI is intended to result in the identification of conditions indicative of releases and threatened releases of pollutants or contaminants on, at, in, or to the subject property. These evaluations and assessments are commonly called 'Phase I Site Assessments.' They must strictly follow the provisions of the rule or certain named industry standards to obtain the protections from liability in CERCLA. The industry standards named in the rule that provide an acceptable alternative to the rule itself are ASTM International Standard E1527–05, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" and ASTM International Standard E2247–08, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property."

The Phase I Site Assessment must be conducted by an 'environmental professional' (as defined in the rule). The environmental professional must document his findings in a report. The main tasks to be performed by the environmental professional include interviews with past and present owners, operators, and occupants, searches for recorded environmental cleanup liens, reviews of federal, tribal, state, and local government records, and visual inspections of the facility and of adjoining properties. The "final rule does not require sampling and analysis as part of the all appropriate inquiries investigation." 70 Fed. Reg. 66101 (Nov. 1, 2005). The environmental professional may recommend sampling in the Phase I Site Assessment Report.

During the Phase I Site Assessment, a purchaser has several duties that should be documented in the Phase I Site Assessment Report. The purchaser must communicate any specialized knowledge or experience that is material to a recognized environmental condition (REC) in connection with the property. The purchaser must communicate any actual knowledge or experience that is material to RECs or activity or use limitation in connection with the property. If the purchase price is too low when compared to market conditions, it may indicate a problem and additional inquiry may be required. Any commonly known or information of which the purchaser is aware that is material to RECs in connection with the property should be communicated to the EP. The EP should interview the purchaser to obtain this information and the purchaser should insist that the results of the interview and/or information obtained from the purchaser be included in the Phase I Site Assessment Report.

After the sale, the purchaser has additional duties that must be fulfilled. The purchaser must provide all legally required notices with respect to the discovery of contamination. Generally, this involves providing the Phase I Site Assessment Report, or a summary, to the appropriate regulatory agency. The purchaser must take appropriate care to stop continuing releases, prevent future releases, and prevent exposure to previously released substances. The purchaser must provide full cooperation to persons conducting response actions, comply with land use restrictions, not impede the effectiveness of institutional controls, and comply with all information requests. The purchaser must not be affiliated with any person who is potentially liable for response costs.

The purchaser should document his compliance with these requirements. All documentation, including a copy of the Phase I Site Assessment Report, should be retained indefinitely so that should a claim be made, the documentation needed to assert the defense is readily available.

As noted above, the purchaser must have acquired the property after the disposal of the pollutant or contaminant and the purchaser is always responsible for his own acts once he occupies the property. However, if all the requirements are strictly followed, and documentation is maintained so that compliance may be established, the purchaser may buy property with knowledge of contamination and possess a viable defense to liability to the government for that contamination.

Environmental Compliance to Reduce Liability

Many automotive dealers also have service centers. Unless properly managed, these 'automotive repair facilities,' as they are known in EPA's jargon, may create a host of potential environmental problems. As noted above, improper management may lead to contamination that could impact a potential sale. It could also lead to environmental violations and citations by the regulatory agency, creating unnecessary costs in dealing with the agency and possibly the payment of penalties.

Automotive repair facilities engage in numerous activities that may subject the facility to regulation. These activities could include waste generation, air emissions, and wastewater discharges.

Generally, the waste materials that are typically generated in a repair facility are spent parts washer solvents, used oil, used batteries, used antifreeze, and even used tires. Once generated, regulations apply to govern the handling of these materials. Space does not permit a full recitation of each and every rule that applies to each of these types of materials. However, some of the requirements associ-

ated with common waste materials, spent solvents and used oil, will be discussed.

Solvents are used primarily to clean engine parts or other oily surfaces. When the solvent gets contaminated such that it cannot be used anymore, it may become a hazardous waste, making the repair facility a hazardous waste generator. At that point, certain regulations apply. A notification as a generator must be provided to the regulatory agency. Additionally, the repair facility must label containers of the spent solvents as a 'Hazardous Waste' and send those containers off-site within ninety days, with a hazardous waste manifest, to a permitted treatment or disposal facility. While on-site, the facility must ensure that the spent solvent is in containers that are in good condition and that there are no spills or releases.

Some facilities use special types of solvents that, when spent, are not listed or characteristic hazardous waste. Also, many facilities utilize solvent supply and recycling services that routinely deliver clean solvent and pick up any spent solvent. The solvent supply service usually provides a parts washing tray in which parts washing occurs and the material is contained.

Used oil from oil changes must also be specially handled. As a used oil generator, the facility must ensure that the used oil is stored in containers that are in good condition and that there are no spills or releases. The containers must be labeled with the words "Used Oil." Usually, used oil is stored in drums or other containers and routinely picked up by a used oil recycler.

The regulations are generally aimed at ensuring good housekeeping practices at the facility, which in turn serve to minimize spills or releases into the environment. Most facilities contain these types of materials in drums and provide adequate containment for the drums so that any spills or releases are prevented from reaching the environment. These types of practices, and conformance with the rules, will assist in satisfying the regulatory agency conducting an inspection, minimizing current liability, and preserving the defense noted above.

Volatile organic compound (VOC) emissions may result from painting or paint storage. These air emissions may be regulated through a requirement to obtain a permit and maintain records of the VOC content of the paints used. Most states have a *de minimis* emissions limit under which a permit is not required. However, calculations should be performed and retained on site to determine whether air emissions are under *de minimis* levels.

Some dealers may also conduct painting or have a collision repair shop. If so, they need to be aware that the so-called '6H Rule' (named after the citation of the rule, 40 CFR Part 63, Subpart HHHHHH) is now in effect. The rule is an attempt to lower the emissions of certain hazardous air emissions, such as lead, manganese, cadmium, and chromium, from paint stripping and miscellaneous surface coating operations.

Requirements must have been met by January 10, 2011, with a final notification due on March 11, 2011. Generally, spray painting must be done in a spray booth or prep station; the spray booth exhaust systems must haves filters with a 98% efficiency; high volume, low pressure spray guns must be used; and painter training is required.

Finally, some facilities may wash down their service areas, thereby picking up oils, absorbents, and other pollutants which may make their way into waterways or a municipal storm water system. If so, a permit to discharge to 'waters of the United States' or a local permit to discharge to a publicly owned treatment works may be required.

Environmental regulation of automotive repair facilities is extensive and intrusive. Even within the areas briefly touched on above, numerous other regulations may apply. For a more in-depth review, consult EPA's *Consolidated Screening Checklist for Automotive Repair Facilities Guidebook,* October, 2003. The Guidebook also contains a checklist that may be used to understand the applicability of most environmental regulations. ■

John B. King is a partner with Breazeale, Sachse & Wilson, LLP, in Baton Rouge, Louisiana. His practice relates mainly to environmental regulatory permitting and compliance. He provides compliance counseling to automotive dealers and other companies. Prior to joining the firm in 2003, he served as Chief Attorney for Enforcement for the Louisiana Department of Environmental Quality.

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