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List-Serve: Looking for Privacy in all the Wrong Places

By Andrew J. Weill, Benjamin, Weill and Mazer

Many of the members of NADC find the list-serve to be a valuable tool for the exchange of information. Because members are communicating with colleagues sharing similar values, they often feel free to be candid in assessing legal strategies, witnesses, courts, etc. However, the users of the list-serve should be aware that these communications may be subject to discovery and other unwanted consequences.

Generally speaking, a person does not have an expectation of privacy in any information that they voluntarily post on a public website or list-serve. In a federal civil rights case, *McCarthy v. Barrett,* 804 F. Supp.2d 1126, 1145 (W.D. Wash. 2011), plaintiffs alleged that their private affairs were disturbed in violation of state law when police officers monitored plaintiffs' participation on internet list-serves. The court held, "Plaintiffs had no privacy interest in any information that they voluntarily posted on public websites or list-serves, and it is disingenuous for them to claim that their private affairs were disturbed when law enforcement monitored their *public* postings." (Emphasis in original.) Note, however, that the court did not deal with the expectation of privacy associated with a private list-serve.

Privacy of electronic communication has evolved from privacy considerations determined through challenges to letter correspondence, and cases on the latter may be analogous. Typically, the sender's expectation of privacy regarding letters ordinarily terminates upon delivery, even if the sender asked the recipient to keep the matter private. *U.S. v. King,* 55 F.3d 1193, 1196 (6th Cir. 1995). This principle was applied to email communications in Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001).

An interesting analysis of the issue can be found in a reported court-martial decision involving the validity of the Government's seizure of stored email communications from a computer. The court in *U.S. v. Maxwell,* 45 M.J. 406, 419 (C.A.A.F. 1996) stated: "Messages sent to the public at large in the "chat room" or e-mail that is "forwarded" from correspondent to correspondent lose any semblance of privacy. Once these transmissions are sent out to more and more subscribers, the subsequent expectation of privacy incrementally diminishes. This loss of an expectation of privacy, however, only goes to these specific pieces of mail for which

privacy interests were lessened and ultimately abandoned." The court found that an expectation of privacy existed in email transmissions made on the AOL service, and concluded that a private email communication had been improperly seized.

A further matter of interest is the expectation of privacy regarding private material on a system or bulletin board. A workplace policy disclaimer stating that there is no expectation of privacy for the user regarding internet usage, emails and file transfers has been upheld in the workplace. *U.S. v. Simons,* 206 F.3d 392, 398-399 (4th Cir. 2000) The court noted that "whenever one knowingly exposes his activities [or effects] to third parties, he surrenders Fourth Amendment protections' in favor of such activities or effects" (alteration in original) (quoting *Reporters Committee for Freedom of the Press v. AT&T,* 593 F.2d 1030, 1043 (D.C.Cir.1978). See also, Guest v. Leis, supra, 255 F.3d 325, 333 ("disclaimer defeats claims to an objectively reasonable expectation of privacy").

However, to the extent that a list-serve is considered the equivalent of a private bulletin board service, there is a body of law that BBS contents are subject to the Stored Communications Act (the "SCA") of the Electronic Communications Privacy Act ("ECPA"), found at 18 U.S.C. §§ 2701 to 2712. *U. S. v. Steiger,* 318 F.3d 1039, 1049 (11th Cir. 2003) ("Thus, the SCA clearly applies, for example, to information stored with a phone company, Internet Service Provider (ISP), or electronic bulletin board system (BBS)"); *Konop v. Hawaiian Airlines, Inc.,* 302 F.3d 868, 875 (9th Cir. 2002) ("The legislative history of the [SCA] suggests that Congress wanted to protect electronic communications that are configured to be private, such as email and private electronic bulletin boards"); *Steve Jackson Games, Inc. v. U.S. Secret Service,* 36 F.3d 457, 462 (5th Cir.1994) (holding that the SCA "clearly applies" to the seizing of information on a BBS); *Becker v. Toca,* No. 07-7202, 2008 WL 4443050, at *4 (E.D. La. Sept. 26, 2008) ("Courts have interpreted the statute to apply primarily to telephone companies, internet or e-mail service providers, and bulletin board services"); *Kaufman v. Nest Seekers, LLC,* No. 05 CV 6782(GBD), 2006 WL 2807177, at *5 (S.D.N.Y. Sept. 26, 2006) ("An electronic bulletin board fits within the definition of an electronic communication service provider"); *Inventory Locator Service, LLC v. Partsbase, Inc.,* No. 02-2695 MA/V, 2005 WL 2179185, at *24 (W.D. Tenn. Sept. 6, 2005) (finding that the SCA not only applied to entities that provide gateway access to the Internet, but also applied to a password-protected website containing an electronic bulletin board and a web-based forum where parties could communicate). See also, *Crispin v. Christian Audigier, Inc,* 717 F.Supp.2d 965, 980 (C.D. Ca. 2010), where the judge refused to allow a subpoena of personal Myspace and Facebook postings because they were protected by the SCA: "Facebook wall postings and the MySpace comments are not strictly 'public,' but are accessible only to those users plaintiff selects."

While the law is not completely settled, most courts have found that the SCA operates to preclude civil discovery directed at electronic communications within its scope. *Thayer v. Chiczewski,* No. 07 C1290, 2009 WL 2957317 at *5 (N.D. Ill. Sept. 11, 2009) ("most courts have concluded that third parties cannot be compelled to disclose electronic communications pursuant to a civil--as opposed to criminal--discovery subpoena")

A recent California case, *Muniz v. United Parcel Serv., Inc.,* No. C-09-01987-CW (DMR), 2011 WL 311374 (N.D. Ca. Jan 28, 2011) dealt with the issue of whether list-serve communications can be subject to discovery during litigation. The plaintiff's attorney had sent out messages through a list-serve sharing his thoughts about that case (and in particular some unflattering references to the judge). The defendant's attorney subpoenaed the list-serve records, claiming that those records were relevant to the attorneys' fees motion that was pending before the court. The attorney's association that hosted the list-serve was outraged and considerable ink was devoted to the discoverability of the list-serve communications. The district court considered all of these arguments and did what courts do best: it ducked the tough issue, finding that the communications sought were irrelevant to the attorney's fees motion.

While there may be arguments to resist discovery directed at list-serves, there is certainly no guarantee. One should use common sense in making postings on a list-serve. There are matters that are far best reserved for communications with assurances of confidentiality that may not exist on a list-serve. In drafting the NADC list-serve guidelines, we have been mindful of the above lessons. The old saying continues to be true: discretion is the better part of valor.

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President's Message

Patricia E.M. Covington
Hudson Cook, LLP
NADC President

This year the National Automobile Dealers Association (NADA) expo was 'hopping', with the NADC being part of the fun. While the increased activity and attendance could partly be due to the convention being held in Las Vegas – a favorite dealer venue – it's more likely because the industry is well on its way to being back. Maybe not back to the heady days of 16 to 17 million unit car sales and leases of years 2000 to 2007, but definitely better than the last four years. If you caught the Chrysler Clint Eastwood Super Bowl commercial, you might be further encouraged that this year will be good, really good for car sales. I'm a natural optimist, so I was a sucker for the Chrysler "halftime" commercial challenging America to have confidence in our fortitude and ability to pick ourselves up from the collapse of the credit crisis.

In keeping with this theme, the NADA Exhibit Hall was bustling. Vendors were hawking their wares, dealers were visiting with their service providers and suppliers, reporters were soaking up all the new information and energy to report in their next editions … and, of course, everyone was picking up all the freebies they could, available at most booths. Overall, NADA attendance was definitely up.

The NADC was right there in the middle of it – and in a "great spot" to boot. We were more than lucky with respect to our location. We snagged a spot right across from the NADA booth. We had great exposure to attendees and constant traffic. Erin Murphy, our executive director, commented that we had more people visit our booth in the first half of the first day than we had the entire time last year.

We had a successful event! We had a lot of interest from potential new members, including some for associate membership. We distributed NADC marketing materials, as well as the NADC member directory. Current members worked the booth along with Erin, members that didn't work the booth came by to visit, bringing their friends and family members, and everyone took time out of their busy schedules to catch up with old friends and meet new ones. Lots of good networking!

I even learned about 1031 exchanges – who knew that someone could make a living off of coordinating these transactions! Mike Charapp and I urged a gentleman who did these 1031 exchanges to sign up as an associate member so that he could share his expertise with our members. I also had a delightful time joking around with my NADC friends and exchanging hopeful expectations for the car business.

Some interesting reports came out at NADA. NADA published its much anticipated report on factory mandated image upgrades. The results were not shocking, but in line with what most folks expected. There is little empirical data to support or justify the return on investment. Specifically, the study revealed that a car shopper's perception of the dealership facility is among the least important factors in the vehicle purchase decision. It also reported that the costs of the program are excessive, particularly since dealers are instructed to purchase items from designated vendors.

NADA also forecasted a good year for car sales and reported that used car prices were continuing to rise. The NADA expects 13.945 million in new cars and lights trucks sales and leases for 2012. I understand that part of the increase in car sales was due to credit "easing." Hmm, credit – that reminds me of another conference that was in town that week. The American Financial Services Association (AFSA).

For those of you who are not familiar with AFSA, it is a large trade association for the non-depository companies who extend credit to consumers. For the last few years, AFSA has held its Vehicle Finance Conference right before the NADA convention. The Vehicle Finance Conference is AFSA's premier event for companies that purchase installment contracts from dealers or engage in vehicle direct loans or leases. The AFSA and NADA consecutive conferences result in a lot of mixing

and mingling of dealers and finance folks, as well as cross-pollination of the two organizations. Dealers participate on the AFSA educational panels and many of the finance folks stay over for the NADA programs, as well as to meet with their dealer customers.

The upswing in business was also part of the buzz at the AFSA conference, but there was more … something not quite as encouraging. It was compliance, regulatory compliance (think F&I issues). Rick Hackett, the new installment credit "boss" in charge of research at the Consumer Financial Protection Bureau (Bureau) spoke at the AFSA conference, along with one of the Bureau's new analysts. He tried to allay general fears of "the sky is falling" with respect to compliance. Additionally, and more importantly – he announced that he was there to learn about the industry and gather information. Yep, just like we're learning about them, they're doing the same with respect to us.

I know Rick personally. He's a good guy (not sure why that matters – but, I thought I'd let you know anyway). We had a chance to catch up and I asked him about the Bureau's collection of anecdotal "stories" on the website. I told him how much I didn't like it and that it was very worrisome that the Bureau would be regulating and enforcing based on anecdotal "evidence." He assured me that that wouldn't be the case. He said the Bureau wants to attach a "real person" to the practices they seek to impact. Hmmm, OK – I'll take that for now; but I'm also not holding my breath.

Why is all this important for dealers? Well, it's entirely possible that the compliance requirements imposed on finance companies will "trickle down" to dealers. It's also very possible – particularly because the Federal Trade Commission and the Bureau entered into a Memorandum of Understanding – that the FTC and the Bureau (along with the Federal Reserve Board, which has rulemaking authority over many dealers) will coordinate efforts.

And while I'm talking about the FTC … you can expect the FTC to do its own information gathering. There were various dealer practices discussed at the FTC's Dealer Roundtables that grabbed, and held their attention. Spot delivery for one. You may recall from my November/December 2011 President's Message, that the FTC and consumer panelists kept bringing the subject up, or coming back to it. No empirical data was ever produced regarding the number of spot delivery transactions or how many go bad. The FTC was very curious about this issue and I don't expect they'll let it go. Consequently, enforcement is likely the path they will pursue.

The upcoming year looks like one in which dealer lawyers will be very busy. With the industry coming back to life after its near-death experience, and a newly-invigorated federal regulatory effort in the works, we're likely to have our hands full. We'll try to make the NADC one of your principal resources in meeting the challenge. ■

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Welcomes New Member

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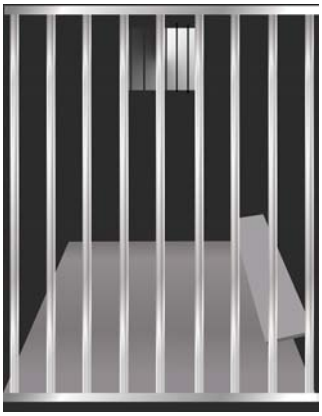
Sean Williams
Integrity Auto Group
Oklahoma City, OK

When Crime Doesn't Pay: Recent Activity from the EEOC

Feature Article

By Melissa M. Shirley, Breazeale, Sachse & Wilson, LLP



According to a 2010 survey conducted by the Society for Human Resource Management, approximately 73 percent of major employers report that they always check a job applicant's criminal records, while 19 percent of those surveyed reported that they do so only for select job candidates. Employers should take note: using arrest and/or conviction records to deny employment can be illegal if it is irrelevant to the particular job, according to the Equal Employment Opportunity Commission ("EEOC"), the federal agency which enforces federal employment discrimination laws and investigations of alleged violations. On January 11, 2012, the EEOC publically announced that it had entered into a conciliation agreement with Pepsi Beverages Company for $3.13 million. The agreement stemmed from allegations that Pepsi discriminated against African American job applicants based on Pepsi's use of the applicants' criminal histories in the hiring process. According to the EEOC's press release, its investigation revealed that Pepsi had a policy of refusing to hire applicants with pending criminal charges that had not resulted in convictions, and had failed to hire job applicants with arrests or minor conviction records. The EEOC's position is that people of a certain race or color are arrested and convicted more frequently than others outside of these protected groups and, therefore, employers using such information in hiring decisions can cause a disparate impact on those protected classes. The EEOC's past guidance, issued over two decades ago, provides that an employer's selection criteria regarding criminal history information must take into consideration certain factors to demonstrate the "business necessity" of the criteria (i.e. to be sure that the exclusion of the person due to criminal history is important for the particular position), including: (1) the nature and gravity of the offense or offenses, (2) the time that has passed since the conviction and/or completion of the sentence, and (3) the nature of the job held or sought as related to the conviction. EEOC officials have said, for example, that a drunk driving conviction from years past may not be relevant to a clerical job, but a theft conviction may disqualify someone from working at a bank.

The Commission has also advised that when using arrest records, employers must consider the likelihood that the individual engaged in the conduct for which he/she was arrested, and the "job-relatedness" of the allegations, before making a hiring decision. According to the EEOC, a blanket exclusion of individuals with arrest records (without convictions) would almost never withstand scrutiny.

On July 26, 2011, the EEOC held a public meeting to revisit the use of arrest and conviction records in employment. As a result, and considering the Pepsi agreement, it is anticipated that the EEOC will likely issue new or updated policy guidance regarding the use of criminal records in employment in the near future. In the meantime, employers should be mindful of the EEOC's apparent renewed interest in the topic, evidenced by it's commentary regarding the Pepsi matter, including this directive from one Acting Director: "We hope that employers with unnecessarily broad criminal background check policies

take note of this agreement and reassess their policies to ensure compliance with Title VII." Indeed, the Pepsi lawsuit demonstrates that employers must be careful how they use information obtained when conducting background checks for applicants. Using arrest-only records can be risky, and even where there is evidence of a conviction, an employer who disqualifies a large number of applicants on the basis of criminal convictions should consider whether this practice has a disproportionate effect on individuals of any particular race, national origin, gender, or any other protected class, and whether exclusion of a particular applicant is for a legitimate purpose related to the job position.

Finally, employers obtaining criminal histories must also be mindful of the need to comply with the consent and disclosure requirements of the Fair Credit Reporting Act (FCRA) when ordering any kind of consumer report, including background checks. ■

Melissa Morse Shirley, a partner in the Baton Rouge office of Breazeale, Sachse & Wilso, LLP, practices in the areas of labor and employment law, including litigation, transactional, administrative and counseling matters.

» Please reference the book excerpt from Auto Dealer Law on the next page for additional information on detailed background checks.

NADC Top Contributor Award

NADC's campaign for Top Contributor 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:

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1 point for posting to the list-serve, eForum and eLibrary.

NADC staff will carefully track each member's involvement.

Michael Charapp

Rob Cohen

Book Excerpt:

Credit Reports and Investigative Background Checks

(from Auto Dealer Law)

Feature Article

By Michael Charapp, Esq. & Rob Cohen, Esq.

For some job classifications, more detailed background checks may be appropriate. For example, you may want to run a credit report for an employee handling money to determine if there are financial pressures you should know about. You may want to do a deeper background check for applicants in management positions.

Unfortunately, many dealers do not realize that there are special laws applicable to credit checks and investigative background reports for a job applicant.

Most dealers are acquainted with the concept of adverse action notices (or "turn down letters") for customers who apply for credit. However, many dealers do not understand that the Fair Credit Reporting Act (FCRA) also requires consent to credit reports and investigative background checks for job applicants and employees. FCRA further requires notification to applicants and employees in the event these tools lead to an adverse employment decision.

Whenever a dealer decides to run a credit report on an applicant or employee, or to hire an outside company to do a routine investigation of applicants or employees, FCRA's requirements kick in. Here are some frequently asked questions and answers that arise from this situation:

If I have reason to know about a job applicant's credit rating, can I run a credit report?

The rules concerning credit reports for job applicants and employees differ from the rules concerning credit reports for customers. To run a credit report on a customer, a dealer simply must have a legitimate business purpose in connection with the extension of credit (and a signature on a credit application is typically sufficient authorization). The law is different for employment purposes. It requires that consent to run credit reports and to hire companies to do investigative consumer reports must be in writing, must be signed by the applicant or employee, and must be contained in a document which contains no other information. The consent must be a totally separate signed statement.

My neighbor runs a company that will investigate job applicants for my dealership. Won't that make it easier to do background checks?

Not really. Under FCRA, a company doing such investigations is compiling investigative consumer reports. You must obtain the individual's written consent before you ask the company to investigate the applicant's background and you must go through an adverse action procedure if the investigation is a factor in an adverse employment decision.

I have run a credit report on an applicant and I am not comfortable hiring him because of credit problems. Do I have any obligations?

Yes. FCRA sets up a two step process if the credit report is a factor in your decision. First, before you take the adverse action, you must give the individual a pre-adverse action disclosure that includes a copy of the individual's credit report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," (is available at www.ftc.gov/bcp/edu/pubs/con sumer/credit/cre35.pdf). After you have taken the adverse action (*e.g.,* rejecting the applicant), you must give an adverse action notice that gives the following information: the name, address and telephone number of the credit reporting agency used; a statement that the consumer reporting agency did not make the decision and it cannot give specific reasons for the action; notice of the individual's right to dispute the accuracy and completeness of any information the agency furnished; and his or her right to a free consumer report from the agency upon request within 60 days.

I know I ran a credit report, but it really was not the major reason that I did not hire the applicant. Do I have to follow the adverse action notice procedure?

The information in the credit report does not have to be the major reason you did not hire the person. It merely has to be a factor. If you run a credit report and it is a factor in your decision to take adverse action as to an applicant, you should follow the adverse action notice process.

What if I make my decision not based on the credit report but based on other information generally considered part of an investigative consumer report if done by an outside agency such as the employee's driving record or his criminal background check?

The answer depends on who compiles the information. If the dealership compiles the information on its own based on appropriate consent, no adverse action process is necessary. If it is gathered by

an outside firm, then an adverse action process identifying the firm is required.

I have some existing employees who handle cash, and I want to check their credit reports. Do I have to get permission?

If the employees have given permission in the past in a separate written document that states that reports may be obtained during the course of their employment, no more notice or permission is required. If they have not received notice and have not given permission, then you must notify the employees and get their permission before you access their reports. Do not forget, if you take adverse action against the employee in which the report is a factor, you must follow the adverse action notice procedures.

I think I have some employees who are engaged in theft. Do I have to get their permission to have a private detective investigate them?

No. If you suspect employees of misconduct, a 2003 change to FCRA permits an investigation without notification and consent.

Important Note: State law may impose additional requirements with respect to employment-related credit and background checks. Be sure to check with a local dealer association or competent labor counsel for further instructions in this area.

Criminal Background Checks

You may want to do a criminal background check for management applicants, those whose position may involve handling money, or applicants who must be licensed and a criminal background may be an issue. Remember, this is in the nature of an investigative report. Therefore, you must get the specific authorization of the applicant to do that. ■

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