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DEFENDER

The National Association of Dealer Counsel Newsletter
NOVEMBER/ DECEMBER 2012

How Insurance Can Help Auto Dealers Offset Losses From Superstorm Sandy

Barry I. Buchman, *Gilbert LLP*

Although the media properly has focused on the human suffering caused by Superstorm Sandy, much also has been written about the economic impact of the storm, particularly within the auto industry. Although losses caused by the storm fortunately appear to be less severe than initially feared, manufacturers and dealerships still lost many vehicles, dealerships still experienced damage to, and/or power outages in, their stores, and these consequences had an impact on October sales.[1]

Auto dealers may be able to recoup some of their losses by accessing various types of coverage that likely are included within their "first-party" property insurance policies. Significantly, these policies often provide coverage for more than physical property damage, such as lost profits. Indeed, dealers may be able to obtain coverage even if they did not sustain any damage to their own facilities.

This article first addresses coverage issues specific to dealers that have sustained physical damage, and then discusses coverage issues applicable to all dealers who have suffered Sandy-related business losses, regardless of whether they sustained physical damage.[2]

Potential Coverage for Dealers That Have Sustained Physical Damage

Dealerships that sustained damage to one or more of their stores probably have coverage for the cost of rebuilding or repairing these facilities, and for any business interruptions caused by the damage.

First, unlike typical homeowner insurance policies, many commercial property policies cover flood damage. Although this coverage may be subject to higher deductibles and/or lower policy limits, this coverage would avoid the common "flood vs. wind" dispute that often arises in homeowner insurance claims after hurricanes.

Second, even if a dealer's insurance policy excludes flood damage, the dealer still may be entitled to coverage if the dealer's damage was due not only to flooding but also to another, covered cause of loss, such as wind or fire. Insurers have attempted to contract around the legal doctrines that allow for this potential outcome, through the use of so-called "anti-concurrent causation clauses" in their policies.

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Courts have taken differing approaches to these doctrines and clauses, and thus, the issue of which jurisdiction's law applies to these issues is important.

Third, typical property policies also often cover so-called "extra expenses" that businesses incur in order to mitigate storm-related losses. Dealers, for example, may have coverage not only for expenses that they incur to repair damaged property, but also for the cost of overtime pay that they incur in order to get their operations back to normal, and potentially even for incentives that they offer to get customers back in their stores.[3] Further, property policies also often cover the fees charged by professionals, such as accounting firms and consultants, who are necessary to help companies address the impact of the storms like Sandy.

Potential Coverage for All Dealers with Sandy-Related Losses

Regardless of whether a dealer has sustained physical property damage, the dealer may have sustained one or more categories of loss that are covered under various provisions of typical property insurance policies.

First, property policies typically cover companies for business interruptions caused by property damage suffered by other businesses in the supply chain, namely suppliers or customers. These "contingent business interruption" provisions would apply, for example, if an insured business was unable to obtain materials from a supplier or to sell its products to a customer, due to property damage sustained by that supplier or customer. Given that many automobile manufacturers suffered losses of inventory, which, in turn, may have prevented dealers from obtaining scheduled deliveries of vehicles, this coverage could be significant. Moreover, some courts have interpreted the term "supplier" to include more than just direct suppliers. Thus, even property damage sustained by an indirect supplier may be sufficient to trigger contingent business interruption coverage.

Second, many property policies also provide "civil authority" coverage, which typically covers business interruption losses caused by an order, such as a curfew, evacuation, or transportation ban or closure, that prevents use of an insured's facilities. Such provisions sometimes provide coverage only if certain criteria are met, such as criteria regarding the duration of the order and criteria regarding whether there has been property damage somewhere in the vicinity of the insured location. But, civil authority provisions tend to vary materially between policies, and not always in obvious ways, so a careful examination of the precise language is critical.[4]

Third, "ingress/egress" provisions often cover interruption of an insured's business when the insured's facilities are inaccessible for reasons other than a civil authority order. These provisions typically require that the inaccessibility result from covered damage to some property, which usually has to be within a certain distance of the insured location.

Fourth, "service interruption" provisions may cover property damage that has not yet occurred, but may still occur, to an insured's facility, due to a loss of power, running water, and similar services at that location. And, even without damage to the insured's location, such provisions may cover a business interruption at that location if the interruption was caused by physical damage to a facility, such as a power station, that provided critical services to the insured location.

Fifth, dealers may be able to recover expenses that they incurred before the storm in order to prevent or mitigate imminent damage. Such expenses may be covered under a property policy's "sue and labor" provision, or under common law. Because reasonable steps taken to prepare for and minimize losses save insurers money, insurers should pay for these efforts.

A Special Note about Loss Prevention and Mitigation Measures

As noted, property policies often cover expenses that businesses incur to prevent and mitigate damage and other losses. Dealerships, like other businesses, sometimes incur these types of expenses. Indeed, as Automotive News recently reported, a dealership group in New Jersey undertook significant preparations before Sandy's arrival, which helped that group to mitigate losses.[5]

Insurers, however, often challenge the efficacy of those prevention and mitigation efforts, including in the automotive context. For example, in a case involving insurance coverage for residual value losses on a large portfolio of leases, the insurer attacked the leasing company's lease-termination practices, such as its protocols for collecting excess damage charges, and its remarketing practices, such as its use of alternate sales channels in addition to auctions. Fortunately, the insurer's attacks were unsuccessful.[6] Insurers do not know how to manage dealerships as well as the dealers who actually run them, so dealers should be prepared to defend their business decisions.

Practical Pointers for Preserving Insurance Rights

There are steps that dealers can and should take now to put themselves in the best possible position to secure coverage if and when the need arises.

First, dealers should review all applicable policies, which may include policies other than ones sold directly to your business. This process should include a review of policies issued to current and former affiliates, and policies issued to other companies in your supply chain that may include your business as an "additional insured."

Second, dealers should address the often-tight deadlines that most property policies impose for providing notice of potential claims, submitting "proofs of loss," and even for filings lawsuits against the insurer. For example, many property policies require that a policyholder submit a "proof of loss," documenting the insured damage, business losses, and expenses, within 60-90 days. Dealers thus should promptly give at least precautionary notice of potential claims, absent business reasons to refrain from doing so, and approach their insurers about postponing the referenced proof of loss and lawsuit deadlines if necessary. Jurisdictions differ regarding the extent to which parties can enter into such "tolling" agreements, so an examination of the applicable law is necessary.

Third, dealers should carefully document their property damage, lost revenues, and additional expenses. Dealers, for example, should prepare an inventory of damaged or lost property, including, if possible, photographs and/or videos of the damage. Dealers also should keep receipts regarding all expenses incurred. Further, preservation of pre-storm accounting records may help substantiate a claim for lost profits.

Fourth, dealers should set up protocols for communicating about any losses and insurance issues. Because of the fluid nature of the situation, and because of the nuances in the coverage issues raised, such protocols are important to help protect against inadvertent characterizations regarding, for example, the nature or cause of losses that insurance companies might use later if a coverage dispute arises. Thus, dealers should consider involving their in-house and outside counsel in such communications.

Conclusion

The coverage provided by auto dealers' insurance policies can be an extremely valuable business asset. Dealers can maximize the benefits of that asset, and minimize the chances of protracted disputes later, by acting proactively now to assess and preserve their rights. ■

References

1. *See* Alex Kowalski, *Retail Sales Probably Fell as Sandy Kept U.S. Consumers Home,* Bloomberg, Nov. 14, 2012 (noting Sandy's impact on GM and Ford October sales); Suzanne Kane, *Hurricane Sandy's New and Used Car Toll: Up to 200,000 Vehicles Could Be Scrapped,* The Washington Post, Nov. 12, 2012; Theresa Clift, *Penske Automotive, Group 1 Rebounding from Sandy's Wrath,* Automotive News, Nov. 8, 2012; Alan Ohnsman and Craig Trudell, *Sandy Spurs Toyota, Honda, Chrysler to Scrap Vehicles,* Bloomberg, Nov. 7, 2012; Amy Wilson, *Penske Surveys New Jersey Store Damage: 'It was devastating',* Automotive News, Nov. 5, 2012 at 6; Theresa Clift, *Limited Time, Lack of Storage Hurt N.Y. Dealers,* Automotive News, Nov. 5, 2012 at 8; Vince Bond, *Group 1's East Coast Dealers Expect $2 Million In Inventory Losses,* Automotive News, Nov. 1, 2012; Dan Bigman, *How Will Hurricane Sandy Impact Auto Sales? It Depends on How the Dealers Did,* Forbes, Nov. 1, 2012; Theresa Clift, *Dealers Still Reeling After Sandy's Wrath,* Automotive News, Oct. 31, 2012.
2. This article provides an overview of general principles and a non-exhaustive set of examples of the issues and arguments that may arise. Actual legal advice should be based upon an evaluation of all facts and circumstances, including specific policy language and the law of the pertinent jurisdiction(s).
3. *See* Barry Buchman, Kami Quinn & Jason Rubinstein, *Insurance Coverage for Wage & Hour Claims Arising Out of Superstorm Sandy,* JD Supra, Nov. 8, 2012, available at www.jdsupra.com/legalnews/insurance-coverage-for-wage-hour-claim-61234/. As many readers of this publication know, the issue of whether certain dealership personnel are exempt from federal wage and hour laws has been a significant issue recently. See Douglas Greenhaus, *Congress Tells DOL to Stand Down, Dealership Service Writers Still Exempt from Overtime,* Defender, Oct. 2012; Christina Rogers, *NADA Opposes OT Plan for Service Advisers,* Automotive News, Aug. 6, 2012. *See also* Jamie LaReau, *Prep Work Helped Dealership Weather the Storm,* Automotive News, Nov. 5, 2012 at 6 (noting that one dealership group evaluated both extending service center hours and offering incentives to reignite business).
4. For example, after the terrorist attacks of September 11, 2001, U.S. Airways and United Airlines each litigated with their insurers over whether their civil authority coverage provisions applied to losses caused by the closure of Reagan National Airport. U.S. Airways won, and United lost, the merits of that coverage dispute, based on nuanced differences in the language of their civil authority provisions. U.S. Airway's victory was later vacated on appeal, on grounds independent of the merits of the policy interpretation dispute between U.S. Airways and its insurer.
5. *See* Jamie LaReau, *Prep Work Helped Dealership Weather the Storm,* Automotive News, Nov. 5, 2012 at 6 (noting that dealership group's preparations included closing the day before Sandy's arrival, and moving many vehicles indoors or away from trees or other objects that could cause damage).
6. The author and his firm were counsel for the automotive leasing and finance company that brought the residual value insurance case.

Barry Buchman is a partner in the Washington, D.C. law firm of Gilbert LLP. Mr. Buchman represents companies on a wide variety of insurance issues, and has extensive experience representing automotive industry companies in particular. The views expressed in this article are solely those of the author, and do not necessarily reflect the views of Gilbert LLP or any of its clients.

New FCRA Background Check Requirements Effective January 1, 2013

By Jeffrey B. Halbert, *Stewart & Irwin, P.C.*

Dealers utilizing consumer reporting agencies for purposes of conducting employee background checks are required to comply with specific requirements of the Fair Credit Reporting Act ("FCRA"). The FCRA provides very broad definitions for what constitutes a "consumer reporting agency," "consumer report," and "investigative consumer report." In order to comply with the FCRA, employers obtaining consumer reports from consumer reporting agencies, must: (i) prior to receipt of a consumer report, make a "clear and conspicuous" written disclosure to the consumer (*i.e.,* prospective employee), in a document that consists "solely" of the disclosure, that a consumer report may be obtained for "employment purposes"; and (ii) the applicant must provide advance written consent for the employer to obtain a consumer report for "employment purposes."[1] The FCRA also imposes additional disclosure requirements on employers obtaining investigative consumer reports (*i.e.,* consumer reports based on personal interviews conducted by a consumer reporting agency, such as in-depth reference checks). The employer must disclose to the applicant or employee that an investigative consumer report may be obtained from a consumer reporting agency. The disclosure must include a statement informing the applicant or employee of his or her right to request additional disclosures of the "nature and scope" of the investigation, as well as the FCRA Summary of Rights. The employer must also certify to the consumer reporting agency that it has a "permissible purpose" for requesting a report and that it (i) has provided the required disclosures to the applicant or employee; (ii) has obtained written authorization from the applicant or employee; (iii) will not use the information contained in the report in violation of any federal or state equal opportunity law of regulation; and (iv) will provide the applicant or employee with a copy of the report and FCRA Summary of Rights in the event that an "adverse action" is taken on the basis of information contained in the report.

If an employer takes an adverse action against the applicant or employee, in whole or in part, based on information contained in the report, the employer must follow a two-step notification process. First, before the employer implements the adverse action against the applicant or employee, it must provide a "pre-adverse action" notice to the individual, which must include a copy of the report and the FCRA Summary of Rights. If after waiting the required time[2], the employer is prepared to take the adverse action against the applicant or employee, it must then provide an "adverse action" notice to the individual which must include specific information contained within the statute, including contact information for the applicable consumer reporting agency.[3]

The FCRA allows an applicant or employee to pursue a private cause of action against an employer for "negligently" or "willfully" failing to comply with any of the requirements of the Act relating to the individual. The statute of limitations for FCRA violations require that an action be brought by the earlier of (i) two years after the date of discovery by the plaintiff of the violation; or (ii) five years after the date on which the violation that is the basis of the alleged liability occurred. Available damages vary depending on whether the alleged violation is negligent of willful. An employer who negligently fails to comply with any requirement of the FCRA relating to the individual is liable for (i) actual damages sustained by the individual; and (ii) reasonable attorneys' fees and costs. Employers who willfully violate the statute are subject to (i) actual damages or statutory damages ranging between $100 and $1,000; (ii) punitive damages; and (iii) attorneys' fees and costs.

Responsibility for enforcement of the FCRA, for the most part, has been transferred from the Fair Trade Commission (FTC) to the newly created Consumer Financial Protection Bureau (CFPB) as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act. As such, the CFPB now possesses primary rulemaking responsibility for the FCRA and has recently issued regulations requiring updates to FCRA notices being utilized for background check purposes. Prior to January 1, 2013, employers must substitute the new FCRA Summary of Rights for those currently being utilized when (i) they enclose the form with the "pre-adverse action" notice; and (ii) provide the form with required disclosures for investigative consumer reports. Specifically, the CFPB has modified the FCRA Summary of Rights, Notice to Users of Consumer Reports of their Obligations under the FCRA and Notice to Furnishers of Information of their Obligations under the FCRA to make clear that the CFPB is the agency from which consumers may obtain information about their rights under the FCRA. The new forms can be found at Appendices K, M, and N to 12 C.F.R. Part 1022 and obtained online at www.ecfr.gov or www.consumerfinance.gov.

Given the intensified focus on background checks by other agencies such as the Equal Employment Opportunity Commission (EEOC) and newly issued state laws in Indiana and other states, it is incumbent

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Executive Director's Message

Erin H. Murphy
NADC Executive Director

This issue marks the final 2012 publication of *The Defender*. We have already started to solicit articles for 2013. We encourage all members to share their knowledge and expertise with the NADC community by submitting an article to be published in *The Defender.* Please contact me at emurphy@dealercounsel.com or Editor Mike Charapp at mike.charapp@cwattorneys.com for more information.

Another way to keep up with the ever changing landscape of the auto industry is to attend the educational sessions at NADC meetings. Plan now to attend the 9th Annual NADC Member Conference, April 28-30, 2013 at the Montage Resort in Laguna Beach, CA.

The planning committee is working hard to put together a program of 14 to 15 hours of educational sessions. As usual, CLE credit will be available. Preliminary topics will be released soon.

Hotel reservations must be made directly with the Montage by calling 866-271-6953. Please reference the NADC Annual Conference to receive our discounted rate of $275. A deposit equal to the room rate and tax (12.2%) for the first and last night for each reservation is required to reserve a room.

The room block deadline for hotel reservations is April 5, 2013. Please make your reservation early to avoid the room block selling out.

The deposit is refundable if the Montage receives notice of cancellation at least three days prior to the scheduled arrival.

Additional program information and registration will be available on our website, www.dealercounsel.com, in early 2013

I hope everyone has a happy and healthy holiday season! ■

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New FCRA Background Check Requirements

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upon employers to sufficiently assess their current background screening policies and procedures in order to ensure compliance with applicable laws. ■

References

1. Additional, but less stringent, rules apply in the context of investigations into employee misconduct.
2. No specific time period is designated by either the statute or regulations. However, as a general rule, five (5) business days has been recognized as being a reasonable period of time to wait after sending a pre-adverse action notice and taking the adverse action being contemplated.
3. An "adverse action notice" needs to include:
   - Name, address and telephone number of the consumer reporting agency that provided the report (*i.e.,* Employment Screening Services, Inc.)
   - Statement that the consumer reporting agency did not make the adverse decision and is not able to explain why the decision was made
   - Statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the consumer reporting agency if the consumer makes a request within 60 days
   - Statement setting forth the consumer's right to dispute directly with the consumer reporting agency the accuracy or completeness of any information provided by the consumer reporting agency.

Jeff Halbert is an Equity Shareholder with Stewart & Irwin, P.C. in Indianapolis, Indiana and heads the firm's Labor and Employment Section. Jeff focuses his practice in the areas of employment and labor litigation and corporate and business law. A substantial portion of Jeff's practice is devoted to issue avoidance for employers of all types, specifically automobile dealerships. Jeff handles litigation before state and federal courts in Indiana, including the Seventh Circuit Court of Appeals and United States Supreme Court. He also practices before numerous state and federal agencies including, but not limited to, the Equal Employment Opportunity Commission, the Indiana Civil Rights Commission, the National Labor Relations Board and the Indiana Department of Labor. Jeff serves as a frequent presenter on various employment related topics, including but not limited to, the Fair Labor Standards Act, the Americans with Disabilities Act, Title VII, ADEA and the Family and Medical Leave Act. Jeff is the current Chairman of the Labor and Employment Section Executive Committee for the Indianapolis Bar Association and has been selected for inclusion in Indiana Super Lawyers® Rising Stars in 2011 and 2012.
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Social Media Bullying

By Scott Silverman, *Silverman Advisors PC*

Feature Article

Picture this scenario:

Silverman Motors has a psychopath customer who has what he perceives as a bad experience. Mr. Psychopath decides to create a Facebook page to voice his displeasure with the dealership. Unfortunately the law has not caught up with the ability of individuals to quickly spread defamatory messages as depicted in this example. At this juncture, even if a statement is knowingly false, most jurisdictions do not allow any type of prospective PRELIMINARY injunction against the content of future speech until a full and final trial on the merits. Some 1st Amendment fanatics would even argue that such an injunction is still not allowed even after a full trial that determines this speech is false and defamatory (and even made with malice to injure). The Supreme Court was set to resolve this issue in 2005 – when confronted with the decision of a California Court giving Johnny Cochrane a post-trial permanent injunction against a disgruntled former client who chose to engage in a campaign of false, defamatory and harassing statements. Attorney Cochrane passed away in the midst of the appeal and we were deprived of a substantive decision on the merits.

With the infiltration of Social Media into everyday life, the ability and opportunity to abuse the protections afforded to protected speech have never been greater. Facebook, Twitter and other sites provide access to an unprecedented audience for anyone with access to the Internet. In addition, the access to this audience is not buffered by any filter, editor, publisher or producer that usually exist for reporters that typically have access to a wide audience. Additionally, the time between when a message is sent and when it is received is not delayed by any production time or printing process. Rather, it is instantaneous - a soap-box with immediate access to the world.

Unless the perpetrator fears a resulting finding of damages (and many social media junkies do NOT) then a victim of a social media defamation needs to get very creative in responding to those that wish to spread lies that will irreversibly harm their reputation.

Many businesses (dealers included) are just beginning to learn about the benefits and power of social media and Internet based communications. The focus for most dealers is usually on the marketing side – and learning to adjust and capitalize on how the vast majority of customers now use the Internet for research and analysis before buying or leasing a new car.

Unfortunately, some businesses get schooled on the power of social media on a completely different front - after they are the subject of a negative message published on a social media site. The power individuals have by using social media can be easily abused and dealers can find themselves on the short end of Internet bullying by tech-savvy adversaries (otherwise known as unhappy customers). These disgruntled customers can quickly establish followers with an angry mob mentality that is incredibly difficult to diffuse. The result is a two-headed monster type problem.

First are the public relations concerns. With the goal being to maintain “customers for life” and build on that foundation with conquests, a negative story spread in a dealer’s market can do serious damage. Every dealer is concerned by this problem (no matter how it originates), and the efforts necessary to ensure potential customers do not view your dealership as “tainted.”

Second is the leverage acquired by an unhappy customer. Most customer disputes can be resolved through some good-will accommodations. Some customers are a bit more unreasonable and become a dispute involving legal counsel. Then there are the small but growing number of disputes that evolve into the public relations concern described above. Those customers that are familiar with social media, are also acutely aware (and sometimes over-estimate) the impact of a negative publicity and use the threat of such a message as a negotiating tactic (rather than focusing on the substance, or lack of substance, of the issue that caused the dispute with the dealer).

Most people (and businesses) can quickly decide they want the benefits of that which the internet and social media provides - the ability to publish their message to an incredibly large audience of readers captivated by anything that can be spun as an interesting subject matter. However, everyone needs to recognize the burdens or responsibilities that must accompany such power. Misuse of social media can only exacerbate an age-old maxim best described by Mark Twain, “A lie can travel halfway around the world while the truth is putting on its shoes.”

Traditionally, a newspaper or magazine and thereafter television news station were the tools necessary to spread a message. Today, none of these media are necessary to tap an incredibly large audience. Now, reporters are not the only people that need to understand the responsibility to fact check before publicizing a statement.

So, what crosses the line in terms of negative statements about others? What is the distinction between free speech and defamation? The answer can involve a complicated analysis – but usually comes down to a simple question, do the published statements contain false statements of fact that could harm your reputation in the eyes of the public? Anyone posting statements on the Internet needs to be very careful when they are critical of others. Simply labeling a statement as "opinion" does not automatically shield words with the 1st Amendment freedom of speech. If negative comments are presented as facts, or even if the context of a statement could be interpreted as a

presentation of facts, those facts better be accurate.

Most dealers have a formal process of follow-up phone calls and e-mails in place for ensuring that they maximize their scores on customer satisfaction surveys. But what happens when a disgruntled customer has a vendetta and "dinging" you on a survey isn't enough. Edmunds, DealerRater, and Facebook are all examples of forums that never existed before. Before you are the victim of a social media attack, you should have a policy in place from management describing how to handle such a situation. A quick overreaction by a salesperson publicizing a response online may quickly send a problem in the wrong direction.

The rules for customers apply equally to businesses that use the Internet for marketing and communications with the public. If dealers have a Facebook page and staff that communicates with their customer base through posts on Facebook, Twitter, or other social media sites, they need to be familiar with the law regarding defamation. Even those ignorant of the law tend to be careful about what they write in a letter. However, they should be most careful when sending electronic statements which last longer, and are more easily transmitted, recorded and shared. ■

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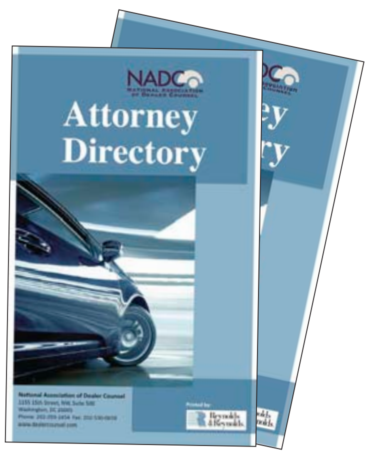

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