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DEFENDER

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In this Issue:

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Seller Beware:
Dealership's Failure to Disclose That Used Car was a 'Loaner' Leads to Treble Damages and Attorney's Fee Award

By David S. Osterman, *Partner* and Thomas J. O'Grady, *Special Counsel*
Goldberg Segalla

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Although the focus of the Used Car Rule[1] is the communication of warranty – as opposed to vehicle history – information, a recent New Jersey state court case illustrates a legal risk dealerships may encounter with respect to representations concerning vehicle history and, more specifically, loaner cars. In what appears to be a case of first impression in New Jersey, the Court in *Montgomery v. Millennium Auto Group* ruled that a used car dealership's failure to disclose that a used car was a loaner car and not merely a one-owner, turned-back lease vehicle was actionable under the New Jersey Consumer Fraud Act.

The background of the case involved the plaintiff's 2009 purchase of a used 2008 Mercedes Benz ML 350 from the defendant Mercedes dealership, with the understanding that the car had been returned to the dealership by its original owner at the end of its lease. The first time it rained, however, the plaintiff could read the outline of the words "courtesy car" on the windshield, where decal letters were previously located. The plaintiff claimed that he would not have purchased the car for that price had he known it was a loaner car, and introduced the testimony of an expert who opined that a prior loaner car is worth 10-15 percent less than a normal car.

The defendant contended that its representation that the vehicle had been returned on a lease was technically true because the dealership itself had leased it from Mercedes for use as a loaner car. The dealership further argued that the car's use as a loaner was immaterial and therefore did not need to be disclosed.

At trial, the jury found that the dealership's failure to disclose the car's loaner status was an "unconscionable commercial practice" under the New Jersey Consumer Fraud Act[2], justifying an award of treble (triple) damages and attorney's fees to the plaintiff.

The jury awarded $30,000 (three times the $10,000 loss of value alleged by plaintiff) for the misrepresentation, and the trial court approved an amount of $45,000 constituting the additional award of attorney's fees and costs.

While this appears to be a case of first impression in New Jersey, it is not likely to be the last such case. Several states including California, Maine, and Wisconsin have statutes specifically requiring dealerships to disclose a vehicle's prior use as a daily rental. Moreover, this issue has been the subject of several class actions in other states, including some cases where the dealership had actually disclosed the vehicle's prior status, but where consumers ultimately challenged the adequacy of the dealership's disclosure.

Additionally, this issue is clearly on the radar of many states' attorneys general, who previously submitted comments to the Federal Trade Commission in support of a national requirement similar to Wisconsin's expansive consumer right-to-know regulations.[3] Notably, however, in December 2012 the Federal Trade Commission ("FTC") issued a request for comments with respect to proposed rulemaking, in which the FTC declined to propose an amendment to the Used Car Rule that would involve a national requirement involving broad vehicle history disclosures (similar to Wisconsin's).[4] Rather, the FTC proposed adding a statement to the Buyers Guide encouraging consumers to seek vehicle history and directing consumers to a FTC website for further information about obtaining vehicle histories.[5]

Despite the fact that the FTC has rejected the concept of amending the Used Car Rule to directly incorporate vehicle history disclosures, the recent New Jersey case demonstrates that car dealerships – particularly those operating in states with liberal consumer protection laws – would be wise to revisit their disclosure practices and state consumer protection laws with respect to rental or loaner cars. ■

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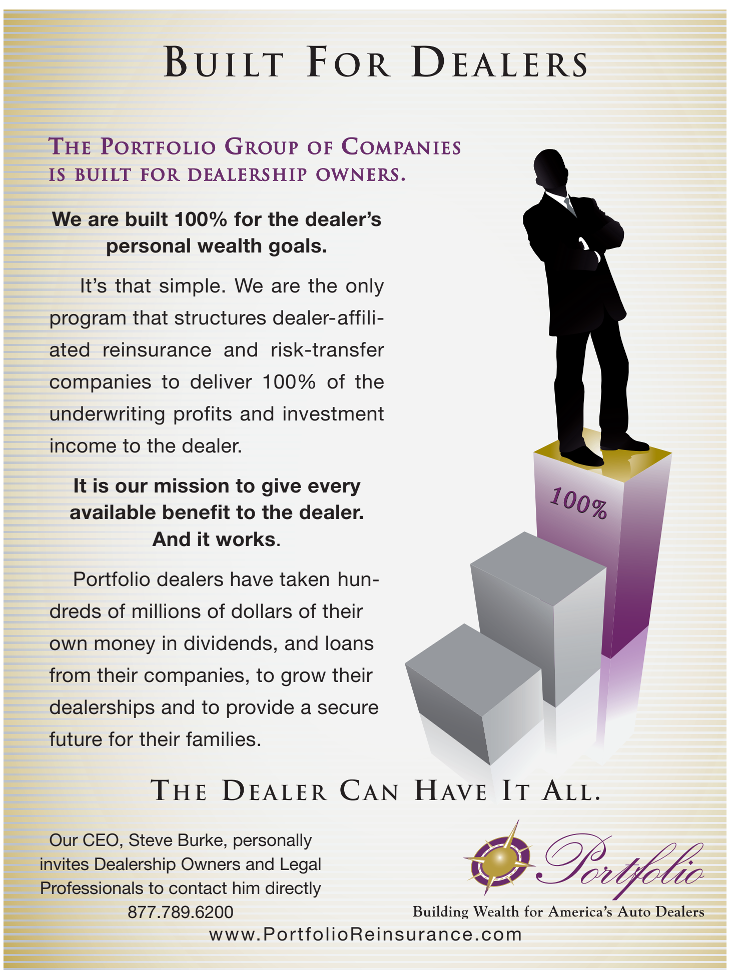
References

1. Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455.
2. N.J.S.A. 56:8-1, et seq.
3. The states participating in the submission were: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.
4. 77 Fed. Reg. 74746-74774 (2012).
5. The FTC also commented on the existence of the National Motor Vehicle Title Information System ("NMVTIS"). NMVTIS is an electronic system designed to protect consumers from fraud and unsafe vehicles and to keep stolen vehicles from being sold. The focus of NMVTIS is on stolen and or salvaged vehicles likely to have experienced significant damage, and does not involve matters such as lease history.



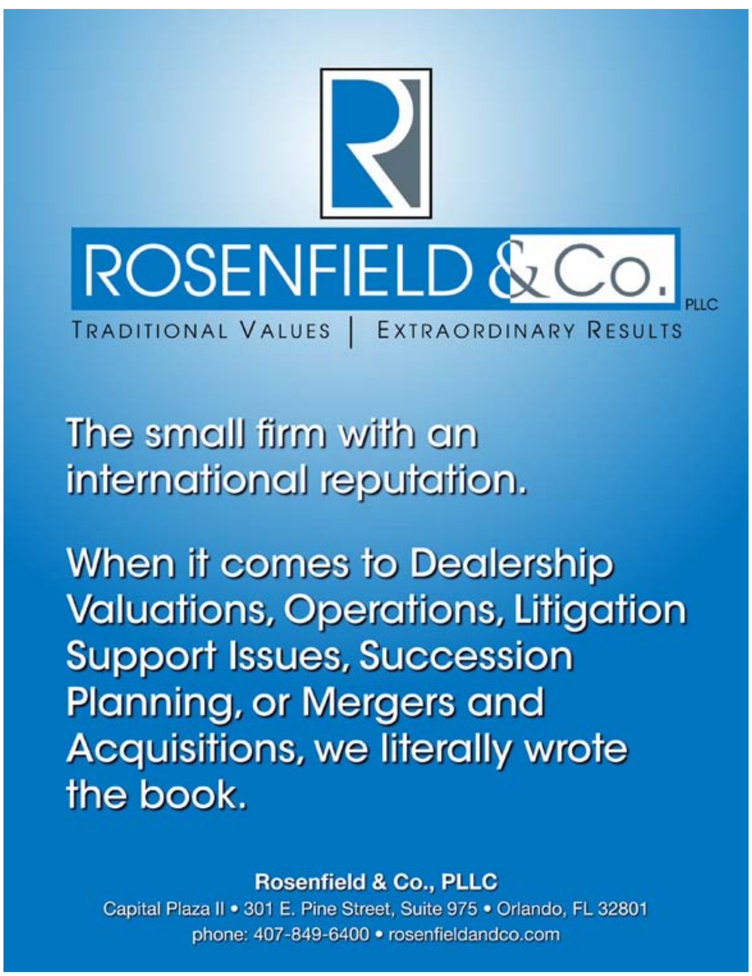
President's Message

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

This is my last letter to you as President of NADC. I remember writing my first letter and being very excited about leading an association of members, so fervent and committed to their dealer clients. I also remember that it was a time of upheaval and an unknown future for our clients and the auto industry, when the federal regulatory framework affecting dealers was undergoing tremendous change.

Well, the dust has settled on at least some of the federal regulatory structure. Many of our dealer clients are regulated by the FTC and many others by the CFPB *(don't you love how Congress simplifies and clarifies – a true improvement?!)*. But, our dealer clients (and we) continue to confront new challenges. On the federal side, for instance, the CFPB has identified dealer participation as a target; pursuing it via the finance companies, banks and credit unions that buy installment contracts from dealers. The CFPB seems intent on reducing the prevalence (and eliminating, if it can) this compensation model, alleging that dealer participation results in unlawful discrimination in violation of the ECOA and Regulation B. Interestingly, they have not pointed to any empirical data to support their allegation. Rather, the CFPB has simply recounted the history of disparate impact, the somewhat questionable legal theory on which they are relying.

But, that's not all that our clients face. Dealers continue to be challenged by the Federal Trade Commission and state AGs on advertising issues. Last year the FTC brought 4 enforcement actions against dealers for claims made regarding negative equity. There is good news, though. The FTC has been quiet on most of the issues raised during their 2011 Roundtables (remember those?). Many NADC members, including Mike Charapp, Rob Cohen, Tom Hudson, Stuart Rosenthal, Andy Koblenz, Paul Metrey, Terry O'Loughlin, Michael Benoit, Shawn Mercer, Damon Lester, Randy Henrick and Peter Kitzmiller participated in the Roundtables. Our members were very effective in getting the message out that dealers are already subject to a plethora of laws and regulations,



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particularly those necessary to curb wrongful conduct. Also, the FTC was not able to find any empirical data supporting the need for a new dealer-specific regulation. As of now, the FTC seems convinced that no new dealer regulation is necessary. Good news for our clients!

One existing dealer regulation, the Used Car Rule, is getting updated, however. The primary driver is the FTC's own process of reviewing its rules to assess their "efficacy, costs, and benefits," and to determine whether to "retain, modify or rescind them." So, keep your eyes open for the final rule. Also, on the federal front, dealers are figuring out and dealing with the real-life effects of Obama-Care.

In the non-government sector, prior history reports are getting more attention and presenting challenges. And with respect to manufacturers, facility upgrade demands have been at the top of the list, along with dealer "incentives" and other ever-present tensions between the dealers and the manufacturers. Every time we turn around, there is some new agreement or revision to an existing agreement being presented to dealers.

But, no worries, right? …

Members have a resource to turn to – the NADC. We are here to help members help their clients. We do this via a variety of platforms, from our annual and fall conferences, to webinars, the list-serve and our newsletter. Through our members, we were even able to use the FTC Roundtables as a platform to help our clients.

One of the key platforms we have is attorney-to-attorney exchanges. Many of these relationships started from the networking at our conferences, whether at breakfast, lunch, one of our cocktails or a stray comment during a presentation. Others started from responding to emails, or picking up the phone and calling a member whose email you read on the list-serve. The NADC has successfully networked hundreds of dealer attorneys (almost 500) across our great nation. About 10 years ago, most of us were plugging away practicing dealer law virtually alone. Who knew that there were this many lawyers practicing dealer law?!

The NADC will be celebrating its 10th Anniversary next year – 10 years since Jonathan Harvey came up with the notion that an association of dealer lawyers was long overdue. Wow, it's hard to believe! In my humble opinion, one of our greatest accomplishments is having brought dealer attorneys together to exchange information, ideas, strategy and to educate each other on issues.

I am so pleased that I have been able to lead and contribute to this first-rate association as President. My hope is that I leave the NADC just a little bit better than when I came in. I consider leading the NADC as President one of my finest professional experiences. Thank you for this opportunity.

And, oh yeah … I remember what else I wrote in my first letter … I simply hoped I didn't mess anything up. Whew! ■

Best to all,

Patty

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Dealerships Can't Avoid the Impact of Health Care Reform

Feature Article

By Mrudul Sharma, CPA, *CliftonLarsonAllen LLP*

For most dealership owners and managers, the approach of health care reform has been like a "check engine" light on the dashboard — you know that something needs to be done, but there is no immediate danger of a breakdown. It can wait.

Well, that "check engine" light is now flashing with a bright red "2014." Implementation of some of the major provisions of the Affordable Care Act (ACA) will begin at the start of next year, but preparation for compliance should start immediately. Whether you have a single dealership point or are a mega-dealer group, it is important to understand the key provisions in the new law from a compliance, tax, and financial perspective.

Financial Issues

Beginning in 2014, dealerships with 50 or more full-time employees plus full-time equivalent (FTE) employees are considered "large employers" and as such are subject to penalties if they fail to comply with the ACA. A full-time employee is defined as someone who works an average of 30 hours per week or 130 hours per month. To calculate full-time equivalents under the law, dealerships should take the total part-time employee hours worked in a month divided by 120.

Dealerships that are considered large employers are required to offer minimum value affordable coverage or pay a penalty if they have full-time employees who qualify for premium tax credits and other cost-sharing assistance. If employer coverage is affordable, employees will not be eligible for subsidies and employers will not be at risk for a penalty.

Also in 2014, health insurance exchanges will allow millions of individuals and small employers to access and compare insurance plans. These exchanges are also central to

determining whether individuals are eligible for Medicaid or premium tax credits to assist in purchasing health insurance coverage.

No coverage penalty (pay or play)

Dealerships who are large employers are subject to a penalty of $2,000 per full-time employee (excluding the first 30 full-time employees) if:

- full-time employees are not offered the opportunity to enroll in an eligible employer sponsored plan that provides a minimum essential level of coverage; AND
- at least one full-time employee enrolls in a health plan via a state or federally-established health insurance exchange and receives government subsidies to pay the premiums.

Unaffordable coverage penalty

This penalty applies if an employer offers full-time employees (and their dependent children under the age of 26) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan that either is unaffordable or does not provide minimum value. A plan is unaffordable if the full-time employee's premium payments for self-only insurance coverage are more than 9.5 percent of their household income (although employers are not subject to the penalty under a safe harbor if the coverage is affordable when compared to the employee's W-2 wages).

If at least one full-time dealership employee enrolls in the exchange and receives a government subsidy, the dealership is subject to the penalty of $3,000 for each full-time employee. The government subsidies are available for individuals whose household income is between 100 percent and 400 percent of the federal poverty level — currently $92,200 for a family of four. Full-time employees whose household income is below 138 percent of the poverty level will be covered by Medicaid, unless the state opts out of this provision of the ACA.

Dealerships who are considered large employers

You should consider whether to continue providing health care benefits or pay federal penalties. However, although it may appear that you come out ahead financially by simply paying the penalties and not providing coverage, remember that you are entitled to a tax deduction for health care premiums — and not for the federal penalties you pay. In addition, good employees are hard to find, and you should therefore think about how you can offer a benefits package that attracts high-quality employees.

You may also consider if it is cost-advantageous to bump some employees down to part-time status to side-step requirements to avoid the federal penalties which are based on full-time employees. But if you use this strategy, don't forget that there may be other costs in employee morale, productivity, and customer service.

Tax and Compliance Issues

Summary benefits and coverage

As plan sponsors, dealerships will need to provide a summary of benefits and coverage (SBC) document to health plan participants beginning on the first day of the first open enrollment period, starting on or after September 23, 2012. The SBC must be given to participants and beneficiaries who enroll or re-enroll in group health coverage during open enrollment.

The SBC should include uniform standard definitions of medical and health coverage terms; a description of coverage (including the cost-sharing requirements such as deductibles, co-insurance, and co-payments); and information about any exceptions, reductions, or limitations under the coverage. Examples of benefits and coverage for common scenarios are also required.

W-2 reporting

Employers must report the cost of employer-sponsored health coverage on plan participants' annual W-2 forms for calendar year 2012. This is required only to inform employees about the cost of health coverage — it does not affect taxation. The amount reported includes both the dealership's and the employee's contributions. Small employers — those required to file fewer than 250 W-2 forms for the calendar year prior to the reporting year — are not subject to the requirement for 2012.

It is important for dealers to understand the various impacts of health care reform on their specific dealership. Dealers should take time to consider the financial, tax, and regulatory impacts of the ACA on their businesses and their employees. ■

Mrudul Sharma, CPA is a manager in the dealership group for CliftonLarsonAllen. He is responsible for planning and managing financial statement and tax engagements for dealership clients. He joined the firm in January 2004 after graduating from Minnesota State University, Mankato.

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