NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

DEFENDER

The National Association of Dealer Counsel Newsletter JULY/AUGUST 2014

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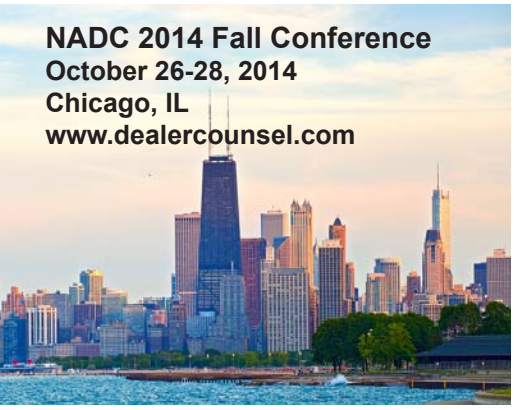

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Just the Facts ... Dealing with Potential Claims

By Steve Gibson, *Dealer Risk Services, Inc.*

Before the wave of reality shows invaded our television programming, networks were awash with fact gathering, clue finding detective shows. Especially during the late 1970's and 1980's, shows like Magnum PI, The Rockford Files, Matlock and Columbo portrayed aggressive (sometimes bungling and humorous) investigators trying to put the pieces of the puzzle together to solve a crime. In the end, the 'Aha moment" cultivated with the case being solved … and the perpetrator arrested.

In the automotive world, we deal with occurrences that can cause our clients financial harm and trigger the response of the insurance company. These unfortunate and unplanned events have a striking similarity to the crimes mentioned above: someone is injured and/or property is damaged, so there is a need for fact gathering to figure out what actually happened.

While property claims generally are immediate and easily valued, personal liability claims can lie seemingly dormant for months, only to explode into litigation and demands just before the statute of limitations deadline.

The problem is knowing the facts and the details surrounding the claim.

Here is an example: A dealership General Manager was involved in an accident in mid-2012. The insured vehicle rear-ended another vehicle that had stopped for a bus, with minimal damage to both vehicles (under $5000 to each). The Dealership filed a report to their insurance carrier, the property damage claim was paid, and the Insured unit was repaired.

In 2014 the demand letter arrived. The insurance carrier quickly assessed the claim and placed a Bodily Injury Reserve at $ 500,000 With their insurance renewal "at hand," the Dealership was pressed by the marketplace to explain the circumstance surrounding this incident, which had destroyed their loss ratio. Management quickly discovered that they knew very little about the claim.

Gathering the facts about the claim became a very challenging task. Retirement had displaced the Controller on staff at the time of loss The General Manager had moved to another position. Memories had faded and ''facts" about the accident seemed to blur. A review of the police report noted only that the Claimant complained of "soreness" but declined medical attention at the scene. As a result, the Dealership now is facing a higher insurance renewal, a bodily injury deductible, and a loss ratio that is "scarred" for the next few years even longer

for the carrier that may ultimately pay out the loss.

We always talk about claims being like an "iceberg." You can only see a portion of it. The real danger lies with what is below the surface, the part you cannot see. Could this claim have been prevented? Probably not, but, it most certainly could have been minimized and controlled.

There ***was*** an automobile accident involving an individual. Gathering the "facts" at the time of loss would have alerted Dealership Management a potential ''iceberg" was at hand. The "soreness complaint" provided by the other party at the accident scene should have sounded alarms at the Dealership.

With complete information at hand, the Dealership's Loss Control Committee (remember we truly need one) would have monitored this and discussed strategies with the insurance adjusters assigned. Potential goodwill discussions and/or early settlement offers could have been tendered by the Dealership's counsel. At the very least, an opportunity would have existed for monitoring or surveillance of the potential claimant's daily activities before a claim with a huge settlement demand reached the Dealership Management's desk.

It is imperative to "gather the facts" at the time of loss, completely and painstakingly. Remember Detective Columbo who kept constantly probing– "Sorry, but, I just have one more question." There is an absolute need for the complete truth about what happened.

Information is the key to any defense, and as counsel, you more than anyone, understand the need to know all of the facts prior to stepping into a mediation/arbitration or facing a potentially unfriendly jury in a courtroom.

Dealerships must initiate internal procedures that require full incident reports on any and all accidents. This report should include pictures, witness statements, and a full statement of the facts surrounding the event. Any accident that involves an injury should be noted and referred to the Loss Control Committee for review and monitoring. Finally, each of these "open claims," or any injury-related occurrence that does not have a proper release, should be discussed at the quarterly claims review with the insurance carrier's Claims Manager.

Get in front of claims and know the FACTS! ■

Steven P. Gibson is the President of Dealer Risk Services, Inc., a Florida based firm that provides insurance expertise to the Automotive Industry. With over 30 years of experience, Gibson leads DRS by specializing in Risk Management, Product Development, Program Management and Education for the Dealer community. He has presented workshops at NADA, NADC and AutoCPA in addition to providing articles for various industry publications.

President's Message

Oren Tasini
Haile, Shaw & Pfaffenberger, P.A.
NADC President

Our Fall Conference is fast approaching. We will be meeting at the lovely Trump International Hotel & Tower in Chicago, October 26- 28, 2014. For the second year, due to popular demand, we have extended the program by a half day, making the total education program 1½ days. There are so many interesting, timely topics to cover, and it was clear that one day was not enough. The conference schedule is as follows:

SUNDAY, OCTOBER 26

3:00 – 5:00 pm
Board Meeting

6:00 – 7:30 pm
Reception Sponsored by The Fontana Group, Inc.

MONDAY, OCTOBER 27

7:30 – 8:30 am
Breakfast Sponsored by CounselorLibrary.com, LLC

8:30 – 8:45 am
Opening Remarks

8:45 – 9:45 am
Session 1: Dealership Data – Security and Sharing in Today's Business and Legal Landscape
Steve Cottrell, *Dealervault and Authenticom*
Beth Hill, *FordDirect*
Brad Miller, *NADA Attorney*
Gerry Stegmaier, *Goodwin Procter LLP*

9:45 – 10:00 am
Break
All conference breaks Sponsored by
Portfolio General Management Group Inc.

10:00 – 11:00 am
Session 2: Recall Madness
Aaron Jacoby, *Arent Fox, LLP*
Russell McRory, *Arent Fox, LLP*

11:00 – 11:15 am
Break

11:15 – 12:15 pm
Session 3: Insights and Perspectives of a Consumer Advocate and Government Regulator
William L. Brauch, *Special Assistant Attorney General, Director – Consumer Protection Division, Iowa Department of Justice*

12:15 – 1:30 pm
Lunch Sponsored by Arent Fox, LLP

1:30 – 2:30 pm
Session 4: Advertising Compliance: Hot Topics and Live Review
Rob Cohen, *Auto Advisory Services*
Jonathan Morrison, *Auto Advisory Services*

2:30 – 3:30 pm
Session 5: The Latest Factory Intrusions: The Right of First Refusal in Buy-Sells; and Framework Agreements
Leonard Bellavia, *Bellavia Blatt Andron & Crossett, PC*

3:30 – 3:45 pm
Break

3:45 – 5:00 pm
Session 6: List-Serve Open Mic Session
Moderator:
Oren Tasini, *Haile, Shaw & Pfaffenberger, P.A.*

5:00 – 6:30 pm
Reception Sponsored by Anderson Economic Group

TUESDAY, OCTOBER 28

7:30 – 8:30 am
Breakfast Sponsored by Dixon Hughes Goodman LLP

8:30 – 9:30 am
Session 7: NADA Update
Paul Metrey, *NADA, Chief Regulatory Counsel, Financial Services, Privary & Tax, NADA*

9:30 – 9:45 am
Break
All conference breaks Sponsored by
Portfolio General Management Group Inc.

9:45 – 11:15 am
Session 8: Working Through Common Conflict Issues in Dealer Litigation and Transactions
James Christian, *Tiffany & Bosco, P.A.*
Beth Heath, *Tiffany & Bosco, P.A.*
Steve Linzer, *Tiffany & Bosco, P.A.*

11:15 – 11:30 am
Break

11:30 am to 12:30 pm
Session 9: The Transport of Recently Purchased Automobile Overseas: The State of Law, Current Issues and Trends
Christopher M. Santomassimo, *Nicoll Davis & Spinella LLP*
Jack Spinella, *Nicoll Davis & Spinella LLP*

12:30 – 12:45 pm
Closing Remarks

12:45 – 1:30 pm
Lunch

Conference Gift Sponsored by Moss Adams LLP
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Flash Drives Sponsored by Rosenfield & Company, PLLC
Wireless Internet Sponsored by Dealer Risk Services

Please register now so you will not miss out on this valuable educational opportunity and get a chance to network and make new friends and connections. CLE credit is available for the 570 minutes of education program. Checkout the NADC website, www.dealercounsel.com for a detailed agenda and to Register.

See you in Chicago!
Register Now! Click Here. ■

2014 NADC Fall Conference • October 26-28, 2014

Trump International Hotel & Tower • Chicago, Illinois

Please visit www.dealercounsel.com for more details.

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Hotel Reservations

Reservations must be made directly with the **Trump International Hotel & Tower** online or by calling 1-877-45-TRUMP. Reference the NADC Fall Conference (Online code NADC102414) to receive our discounted rate of $305 plus tax.

Rates include the following at no extra cost:

- Complimentary use of the Health Club at The Spa at Trump
- Complimentary internet access in guest rooms
- Complimentary local calls
- Daily newspaper selection
- Nightly turndown service
- Complimentary shoe shine

The hotel has reserved a limited number of rooms at the group rate for the three days pre and post conference. Contact the hotel at the number above to check the availability.

These rates are subject to a 16.4% tax per room per night. These rates are subject to change by law. A deposit equal to one night's stay is required to hold each individual's reservation. The deposit will be refunded if notice is received by 3pm CST the day prior to arrival and a cancellation number is obtained.

The room block deadline for hotel reservations is October 6, 2014. Make your reservation early to avoid the room block selling out. **Reserve your room now!**

The hotel address is:
The Trump International Hotel and Tower
401 N. Wabash Avenue
Chicago, IL 60611

Doing Business with Strangers: Don't Trust Promises, Trust Transparency

Installment 2: Back End Solutions

Feature Article

By Scott Silverman, *Silverman Advisors, PC*

As I addressed in the first installment in May, many of us play a unique role with our clients. We draft contracts and recommend business strategies on the front end, while also being responsible for disputes and litigation on the back end. This dual-role provides us with a unique perspective and opportunity to minimize potential harm by contracting for transparency when reviewing vendor agreements.

However, what if the client has fallen victim to one of these scams despite your best efforts? Or, more likely, what if they signed a contract and only contacted you after a problem arose? What do you do now? How do you determine whether it is a case of fraud or simply an unsuccessful campaign? Do you just file an action against the vendor and rely on discovery to obtain all the relevant information you are going to need? Do you even have a good faith basis to state a claim?

Proving fraud in this space can be extremely difficult. A client may become suspicious of a vendor's Internet marketing campaign that has produced little or no results, but a lot of smoke does not mean you can prove there was a fire. By the time you have figured out there was a problem, the vendor will cite data compression, data extraction, and other technical difficulties that prevent it from producing evidence of its performance. Even if the contract contemplates this situation, the vendor can use its superior technical knowledge to thwart your efforts by handing over falsified results or producing data that is nearly impossible to understand. The vendor's hope is to create a system of fraud so complicated and foreign to a fact finder that it prevents you from proving the scheme's existence.

In this installment, I will briefly review these and other common problems that may arise when attempting to prove the existence of fraudulent Internet-based marketing schemes. I will then explain how litigation holds, the spoliation doctrine, and novel burden-shifting rules assist in overcoming the typical hurdles.

There are several different types of Internet-based marketing options. As the name suggests, in pay-per-click advertising, the dealer pays the vendor each time an individual clicks on its ad and is re-directed to the dealer's website. However, a vendor can artificially generate clicks using computer programs called "bots" or "click farms" that pay people to continuously click on the ads. In cost-per-impression advertising, the dealer pays every time a certain number of people view their ad. Vendors may use "invisible traffic" to generate cost-per-impression advertising revenue at your client's expense. Permission-based e-mail marketing is when a retailer pays a vendor to send advertisements to an e-mail list the vendor has compiled. Unfortunately, as the last article described, the dealer's perceptions often do not match the reality where: (1) the list your client bought does not match the promised attributes; (2) the e-mails are never sent; or (3) the e-mails are sent to "ghost" e-mail addresses that do not reach people who are actually interested in the advertised products.

The issues with pay-per-click and cost-per-impression fraud came to a head around 2006, but technological advances have now made it easier to determine which clicks are legitimate and which are fake. Google and Facebook have played a large part in cleaning up the

practice after being implicated in litigation for a failure to monitor this type of fraud. *See In re Facebook PPC Advertising Litigation*, 709 F.Supp.2d 762 (N.D. Cal. 2010); *Incorp Servcs., Inc. v. Does*, 1-10, WL 5444789 (N.D. Cal. 2011); *Woods v. Google*, 889 F.Supp.2d 1182 (N.D. Cal. 2012). Nonetheless, if your client is a victim, as noted, it is potentially difficult to uncover or prove fraud because vendors coordinate the programs and have complete control over the underlying data that would reveal who is in fact clicking on the advertisements. They can easily manipulate the analytics they offer as proof of their campaign's legitimacy, which makes independent verification a complicated task.

Addressing e-mail marketing fraud is especially difficult because large companies like Google lack a strong incentive to confront the problem. They have never been implicated in fraudulent email marketing campaigns because their only involvement is providing the e-mail addresses.

Legal Solutions

If you believe your client may be the victim of marketing fraud, then there are two important legal principles that greatly assist in overcoming the difficulties of proving the case: **the Litigation Hold and Burden Shifting**.

Litigation Holds

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003), remains one of the leading cases regarding litigation holds and the spoliation of evidence. It provides a three-part test for implementing sanctions where evidence has spoliated:

- Whether the party had control over evidence and an obligation to preserve it at the time it was destroyed;
- Whether the party had a culpable state of mind; and
- Whether the evidence was relevant.

It is easy to show that the vendor had control over the information, but a major question arises as to when exactly the litigation hold should have been implemented. The *Zubulake* court, citing a few previous cases, held "the obligation to preserve evidence arises when a party has notice that the evidence is relevant to litigation or when a party should have known that evidence may be relevant to future litigation." Although what constitutes "notice" can vary from state to state, the best practice is to send a formal written demand letter once there is any indication that a problem may exist with a marketing program.

The initial inquiry is a critical moment. You do not need to allege fraud immediately, but should educate clients to never settle for a vendor's vague answers or explanations. Your contract will ideally address the issue upfront; however, if a vendor cannot provide an easily understandable explanation, then it should raise a red flag. Document a demand for confirmatory information you can independently verify. The written demand will both move the ball forward and serve the notice requirement.

The required level of culpability may vary depending on the jurisdiction. However, the more culpable the defendant and the greater the prejudice to the plaintiff, the more likely it is that the court will exercise its broad discretion to fashion a harsher remedy. The variety of potential sanctions at the court's disposal include an

instruction that the jury may assume the lost evidence was adverse to the defendant, imposing monetary sanctions in the form of punitive damages or attorneys' fees, refusing to allow the defendant to offer testimony concerning the contents of the missing evidence, or even, in rare cases, a default judgment. The potential for money sanctions is tempting, but, as described below, requesting the court to shift the burden of proof is often a more powerful remedy.

Burden Shifting - Spoliation

Burden shifting can offer your client a tremendous advantage. Courts in several states have acknowledged the need for such a shift when spoliation has occurred. A California Appeals Court best described the justification for the shift: "The shift in the burden of proof from the plaintiff to the defendant rests on a policy judgment that there is a substantial probability the defendant has engaged in wrongdoing and the defendant's wrongdoing makes it practically impossible for the plaintiff to prove the wrongdoing." *Nat'l. Council Against Health Fraud, Inc. v. King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336, 1346 (2003).

An impending burden shift will almost guarantee your client's success at trial and provide substantial leverage during settlement negotiations. If the evidence has been spoliated, the vendor will be incapable of producing anything that demonstrates actual performance. The vendor's best-case scenario is to concede the breach of contract claims and attempt to convince the fact finder that it did not participate in a fraudulent scheme. Thus, spoliated evidence is sometimes even better than the real thing.

Often the vendor produces terabytes of data that are only readable with special programs. If the vendor refuses to make the data available in usable form, then counsel should similarly request the burden shifting instruction. Counsel should request that the vendor produce specific evidence regarding the manner in which it stored its data, the devices and systems it utilized, and the procedure for extracting the data during discovery. You should take advantage of the fact that the court, much like you, will want information presented in an intelligible manner and attempt to demonstrate that the vendor is not cooperating with discovery requests or appears to be holding something back.

Burden Shifting – Non-Spoliation

Fraudulent marketing cases are potentially strong candidates for burden shifting, even in the absence of spoliation, because the vendor has better access to the information and significantly more knowledge about the online marketing process. These grounds have been sufficient for courts to shift the burden in other contexts, such as under the tort law doctrine of *res ipsa loquitor* andr in bailment cases, and are often cited as factors for shifting the burden of proof.

In *Knowles v. Gilchrist*, for example, the Massachusetts Supreme Judicial Court described that in bailment cases "the burden of proof should rest on the party who is in the best position to determine what happened to the goods and what safeguards existed both before and after the precipitating event that destroyed or damaged the baled property." 362 Mass. 642, 651 (1972). The court added that the plaintiff's unfamiliarity and lack of control over the information "aggravates the difficult task that all bailors face in trying to rebut the inference of due care which the bailee has created by selecting the most favorable facts from all the information exclusively available to him." *Id.* at 649-50.

The justification for the burden shift applies with equal force to fraudulent marketing campaigns, even though there is little precedent for a court shifting the burden of proof outside of the limited contexts already mentioned. The vendor has exclusive control over the data, and both the dealer and fact finder have limited familiarity with the allegedly fraudulent marketing practices. As such, a court could very well determine that the vendor should bear the burden of explaining its complex, possibly falsified spreadsheets to the fact finder, rather than benefit from cherry-picking or falsifying information that is very difficult to independently verify.

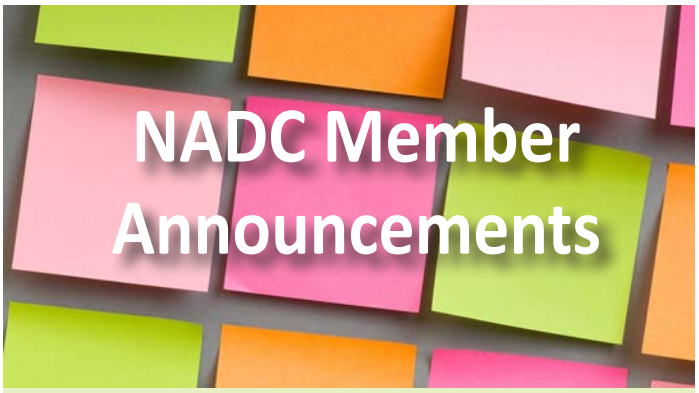
Dealer Obligations

Finally, clients must also be advised of their own duty to preserve electronically stored information, particularly as more and more dealers transition towards electronic record keeping. The benefits of burden shifting are available not only for dealers combating fraudulent marketing, but also for plaintiffs bringing actions against dealers. Dealers should be reminded that preserving evidence includes both a duty to refrain from affirmative efforts to destroy evidence and a duty to intervene in order to prevent the loss of data due to passive, routine operations. Dealers should maintain electronic records for at least the statute of limitations period, and, once given notice of a potential dispute, they should identify and suspend any features in their system that may automatically delete potentially relevant information. As described above, spoliated evidence can lead to disastrous consequences for any defendant, including dealers.

Conclusion

It is essential that dealers insist on front end transparency with vendors they trust when entering into costly contracts for internet marketing campaigns. However, if the client is nonetheless a victim of fraud, counsel may still employ litigation holds, spoliation sanctions, and burden shifting arguments to use the vendor's technical expertise and control of information to their advantage. ■

Scott Silverman concentrates in the areas of complex commercial disputes, automotive franchise and litigation, and business trade practices. He currently serves as outside general counsel for the Massachusetts State Automobile Dealer Association representing dealer interests throughout the Northeast on franchise and regulatory issues.



Do you have an announcement or an accomplishment that you would like to share with the NADC community?

We are starting a new section where we will highlight member's achievements. Please send any news you would like to share to emurphy@dealercounsel.com.

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