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The Cost of Doing Business: The AAA's New Consumer Clause Registry and Due Process Compliance

Michael Dommermuth, *Fairfield and Woods, P.C.*
Sarah Millard, *Fairfield and Woods, P.C.*

Every legal practitioner today has likely interacted with the American Arbitration Association AAA or at the very least has heard of the various alternative dispute resolution services the AAA provides. Traditionally, the AAA's role in the alternative dispute resolution process is to administer a case from its initial filing until the matter's conclusion. In the realm of consumer arbitrations, however, the AAA has implemented a rule change that provides the organization with a proactive role in ensuring due process compliance in the arbitration process before a case is ever filed. Dealer attorneys should be aware of this rule change as large finance and lease companies that do business with dealers are probable participants in this program.

Rule Change

As of September 1, 2014, the AAA implemented Rule 12: *Business Notification and Publicly-Accessible Consumer Clause Registry*. The new rule requires all businesses that use AAA Rules in a consumer contract¹ to jump through a number of procedural and financial hoops before the business can invoke the power of the AAA to arbitrate a dispute.

Also on September 1, 2014, the AAA created the Consumer Clause Registry ("Registry"). The Registry contains a list of businesses that submitted their consumer arbitration clauses to the AAA, which the AAA has determined substantially and materially comply with the due process standards of the AAA Consumer Due Process Protocol ("Protocol"). The Registry is publicly available and searchable. It contains the name of the business, its address, and its consumer arbitration clause, along with any related documents deemed necessary and appropriate for inclusion by the AAA. The intent behind the Registry is to provide a searchable database for a consumer to determine if the AAA has reviewed a consumer arbitration clause and will administer an arbitration.

New Fees

The AAA's new rule change is a costly proposition. When a business submits a consumer contract to the AAA for review of the contract's arbitration clause, each submission requires a nonrefundable fee. The fee is currently \$650 for review for due process compliance and to maintain the clause on the Registry through

¹ The AAA defines a consumer agreement as an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use.

2015. For those businesses submitting an arbitration clause at any time within the 2015 calendar year, the cost of reviewing the clause and maintaining the clause on the Registry is \$500. In subsequent years an annual fee of \$500 will be charged to maintain a previously approved and included clause in the Registry.

The rules are silent with regard to the cost to register a new clause after 2015, and the language of Rule 12 provides no protection against future increases to these costs for new clauses. The AAA has stated that, if after review, it determines there is a Protocol violation, it will notify the business and provide an opportunity to revise the clause. Revision does not require any additional fee.

Failure to Register Arbitration Clause

Rule 12 requires businesses around the country to register all consumer contracts that use AAA arbitration rules. If a business uses a con-

sumer contract that invokes the AAA Rules, but the business failed to register the clause, the AAA will still administer the arbitration, but the business must pay a \$250 expedited review fee in addition to the standard fee. The AAA will refuse to administer consumer arbitrations arising out of an arbitration clause invoking AAA Rules if the business fails to pay the review fee.

For any arbitration clause previously included in the Registry, the AAA requires the clause to be resubmitted for review when there is any change, addition, deletion, or amendment that is not considered "de minimis". The Rule does not define what constitutes a "de minimis" change. Resubmission of a clause will incur another \$500 review fee. Accordingly, a prudent business will ensure that any arbitration clause is fully inclusive of all issues and in final form prior to submission such that only one clause need be submitted.

Registering a Clause in a Form Arbitration Agreement

Many commercial and consumer businesses use arbitration agreements included in forms. For example, many finance companies use the same Retail Installment Sale Contract. To the extent the form will apply to any consumer transaction, each dealership must register the provision with the AAA, even if the form provider previously had the arbitration provision approved by the AAA.

Ensuring Your Arbitration Clause Meets the AAA Due Process Standards

One of the motivations behind the new Registry is to ensure all consumer arbitrations invoking AAA Rules follow the Protocol. The AAA sets forth fifteen guiding principles in its Protocol. These principles, described below, should be considered when drafting any arbitration clause.

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In both public and private communications, many NADC members expressed dissatisfaction with AAA arbitrations. The primary objection, as expressed to the author, has been the perceived excessive cost. Even if the drafter of the consumer arbitration clause elects to select a different arbitration provider, some attention should be paid to the Protocol's principles to avoid due process challenges.

Principle 1. Fundamentally Fair Process. This principle acknowledges that the arbitration, and any dispute resolution process, should be fundamentally fair to all participants. "As embodiments of fundamental fairness, [the following] Principles should be observed in structuring ADR Programs."

Principle 2. Access to Information Regarding ADR Program. At the time of contracting, the business should make reasonable efforts to ensure that the consumer is fully aware of all information regarding the business's consumer ADR programs. The business should consider including: (1) clear and adequate notice regarding the ADR provisions, including whether participation in the ADR Program is mandatory or voluntary; and (2) a vehicle to obtain additional information regarding the ADR Program. The goal is to provide the consumer with access to all information necessary for effective participation in the ADR process.

Principle 3. Independent and Impartial Neutral; Independent Administration. Due process requires a fair, independent, and impartial neutral process; however, the requirement is broader in scope than simply selecting a neutral decision-maker. The AAA suggests that an independent ADR institution, like the AAA, should administer mandatory ADR programs. Administrative services provided by the independent ADR institution should include: 1) maintenance of a panel of prospective neutrals; 2) facilitation of neutral selection; 3) collection and distribution of the neutral's fees and expenses; 4) oversight and implementation of ADR rules and procedures; and 5) general oversight and monitoring of neutrals, including the neutrals' qualifications, performance,

and adherence to pertinent rules, procedures, and ethical standards.

Both the consumer and business should have an equal voice in the selection of the neutral. The neutral also has an ongoing disclosure obligation to inform the ADR administrator of any bias or circumstance that could affect his or her impartiality. The ADR administrator determines whether or not the neutral should be disqualified and informs the parties of its decision.

Principle 4. Quality and Competence of Neutrals. The ADR institution should maintain a pool of highly-qualified ADR professionals and should implement a review process to ensure neutrals are adhering to all performance standards.

Principle 5. Small Claims. If a claim falls within the jurisdictional limits of a small claims court, consumer ADR agreements should be clear that all parties retain the right to seek relief in such courts.

Principle 6. Reasonable Cost. The costs of administering a dispute should be reasonable in relation to the size and nature of the claim, the nature of goods or services provided, and the ability of the consumer to pay. Additionally, the ADR administrator should fashion fee arrangements with all of its neutrals and all payment should be handled through the ADR administrator.

Principle 7. Reasonably Convenient Location. The ADR proceedings should be hosted at a location convenient for both parties. If the parties are unable to agree on a convenient location, the neutral should have the power to assign the location.

Principle 8. Reasonable Time Limits. ADR proceedings should occur without undue delay. The rules selected to govern the ADR process should establish specific time periods for each step of the process. It is also important to include a default procedure, should a party fail to participate in the ADR process after reasonable and sufficient notice.

Principle 9. Right to Representation. The ADR rules and procedures should inform all parties

of their right to representation at their own expense.

Principle 10. Mediation. Just like the traditional court system, mediation is encouraged in the realm of ADR as a means of assisting parties to resolve their own disputes.

Principle 11. Agreements to Arbitrate. This principle reiterates the standards set forth in Principles 2 and 5. Businesses must provide consumers with: 1) clear and adequate notice of the arbitration provision and its consequences, *i.e.*, whether arbitration is mandatory or optional; 2) reasonable access to information regarding the arbitration process, including the difference between arbitration and court, related costs, and direction to full arbitration procedures; 3) notice of the option to use small claims courts, where applicable; and 4) notice, clearly stated, of the means by which the consumer may choose between arbitration or a traditional court proceeding.

Principle 12. Arbitration Hearings. Each party must have adequate notice of hearings as well as an opportunity to present all relevant evidence to the neutral decision-maker. Depending upon the case, telephonic hearings may be appropriate. However, the neutral should have discretion to require a face-to-face hearing upon request of either party. Hearings will be kept private and confidential to the extent permitted by law.

Principle 13. Access to Information. Similar to the discovery process utilized in traditional courts, consumer ADR agreements should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration.

Principle 14. Arbitral Remedies. The arbitrator must be vested with the power to grant any relief that would be available in court, under either the provisions of law or equity.

Principle 15. Arbitration Awards. If desired, agreements to arbitrate should note that the arbitrator's award is final and binding, subject to review in accordance with applicable statutes governing arbitration awards. In issu-

ing the arbitration award, the decision-maker should apply any identified, pertinent contract terms, statutes, and legal precedents. Finally, at the request of either party, the arbitrator should provide a written explanation of the basis for the award. The request for a written opinion should be discussed prior to the arbitration hearing.

Implicit in the AAA's use of the term principle, there are no absolute rules that consistently apply to every case. A consumer arbitration clause must reflect the aforementioned principles while also allowing flexibility to adapt to the demands of a particular case.

Registration of a Consumer Arbitration Clause

First, identify which of the business's consumer agreements or contracts contains a dispute resolution provision designating the AAA Consumer Rules or referencing to the

AAA Rules. If alternative arbitration language exists in various agreements, consider choosing just one version in order to streamline the registration process and reduce costs. In this circumstance, the business should submit the single arbitration clause and also note (either in the cover sheet to the clause or on the clause itself) to which contracts the clause applies. If registered in this manner, only one fee and registration would be required. Alternatively, each individual clause could be submitted and registered separately, with a registration fee applied to each clause.

Next, notify the AAA of the existence of such a consumer contract or of the business's intention to include a dispute resolution provision designating the AAA Rules in a consumer contract. The AAA recommends such notice at least thirty (30) days before the planned effective date of the contract. There are two methods for submitting the consumer

agreement containing the arbitration clause for review:

- 1) via email at: consumerreview@adr.org; or
- 2) via the website at: www.adr.org/consumerclauseregistry.

The "Register Now or Wait" Debate

Businesses must individually determine whether to register an AAA arbitration clause proactively or take the gamble that no demand is made under the arbitration clause. Regardless of the decision, however, it is imperative that businesses incorporate or at least consider the fifteen principles set forth above in any consumer arbitration agreement to ensure due process compliance and enforceability as well as to protect themselves and their customers. ■

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President's Message



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

It was a pleasure to see you all in Chicago. Once again, we had a great program and set a new attendance record for our Fall Conference. Our organization continues to add new members and the level of engagement of our members makes the NADC one of my most useful resources in enhancing value for my clients. I hope that you all feel the same way.

The Board approved the NADC strategic plan which is posted on our website for your review. Our main objectives are to increase the visibility of the NADC and to enhance the value proposition for existing members. The plan will take some time to implement, but we will begin the process before the end of the year.

A great thanks to our sponsors of the Fall Conference. Without their generosity we would not be able to put on such a high quality program in such a high quality venue. Also a great thanks to our Executive Director Erin Murphy and her staff for putting together our Fall Conference. It is nice to know that I never have to sweat the details, as she always does.

The speakers at the Fall Conference did an excellent job! All NADC educational programs rely on members' suggestions for topics and speakers. If you have a suggested session and/or topic you think should be covered at future meetings please email Erin Murphy at emurphy@dealercounsel.com. If you are interested in speaking at future conferences please send Erin a presentation proposal to include session topic, session title, proposed speakers, proposed length of time and a brief description of the session. I encourage you to submit your suggestions soon, as we will begin planning for the April Conference this November.

I look forward to seeing all of you in April at the Montage in Laguna Beach for our 11th Annual NADC Member Conference. This will be my last meeting as President of the organization, and I am deeply honored to have been given the privilege to serve as your President. ■

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Mark A. Eich, CPA, CISA, Principal

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A Hi-Tech Version Of An Old Crime

Alan J. Skobin, *Galpin Auto Group*

Feature Article

A hi-tech version of an old crime is percolating to the surface of the auto industry. The barriers to entry are few...under \$1,000 and a criminal mind can set someone up in business. Few of your dealer clients are even aware of this threat to their businesses, yet it can cost them thousands of dollars per vehicle and embroil them and their employees in costly civil suits and felony criminal indictments. It can also tarnish the good reputations they have worked so hard and so long to build. The crime, odometer roll back, and the havoc it wreaks is far more destructive than you might think. In fact, it threatens to undermine the automobile industry as we know it.

In late 2013 CarFax estimated over one million vehicles were on the road in the United States with odometers rolled back. CarFax has estimated the loss to be \$4,000 per vehicle, but my research is closer to \$6,000 - \$8,000. Based on these figures, victims are facing a staggering consumer fraud loss of more than \$4 to \$8 billion. Many of those victims are your clients or customers of your clients, and there are things you can do to lessen the exposure for both your clients and their customers.

Before automobiles essentially became computers on wheels, criminals rolled back the mechanical odometers with hand tools and often left markings on the vehicles. Today it is as simple as purchasing a device over the Internet to hack into the computer system. The criminals attach it to the OBD port and program in the new mileage.

Many of the reasons for committing this crime have remained the same over the years: to reduce the miles to increase the vehicle's value and desirability at time of trade-in or private resale, to obtain warranty repairs when the vehicle is out of warranty due to excess miles, or to lower the mileage to obtain a higher value for insurance claims related to flooded vehicles or other accident losses. Other reasons odometer fraud occurs include rolling the odometer forward so the vehicle can be easily exported and then rolling it back when it arrives at the destination, as well as rolling the odometer back to enhance the uniqueness and value of collector vehicles. There is also a newer but rapidly growing scheme as a result of changes in the financial industry—rolling back the mileage at lease termination to avoid lease-end charges that often amount to thousands of dollars.

Regardless of the reason odometer fraud is committed, these acts all have many important things in common. Most significantly, they are all federal offenses that could land the perpetrator in federal prison, as well as they can result in huge fines, restitution and legal costs.

They are serious state crimes as well, with varying penalties. The acts also result in the vehicle's being branded "True Miles Unknown", thereby negatively impacting marketability and value. Hacking into the vehicle's computer system may, in given instances, result in safety issues with the vehicle as well. The impact on vehicle safety is of such concern that at least one manufacturer is taking some hacked vehicles off the market, resulting in a total loss of the vehicle value.

Below are some suggestions you may want to consider to help protect your clients protect their dealerships:

- Be sure your clients are aware that electronic odometer readings can be tampered, as well as the magnitude and

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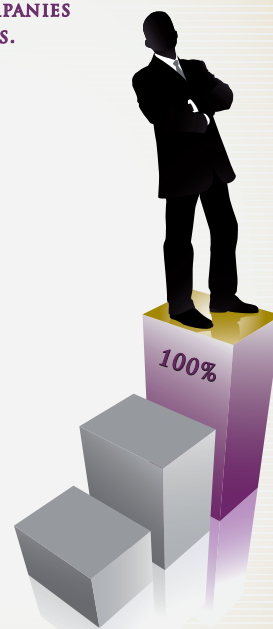
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schemes being utilized. A client who is not even aware of the problem is the most vulnerable and will not even know they should do things to protect themselves.

- Explain the potential criminal, civil, reputation and other adverse consequences of not being proactive.
- Be aware and advise your client of applicable federal and state laws. These include, but are not limited to, 49 USC § 32701, 32711, 49 CFR § 580 and 49 U.S. Code § 32709. As mentioned above, the laws vary from state to state.
- Encourage your clients to adopt procedures to detect odometer fraud. This can include checking service records and CarFax, Experian or other reports for mileage discrepancies. If they do find a discrepancy, they should investigate further as these reports are not always accurate.
- Recommend enhanced inspection procedures, including inspecting for wear and tear that does not match the mileage in areas such as tires, seats, floors, gear shifts, etc.
- Advise dealer clients to be extra cautious if a new customer has no prior sales or service relationship with them for the vehicle in question but attempts to terminate a lease at their dealership.
- Suggest your clients also focus on whether the mileage on a vehicle makes sense for its prior use. For example, it is unlikely that a prior rental vehicle or taxi that has been in operation for 3 years would only have 15,000 miles on the odometer (an average of 5,000 miles per year).
- Encourage DMS and other software providers to develop programs that alert the dealer when there is an odometer discrepancy and alert systems that incorporate data from all departments in the dealership.
- Develop detection reports to help spot internal and external fraud. For example, if most salespeople put customers out in leases of 12,500 or 15,000 miles per year, but one or more particular salespeople put almost all customers out in 10,000 mile per year leases to lower the monthly payment, that MAY be a warning sign that the salesperson is facilitating rollbacks prior to lease termination. It may be an especially large warning sign if a lower percentage of the 10,000 mile customers than the 12,500 or higher mileage customers incur excess mileage charges at lease termination.
- Report any instances of suspected odometer fraud to appropriate authorities, such as the National Highway Traffic Safety Administration (202-366-4761, or the NHTSA Toll-Free Hotline at 1-888-327-4236; TTY: 1-800-424-9153), their state Department of Motor Vehicles, or another appropriate law enforcement agency.

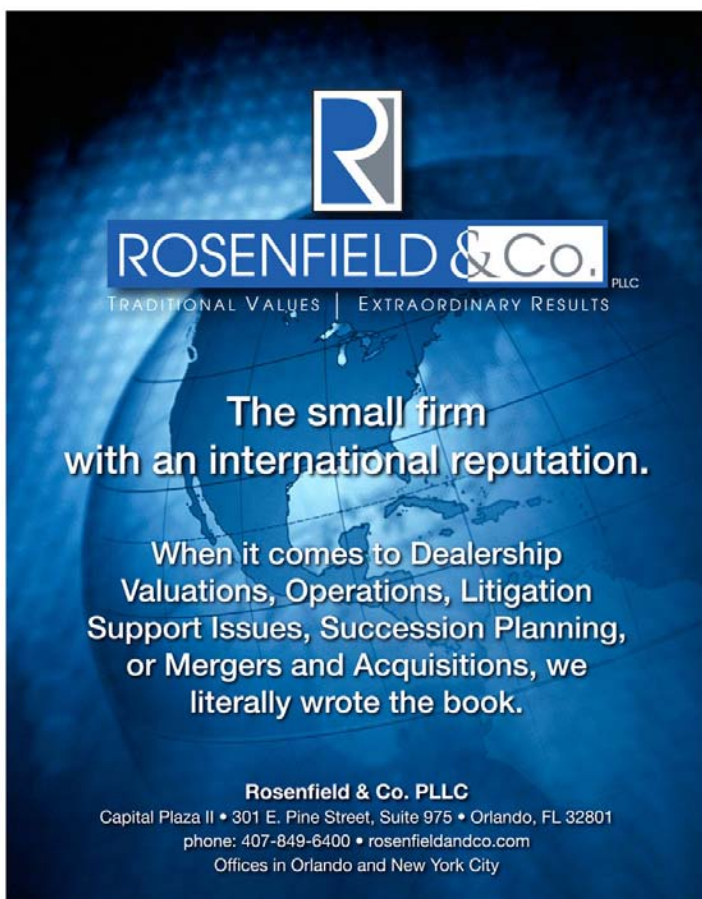
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Whether the threat is internal or external, you can take steps to educate and assist your client in order to better protect themselves, their honest customers and the industry from becoming victims of crime. The biggest crime, in my opinion, is to do nothing. ■

Alan J. Skobin, Vice President and General Counsel of the Galpin Auto Group, served for 9 years as a Los Angeles Police Commissioner, and has over 40 years of sworn law enforcement experience. If you desire further information, he can be reached at askobin@galpin.com or 818 778-2970.



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Volume X, Number 9
OCTOBER, 2014

Jami Farris, Editor
jamifarris@parkerpoe.com

Michael Charapp, Assistant Editor
mike.charapp@cwattorneys.com

*Defender, The NADC Newsletter is published by the
National Association of Dealer Counsel
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