NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

# DEFENDER

The National Association of Dealer Counsel Newsletter MAY 2015

## In this Issue:




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# CFPB Comes Out Swinging Against Arbitration in Releasing Its Required Study

By Randy Henrick
*Dealertrack Technologies, Inc.*

Arbitration and class action waiver clauses in retail installment sales contracts ("RISCs") are important to dealers to help protect them and their businesses.

If properly drafted citing the Federal Arbitration Act, these clauses waive a consumer's right to file a lawsuit, and more importantly a class action, against the dealer, replacing it with arbitration. Arbitration is a less expensive, faster and fairer way to resolve a dispute with a consumer. In general, you are better off before an arbitrator than a judge and jury in court.

On March 10, 2015, the Consumer Financial Protection Bureau ("CFPB") released a study of the effect of mandatory arbitration and class-action waiver clauses on consumers, and the CFPB is taking a strong stance on this matter that dealers need to know.

## CFPB Study: A Dodd-Frank Act Requirement

The 2010 Dodd-Frank Act required the CFPB to conduct this study of the use of pre-dispute arbitration agreements "in connection with the offering or providing of consumer financial products or services."

But it does not stop there. The Dodd-Frank Act not only required the study but also said that the CFPB can issue a regulation prohibiting or limiting the use arbitration clauses if the CFPB finds that doing so "is in the public interest and for the protection of consumers" and their findings are "consistent with the study" performed by the CFPB. You can see where this one is going.

As you might expect, the CFPB said the arbitration clause study shows harm to consumers results from pre-dispute arbitration agreements in terms of what they allegedly recover. According to the CFPB, the study finds that class actions resulted in the greatest recovery for consumer-plaintiffs – at least $220 million per year in settlement funds to consumers who brought actions in federal court over the five year period studied, although it did not indicate how much the average consumer class member received. The CFPB study found that lenders disproportionately invoke the arbitration clause to block class actions as opposed to individual lawsuits (65% of the time verses less than 1% of the time). As a result, the total amount of relief obtained by consumers in arbitration was minimal when compared to class action recoveries. Or so said the CFPB.

However, upon closer inspection, the CFPB study appears to show the exact opposite—that consumers benefit from arbitrations and the only people who really wind up winning in class actions are plaintiffs' lawyers.

Among other things, the CFPB study showed that arbitration is faster and less expensive for consumers to file and results in higher recoveries. The average arbitration settled in 3 to 5 months versus nearly 2 years for a class action. Consumers pay less to arbitrate than to file a lawsuit (AAA - $200 cap; federal court - $400 filing fee). A 2009 study found consumers won 53% of arbitrations that were not settled with an average recovery of 57 cents on the dollar. One can reasonably assume that is higher than individual class members received in the few class actions that settled. Also, 60% of class actions either get dismissed or converted to individual lawsuits so most potential class members get nothing.

The CFPB conveniently omitted what the average consumer received in the 15% of class actions that settled—often a check for a small amount or discount coupons.

## So What's Going to Happen Next and When?

The CFPB will propose regulations that severely limit but probably will not absolutely prohibit mandatory arbitration clauses and class action waivers. Once it writes proposed regulations, the CFPB will have to put them out for public comment and there will be no shortage of comments that come in. The CFPB will have to review and summarize the comments in publishing the final regulations. They would also have to assess the effect on small businesses like many auto dealers and that will be a cumbersome process as well. All of this will take time… a lot of time.

Only after they complete that analysis and review the comments will they publish the final regulations. I doubt this will happen until sometime in late 2016 or early 2017. The regulations would not take effect under Dodd-Frank until 180 days after they are finalized. So we may be looking at close to 2018 before compliance becomes mandatory.

## So What Can Dealers Do in Anticipation?

This would be a good time to set up a process to resolve customer disputes under a formal in-house program. The CFPB has expressed this to be an important part of a Compliance Management System. The program should enable a customer to assert their complaint to a disinterested officer of the dealership (not someone involved in the disputed process) and every effort should be made to satisfy the customer even if this occasionally involves giving windfalls to customers that you otherwise feel are not merited. Believe me, a consumer can do a lot more harm to your dealership by filing their dispute with the FTC, CFPB, or even the Better Business Bureau.

The CFPB has announced that it intends to publish consumer complaints filed with them verbatim, giving the creditor 60 days to pick from a pre-selected list of nine responses and publishing the complaint and response on the CFPB complaint webpage. While this does not apply to dealer complaints, it does apply to complaints against lenders that relate to automotive financing. This can bring in dealer issues through the back door. You absolutely want to avoid this type of adverse publicity, and if paying or giving services to a disgruntled customer will resolve the issue, that is money well spent.

The good news is that there is legislation pending in the Congress to reign in the CFPB. Many analysts believe the CFPB's cumbersome mortgage regulations have caused a decline in the economy because banks are reluctant to issue mortgages. The arbitration issue could be another lynchpin for Congressional reform. And the courts are looking critically at the CFPB as well. One court recently held that the CFPB's "abusive practices" authority does not entitle it to extend the one year statute of limitations for Truth in Lending violations. Other court cases are pending challenging the CFPB's authority and even its constitutionality.

Until there is some action taken by Congress, the CFPB remains a powerful agency that dealers should keep an eye on. It is clear where the CFPB is going on prohibiting or limiting arbitration clauses, and dealers need to be prepared by instituting and refining their own company's dispute resolution process to ensure that they don't come under unfair scrutiny by regulators based on consumers filing complaints.

The agencies all talk to each other and a litany of complaints against a dealership could precipitate an enforcement action or at least a compliance audit by the FTC or your State Attorney General. That is not a result you want; so do what you can to resolve your customers' complaints in-house as professionally and efficiently as possible. ■

*Randy Henrick is Associate General Counsel and lead Compliance Counsel for Dealertrack Technologies, Inc. This article is intended for information purposes only and does not constitute the giving of legal or compliance advice to any person or entity. Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on your particular situations from a knowledgeable attorney or compliance professional licensed to practice in your state.*

## NADC Call for Presentations – NADC 2015 Fall Conference

**Are you interested in presenting at the NADC 2015 Fall Conference?** If you have an interesting and informative program idea, please submit the following to Erin Murphy at emurphy@dealercounsel.com by **Wednesday, June 24, 2015:**

- Session Topic
- Outline and/or short description of session
- Names and bios of presenters
- Requested length of time

The Program Planning Committee will review all proposals. Proposals not chosen for the Conference will be considered for future webinars and/or the 2016 Annual Member Conference.

## Executive Director's Message

Erin H. Murphy
*NADC Executive Director*

I am pleased to report that our 11th Annual NADC Member Conference in Laguna Beach, CA, April 26-28, was yet another successful event! It was our highest attended conference with 185 NADC members present. The beauty of the scenery at the Montage could only be matched by the excellent program. Thanks to the Conference Planning Committee for providing attendees with an outstanding, timely program.

The conference opened with the annual meeting of the membership during which the NADC membership elected five directors to their first term. Eric Baker, Boardman & Clark LLP; Kevin Hochman, Keyes Automotive Group; Jim Sewell, Jr., Smith Law Firm, P.C.; Todd Shadid, Klenda Austerman LLC; and Robert Weller II, Abbott Nicholson PC. The directors will serve a three year term.

The officers were then elected by the new Board of Directors. Stephen Linzer of Tiffany & Bosco, P.A. was elected President, replacing former President Oren Tasini of Haile, Shaw & Pfaffenberger, P.A. Diane Cafritz of CarMax and Andrew Weill of Benjamin, Weill & Mazer were elected Vice Presidents. Lance Kinchen of Breazeale, Sachse & Wilson, L.L.P. was elected Treasurer and Johnnie Brown of Pullin, Fowler, Flanagan, Brown & Poe, PLLC was elected Secretary. The officers will serve two year terms.

Andy Koblenz, Executive Vice President of Legal and Regulatory Affairs and General Counsel for NADA, and Paul Metrey, Chief Regulatory Counsel, Financial Services, Privacy, and Tax for NADA kicked off the conference program with a presentation highlighting several active federal regulatory issues affecting dealers.

Next, Kelly Baker with Asbury Automotive Group, Don Gould with Johnson Deluca Kurisky & Gould, P.C., and Tim Sparks with Sonic Automotive, Inc. offered insight on the types of litigation relating to dealer fees, with particular focus on recent class actions.

Patrick Anderson with the Anderson Economic Group, Joe Roesner with The Fontana Group, Inc. and Ron Smith with Bose McKinney and Evans LLP discussed how manufacturers may design or revise market areas to the detriment of current dealers.

Attendees were then treated to an entertaining lunch session by Paul Ritsema, Assistant General Counsel for Volkswagen Group of America, Inc. Paul has been in-house with Volkswagen and Audi for the past 17 years, and he discussed "dealer law" from the manufacturer's point of view.

After lunch, popular NADC speakers, Mike Charapp with Charapp & Weiss, LLP and Eric Chase with Bressler, Amery & Ross, P.C. returned to the podium to discuss some of the most important and timely legal issues for dealers during 2015.

John Davis and Adam Lawyer with DHG Dealerships closed out the day with a discussion on the current acquisition market, consolidation trends, private equity involvement, and the impact on blue sky.

The second day of the conference started with a panel discussion focused on conducting paperless business at dealerships. The panel included Mike Dommermuth with Fairfield and Woods, P.C., Mark Singleton with Reynolds and Reynolds, and Bert Rasmussen with Arent Fox LLP.

Following that session, Doug Greenhaus, Chief Regulatory Counsel, Environment, Heatlth & Safety for NADA and Jim Moors, Senior Counsel and Director of Franchising and State Law in the Legal and Regulatory Group for NADA discussed a comprehensive overview of disclosure mandates and best practices governing the purchase and resale of used vehicles.

The next panel session covered legal updates under the NLRB impacting dealerships. Panelists included Susan Bartkowski and Claudia Ryan of Towne, Ryan & Partners, P.C.

Last, but not least, Sara Decatur Judge and Sara Beccia of Burns & Levinson LLP captivated the crowd until the very end with a presentation on trademark and trade dress law and the issues that often arise for dealers with respect to licensing of intellectual property.

Both mornings, breakfast sessions were offered to the in-house counsel members of NADC. Christian Scali of The Scali Law Firm offered an advertising presentation that focused on social media and how existing laws apply to current technology. Melinda Levy-Storms of The Niello Company and Adam Turteltaub of the Society of Corporate Compliance and Ethics presented on risk management as it relates to ethical decision-making in the workplace and automotive industry.

Thank you to all of the speakers who presented at the conference. I encourage all of you not in attendance to visit our website at www.dealercounsel.com and benefit from the conference materials that have been uploaded. Please look under the Conference, Workshop and Webinar Handouts section in the eLibrary (11th Annual NADC Member Conference).

I would like to thank all of our event sponsors for their contributions to the Annual Conference. These sponsors help to elevate the quality of the event while keeping the cost low for our members. Many thanks to Anderson Economic Group, Capital Automotive (CARS), CounselorLibrary.com/Hudson Cook, LLP, Dixon Hughes Goodman – DHG Dealerships, The Fontana Group, Haig Partners LLC, Moss Adams, Portfolio and Rosenfield & Company PLLC

Be sure to Save the Date for the 2015 Fall Conference! The Conference will be held November 1-3, 2015 at the Trump International Hotel & Tower in Chicago. 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 Fall Conference please email me at emurphy@dealercounsel.com. ■

## 2015 11th Annual NADC Member Conference

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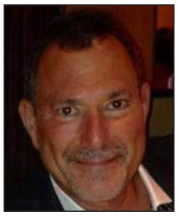
# Recent Developments Regarding IRS Attention to § 831(b) Microcaptives – The Myths and the Reality

Feature Article

By Matthew Howard, *Moore Ingram Johnson & Steele, LLP*
Ken Rosenfield, *Rosenfield & Company PLLC*
Andrew Weill, *Benjamin, Weill & Mazer*


Howard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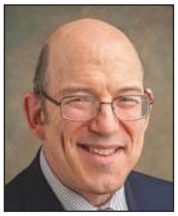
Weill

On February 3, 2015, the IRS published its "Dirty Dozen" list of questionable tax transactions. Among the items included are some transactions involving insurance companies that have elected to be treated as small property and casualty insurance companies under Internal Revenue Code § 831(b). The IRS summarizes the issue as follows:

> In the abusive structure, unscrupulous promoters persuade closely held entities to participate in this scheme by assisting entities to create captive insurance companies onshore or offshore, drafting organizational documents and preparing initial filings to state insurance authorities and the IRS.

(Notice IR-2015-19).

There have been rumors and speculation about what this means. Below is our view of the reality, based on our familiarity with the issues, communications with other practitioners, and off-the-record discussions with IRS insiders.

Review of the language of the notice gives strong clues as to what the IRS considers to be abusive practices. The first focus of the notice follows:

> [U]nscrupulous promoters persuade closely held entities to participate in this scheme by assisting entities to create captive insurance companies onshore or offshore, drafting organizational documents and preparing initial filings to state insurance authorities and the IRS. The promoters assist with creating and "selling" to the entities often times poorly drafted "insurance" binders and policies to cover ordinary business risks or esoteric, implausible risks for exorbitant "premiums," while maintaining their economical commercial coverage with traditional insurers.
>
> *Id.*

This language is directed to two separate issues. First, the IRS is expressing concern about coverages that move risks from traditional insurers to captives, especially if this results in a higher premium than would be paid in the regular market. Second, the IRS is concerned with what it considers "esoteric, implausible risks." One IRS official called attention to an arrangement wherein a Midwest taxpayer took a $1 million deduction by paying a microcaptive for tsunami insurance.

These questions often involve an IRS misunderstanding. As a matter of economic reality, the microcaptive must charge more premium early on due to comparatively small reserves. However, there must be sound actuarial support. Additionally, an infrequent risk but catastrophic in nature can warrant a high premium.

The second focus of the notice shows IRS concern when it appears that the arrangement has been designed precisely to take advantage of the $1.2 million limitation of §831(b). As the notice states:

> Total amounts of annual premiums often equal the amount of deductions business entities need to reduce income for the year; or, for a wealthy entity, total premiums amount to $1.2 million annually to take full advantage of the Code provision.
>
> *Id.*

Thus, the IRS will be paying close attention to structures that are promoted as being designed to maximize the use of the limitation.

The third focus of the notice states that the IRS will find a problem when "[u]nderwriting and actuarial substantiation for the insurance premiums paid are either missing or insufficient." *Id.* Proper underwriting and actuarial standards should always be available to substantiate the premiums. If the only justification for the premium level is to maximize the use of §831(b), that will be a problem.

The final focus of the notice states that IRS attention will be drawn when:

> The promoters manage the entities' captive insurance companies year after year for hefty fees, assisting taxpayers unsophisticated in insurance to continue the charade.
>
> *Id.*

This language seems intended to put promoters of captive programs on notice that attention will be paid to them as well.

Looking at the above, it is pretty clear to our professionals with whom we have spoken that the traditional reinsurance structures used by reputable F&I reinsurance programs are not the intended target of the listing. The coverages are reasonable, as shown by loss history experience; the premiums are actuarially determined on a by-vehicle basis for all dealerships and not tailored at each dealership to reach the predetermined deduction amount; and there is ample substantiation for the premiums charged. Rather, what seems to have prompted the inquiry is an IRS perception that some uses of microcaptives are overly aggressive, such as the tsunami example mentioned above.

However, even if your clients have properly designed structures, the existence of a notice of this sort means that there is an increased risk that an IRS agent may mistakenly think that if there is a §831(b) company in use, there is an issue worth examining. Dealerships and their advisors should understand that in the event of a communication from the IRS regarding a §831(b) company, it is imperative to engage experienced and knowledgeable tax advisors immediately to review the situation and respond. ■

*Matthew Howard joined Moore Ingram Johnson & Steele in 1989 and currently serves as senior partner in the firm's Captive, Tax and Estate Planning Department. Matthew formed the firm's Captive Insurance Company practice in 2006. As of 2015, MIJS Captive Management manages 99 small captive insurance companies domiciled in Alabama, Kentucky, Delaware, Hawaii, Montana, Nevada, South Carolina, and Utah for privately held businesses throughout the United States.*

*Ken Rosenfield with Rosenfield & Company began his career in public accounting in 1980. From the outset of his career, he has served automobile dealerships in many capacities ... as an Advisor, Consultant, Director, and Owner. His automotive retail practice is one of the largest of its kind with over 150 dealerships as clients all over the world. Ken is one of the first independent CPA's in the country to develop and serve clients in the auto dealership industry in Mainland China. His clients range from single point stores to some of the largest multinational dealership groups in the world.*

*Andrew J. Weill is a Principal with Benjamin, Weill & Mazer, a leading complex litigation firm in San Francisco. Andy's practice includes complex business, tax and estate dispute across the nation. He is a Certified Specialist in Taxation Law and a frequent speaker and writer on tax and litigation issues. Andy currently serves as Vice President of the National Association of Dealer Counsel.*

## NADC Member Announcements

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

Please send any news you would like to share to: emurphy@dealercounsel.com.

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# NADC Welcomes New Members

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**Andrew Stonestreet**
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
*Charleston, WV*

# The Power of "Never"

Feature Article

By Mike Charapp
*Charapp & Weiss, LLP*

Dealers facing potentially expensive and harmful conflicts often question when it might be wise strategically to admit some wrongdoing. They ask, "Shouldn't I show how cooperative I am?" or "Won't I get a lot by giving up a little?"

The discussion can be difficult for an attorney representing a dealer. Many dealers want to view those with whom they do business, particularly their franchisors, as "partners". They may feel that business people resolve problems and admitting some culpability may help, while lawyers profit from the fights. Asking them to take a hard line may contribute to their feelings about the intentions of lawyers. So how does a lawyer discuss the dealer's wish to give up ground in the hope that it can lead to a resolution? The key is explaining how the admission may make a solution more difficult and expensive.

Here are situations in which the questions arise. Let's examine when it is wise for a dealer to admit wrongdoing and how the conversation might sound.

## The Conversation about Franchise Disputes

Your franchisor sends you a letter complaining about performance deficiencies. Maybe you are sales ineffective according to the manufacturer's calculations. Maybe your CSI is below the manufacturer's standards based on its calculations. When is the best time to admit that you violated manufacturer standards? Answer: **NEVER!**

Some dealers believe that they can gain the goodwill of the factory by admitting they violated the factory's performance requirements. That is nonsense. Threatening letters are not part of a tough love campaign of the factory brass to show how much they care. They are sent to paper the file that goes to the lawyers when things get to where they want to get rid of you. Your admission of wrongdoing will not help you, but instead will hurt you...greatly.

You are never in violation of your dealer sales and service agreement because of how your dealership performs. **NEVER!** You may make changes to improve performance. Do not characterize those as responses to the manufacturer's threats. They are part of your ongoing strategy to build your business.

Start with the assumption that the factory's claims of breach or default are flawed. Perhaps it is the way the manufacturer measures performance. Perhaps it is the base chosen by the manufacturer against which you are measured such as your area of primary responsibility which may be too large or which may fail to reflect demographic or geographic issues. Your problems may even be the fault of the manufacturer that has not allocated to you enough vehicles or provided enough support for your marketing efforts. Make sure that you respond to factory threats and explain why the factory's analysis is incorrect.

## The Conversation about Fair Lending Letters

You have received a letter from a finance source. It has done an analysis of your portfolio, and it has determined that based on the statistical analysis it has developed to mimic the government's formula that your dealership discriminates against minority buyers based on minor differences in finance spread. When does it help your cause to admit that perhaps your personnel were not careful? Answer: **NEVER!**

The communications you may receive from your finance sources result from pressure from the Consumer Financial Protection Bureau. The purpose of the CFPB's original memorandum in March 2013 imposing duties on finance sources to lecture dealers, monitor them, take action against them, and compensate "victims" was simple – it was designed to force the finance sources to impose flat fees. Because of massive industry push back, the tactic has not worked so far. However, the finance sources are still facing intense pressure to succumb to the will of the CFPB.

Finance sources have struggled to deal with the CFPB's campaign, and they have devised testing to mimic the CFPB's testing. CFPB's test is based on certain assumptions that, when applied to the universe of a lending portfolio, cause dramatic statistical errors calling the whole methodology into question. You should never admit the statistical validity of the testing done by your finance sources, let alone the mistaken conclusion from it – that you have engaged in discrimination.

It is in the best interest of the dealership to have in place a fair lending policy. You should consider the implementation of the policy that removes discretion from F&I personnel in establishing rates. The policy published by the National Automobile Dealers Association is an excellent one.. When you receive a critical communication from a finance source, you can respond that you do not discriminate, and you have taken steps to show that affirmatively by implementation of a fair lending policy.

## The Conversation about Government Communications on Complaints

You receive a letter from the attorney general's office or a consumer protection agency enclosing a complaint from a consumer. When is the best time to admit that you did something wrong to deflate their anger? Answer: **NEVER!**

An admission of wrongdoing will not convince the AG/consumer protection agency to leave you alone because you are such good folks. It will put steel in their spines to extract as much from you as they can. Explain your position. Explain why you did not violate the law.

There is nothing wrong with trying to solve the problem. Suggesting a conference or mediation to do that is appropriate. Settlement of a disputed claim is often the least expensive answer, and it may be the wise choice. But in any settlement agreement, make sure there is no admission of wrongdoing.

## NADC Topical Practice Groups

In accordance with the NADC Strategic Plan the Board of Directors has decided to activate the following two topical practice groups:

* **Regulatory Compliance**
* **Consumer Litigation**

If you are interested in being involved in either practice group, please contact: Erin Murphy at emurphy@dealercounsel.com.

## The Conversation about a Government Investigation

You receive a letter from the Department of Labor that it is looking at your practices under the Fair Labor Standards Act. When is the best time to admit that you may have violated the law? Answer: **NEVER!**

You will not build sympathy with an admission of wrongdoing. Your admission will be a springboard to even greater penalties.

There are many legitimate reasons to settle an audit or investigation. As with a customer complaint, early resolution is often the least expensive course. But that settlement should not include an admission of wrongdoing.

## The Power of Never

Overcoming the preference of a dealer to give up something to resolve a conflict can be difficult. The challenge is to convey that often an admission can make things worse. When alleged to be in default, breach, liable, in violation of the law, or some other unenviable status, an admission of wrongdoing is usually the wrong answer. It is simplistic and generally inaccurate. An admission of wrongdoing can make a solution more difficult and expensive. ■

*Michael G. Charapp is a lawyer in the Washington, D.C. metro area who represents car dealers and dealer associations. He is a Past President of NADC.*

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***We are always looking for submissions to publish in the Defender. Please send your contributions or proposals for articles to: jamifarris@parkerpoe.com***

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