NADC
National Association of Dealer Counsel

DEFENDER

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Erroneous Vehicle History Reports– An Update

By Kieran A. Lasater, Esq., *Fairfield and Woods, P.C.*

Two years ago, the National Association of Dealer Counsel's *Defender* published an article discussing some of the problems associated with erroneous vehicle history reports ("VHRs"). The article concentrated primarily on Carfax due to the large segment of the industry that it occupies, and, in particular, the "Total Loss" designation Carfax assigned to vehicles with only minor damage.

Since that time, I have been contacted numerous times to provide assistance with false VHRs and in correcting the reports, as well as to provide information as to available remedies they might have for the lost value they suffered in a sale or trade-in. Based on the volume of inquiries, I prepared this update.

Sample of Dealer and Individual Experiences

The following are summaries of some of the experiences of dealers and consumers who contacted me:

- **An attorney** contacted me on behalf of an estate client. The assets of the estate included a 2010 Mercedes Benz E550, and the Carfax VHR indicated severe damage from an incident that was, in fact, rather minor. Efforts to have Carfax correct the report proved futile.
- **Another attorney** shared his experience with a client with a 2005 Mercedes Benz G55 AMG, which, when purchased, had a clear Carfax VHR. However, when the client attempted to trade in the vehicle, the VHR showed a "Total Loss". After numerous communications with Carfax on behalf of his client, the attorney was able to secure a corrected VHR.
- A used car dealer specializing in Jeep Wrangler fix-and-flips, purchased a 2006 Jeep Wrangler Rubicon at auction with light body damage and a clear title. After repairing the Jeep, he was forced to sell it for half of its value due to a "Total Loss" designation on the Carfax VHR, which he was unsuccessful in getting removed.
- **Another** was experiencing financial difficulty and attempted to refinance a loan on his Land Rover LR3. The loan was denied due to a negative and erroneous Carfax VHR. Carfax refused to disclose the insurance company from whom it received the negative information. The client then filed a complaint with his state's department of insurance, but received no help because the insurance company indicated the report error was on Carfax's end. After additional attempts to secure a corrected report from Carfax failed, the client eventually had to sell a beloved 1956 Ford Thunderbird in order to stabilize his financial situation. The day after selling the T-Bird, Carfax corrected the report.

The foregoing are some of the real-world effects of a false VHR. Some of the individuals affected were unable to secure any resolution from Carfax. Others were able to secure corrected VHRs but only after much time, effort, and aggravation. Yet others were directly damaged by a loss in value of their vehicle in a transaction.

Carfax's Perspective

In researching this update, I contacted Carfax and spoke with its Director of Communications, Larry Gamache, on June 2 and 3, 2015. Gamache has been with the company for sixteen years, and, when first asked, he said was not aware of the "Total Loss" designation issue discussed in the original article. After he had conducted research, Gamache and I spoke again, and, when asked about whether Carfax withdrew the "Total Loss" designation policy on January 10, 2013, as indicated at that time by Carfax's then-General Counsel Steven Blumenthal, Gamache stated that Carfax had withdrawn the information to conduct further analysis. Gamache indicated that Carfax did not make unilateral determinations of a "Total Loss" designation, but, instead, only reported information received from insurance companies. He also said that over the next thirty to sixty days, Carfax would revise its VHRs to provide consumers with more context in the way of a list of reasons why an insurance company might declare a vehicle as a "Total Loss," and encourages consumers to secure an inspection prior to any purchase. Carfax's explanation was thorough, but did not explain some of the experiences detailed above.

Gamache additionally indicated that Carfax has a team of approximately eighteen to twenty individuals assigned to addressing concerns with the contents of VHRs, many times in twenty-four to forty-eight hours. The process can be started by utilizing the Carfax webpage and clicking on the "help" button at the top of the landing page. However, this is not a new change in response to issues; as Gamache indicated the team has been in existence for a decade or more.

Litigation Update

My original March 2013 article discussed several ongoing and past cases involving Carfax. Since that time, a large group of dealers (now 1048 and counting) filed a $350 million mass action against Carfax alleging antitrust violations. (*Maxon Hyundai Mazda, et al. v. Carfax, Inc.,* 1:13-cv-02680-AJN-RLE (S.D. N.Y.)). The lawsuit asserts that Carfax, through a series of exclusive relationships with key auto industry players (such as thirty-seven of forty manufacturers' certified pre-owned programs, Autotrader.com, and Cars.com), effectively forces dealers to use Carfax for VHRs, which reports are inaccurate and are offered at artificially inflated prices due to the lack of free market competition. Further, the suit alleges that Carfax then uses the ill-gotten inflated profits, ironically, to blanket the airwaves with ads that disparage the same dealers that are forced to contract with Carfax for VHRs.

Based on a review of the court's docket entries, as well as an interview with the plaintiffs' counsel and NADC member, Leonard Bellavia, Esq., the case is at the beginning of the discovery phase after the dealers defeated Carfax's motion to dismiss the second amended complaint. The case has been pending for over two years, and, after the suit was filed, many of the manufacturers, as well as Autotrader.com and Cars.com, voluntarily ended their exclusive relationships with Carfax, perhaps as a direct result of the claims asserted in the suit.

When asked about the erroneous nature of many VHRs, Bellavia stated that it was not the main focus of the mass action, but rather "the absence of free competition in the VHR market results in a disincentive for Carfax to build a better mouse trap." It is this lack of competition—with Carfax enjoying roughly ninety percent of the VHR market—that fosters what, to many, appears to be a lack of genuine interest in correcting erroneous VHRs when alerted by dealers and consumers. With the breakup of the exclusive arrangements between Carfax and the manufacturers, as well as Autotrader.com and Cars.com, the additional competition should result in more accurate VHRs, which represents an important tool for dealers and consumers alike. When asked about Carfax's perspective on the case, Mr. Gamache was not able to comment.

Conclusion

Even years after Carfax first began its Total Loss designation policy, dealers and consumers are still suffering the results of erroneous VHRs. Due to the amount of damages experienced by any single consumer or dealer, individual litigation makes little economic sense. The prominence Carfax has enjoyed has resulted in exposure to numerous civil actions, most recently the antitrust mass action. It will be interesting to see if the pending mass action is able to effectuate meaningful change in the growing VHR industry or if additional cases will be necessary in the future. ■

Kieran A. Lasater practices as a litigator in Denver, Colorado at Fairfield and Woods, P.C. His practice focuses on complex commercial litigation matters including trademarks and the automobile industry. He is a frequent presenter and author. His articles can be found at www.fwlaw.com. He can be reached at (303) 894-4467 or klasater@fwlaw.com.

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.

President's Message

Steve Linzer
Tiffany & Bosco, P.A.
NADC President

I thought it appropriate to start off my first President's Letter for the *Defender* with a disclaimer: *I tend to be anecdotal–so please bear with me.*

Many things went through my mind when I had my first opportunity to address the NADC audience as President in late April at the Montage Hotel at the 2015 Annual Member Conference. When I looked out from the podium, I immediately realized that I that I was not really addressing an audience, instead I was looking out at a vast sea of friends– smiles, winks and nods (and yes, a few heads shaking in disbelief). No one was a stranger. I saw only friends and colleagues. Many of whom who had given freely (and often) of their time and expert knowledge when I and others had asked them for help. And I also saw other lawyers I had gotten to know when I had responded to their requests for help. What a great sense of collegiality this organization has! What a tribute to the hard work of past presidents and officers. My guess is that many of you feel the same way and look forward to our meetings as much as I do.

While I think collegiality is a clear benchmark of the NADC organization, I would like to add another benchmark–transparency. Many of us have been around the industry a long time (some say too long) and have been a part of NADC since the beginning. Sometimes, we take for granted that everyone knows how NADC functions and where it is going. I want every member to feel that he or she is valued as a member and entitled to full information about current NADC "happenings" and future plans. I realized that we need to increase our efforts in this regard when the Board of Directors held its election of officers in the corner of the ballroom early Monday morning at the Annual Conference. While that has been our tradition and conforms to our bylaws, that process (and others) should properly be explained to our new members. The members should know that we have a board of directors made up of twenty-three board members. The board meets just before each conference and twice (or more, as needed) by telephone. The whole board reviews and votes by e-mail on each applicant for admission. The board has a nominating committee that nominates members for the board and nominates the officers. The officers are elected by the board members at the annual meeting (*i.e.,* the huddle in the corner). The bylaws of NADC are readily available to you on the NADC website.

I also realized during our last conference that we need to recognize the outstanding support we get from our administrative manager-Association Management Strategies-with whom we contract every two years. It provides communication and administrative support, membership services, meetings management, financial services, marketing support services, and industry liaison. John Flatley is the President of AMS. Erin Murphy, who is our Executive Director, works closely with John and is an employee of AMS. I believe I speak for the board when I say we have a robust, positive relationship with AMS. Members should feel comfortable asking any board member or officer any questions they may have regarding this relationship.

One final item I would like to mention in this first letter is the recent strategic planning project done by members of the strategic planning committee during Oren Tasini's term as President. The purpose was to build a shared mission and vision for NADC and to develop a three year strategy aimed at achieving that mission. I served on that committee (with Oren Tasini, Andy Weill, Johnnie Brown and Lance Kinchen). We all found this to be a worthwhile and productive project. John and Erin skillfully guided us. Initially, the committee devised a survey that went out to our membership. We received 157 responses which were discussed and evaluated. The result of the survey and our discussions is found in the Report of the Strategic Planning Committee. I urge you to look at eLibrary Document titled: "NADC Strategic Plan", in the category: General- eLibrary on the NADC website. In that document, you can see the goals and objectives of NADC as well as the timeline for implementation. I hope that you find the analysis of our strengths to be appropriate and that you will read what the committee felt was opportunities for the organization. We set two goals: (1) increase, enhance, and effectively communicate the value proposition to our members; and (2) expand recognized leadership as the only organization comprised of attorneys who represent dealers. To meet those objectives we set out many action items including: reactivate topical subgroups (underway), enhance website functionality (evaluating proposal), overhaul website (same), add educational offerings (work in process), provide conference content to members (being evaluated in light of board's public disclosure concerns), engage new members at conferences (added a new member reception, striving for increased transparency), regional workshops (work in process), and develop additional member "value" (work in process).

In my next column, I hope to announce several projects aimed at getting additional benefits and "value" to our membership consistent with the Report. Please stay tuned. Thank you all for letting me serve you. ■


Watts


Frazier

What Dealers Auto Know When Hiring: EEOC v. Abercrombie

By Keith A. Watts, *Ogletree, Deakins, Nash, Smoak & Stewart PC*
Jameson G. Frazier, *Ogletree, Deakins, Nash, Smoak & Stewart PC*

On June 1, 2015 the United States Supreme Court decided whether a prospective employee triggers a prospective employer's Title VII obligations only when an applicant has informed the employer of his need for an accommodation of a religious practice. The Court ruled that an applicant with a disparate-treatment claim is not required to show that an employer had knowledge of his need for an accommodation. Instead, the applicant need only show that the need for an accommodation was a motivating factor in the employer's decision. In an opinion written by Justice Scalia, the Court stated that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.,* No. 14–86, Supreme Court of the United States (June 1, 2015).

Background

Abercrombie & Fitch, the retail clothing store, maintained a "Look Policy" that governs its employee's dress. Under the policy, employees were not permitted to wear caps. Samantha Elauf, a practicing Muslim who wears a head scarf, applied for a position at an Oklahoma Abercrombie store. The store's assistant manager, Heather Cooke, interviewed Elauf and gave her a rating that qualified her to be hired.

To clarify whether wearing a head scarf would conflict with Abercrombie's Look Policy prohibiting all employees from wearing caps, Cooke consulted with Randall Johnson, her district manager. Cooke told Johnson that she believed Elauf wore her head scarf because she is Muslim. Johnson told her not to hire Elauf because wearing a head scarf would violate the Look Policy, "as would all other headwear, religious or otherwise."

The U.S. Equal Employment Opportunity Commission (EEOC) sued Abercrombie on Elauf's behalf claiming that by refusing to hire her, Abercrombie violated Title VII of the Civil Rights Act of 1964 by failing to provide her a reasonable religious accommodation. The district court granted summary judgment in favor of the EEOC. The Tenth Circuit, however, reversed and granted summary judgment in favor of Abercrombie.

The Supreme Court's Decision

In its 8-to-1 decision, the Supreme Court found that the Tenth Circuit misinterpreted Title VII in granting summary judgment for Abercrombie. Under the "disparate treatment" provision of Title VII, 42 U. S. C. §2000e–2(a)(1), employers are prohibited from failing or refusing to hire an applicant because of his or her religion. Abercrombie had argued that liability under this provision requires that the employer have "actual knowledge" of the applicant's need for an accommodation. The Court disagreed, holding that an applicant need only show that his or her religious practice, confirmed or otherwise, was a *motivating factor* in the employer's decision.

The Court found that §2000e–2(a)(1) imposes no knowledge requirement and instead "prohibits certain motives, regardless of the state of the actor's knowledge." The Court stated,

> An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.

The Court also rejected Abercrombie's alternative arguments: (1) that a claim based on a failure to accommodate an applicant's religious practice must be raised as a disparate-impact claim, not a disparate-treatment claim; and (2) that Title VII limits disparate-treatment claims to employer policies that treat religious practices less favorably than similar secular practices. The Court then reversed the Tenth Circuit's decision and remanded the case.

Practical Impact

According to David D. Powell, a shareholder in the Denver office of Ogletree Deakins,

> Based on the Supreme Court's decision, lower trial courts will be more willing to infer a discriminatory motive if the circumstances demonstrate the dealers somehow 'should have known' or had constructive knowledge of the applicant's need for an accommodation. The decision also requires dealerss to take a harder look at their appearance policies, especially when those policies may impact an applicant or employee who is required to wear certain items of clothing or dress in a certain way because of his or her religion. Employers need to ask themselves if the policy is really important enough to maintain. At a minimum, dealerss need to ensure that their management level employees are well versed in Title VII's requirements and know how to respond when confronted with an applicant or employee who is dressed in a way that may conflict with a workplace requirement.

According to Margaret Carroll Alli, a shareholder in the Detroit (Metro) office of Ogletree Deakins,

> "The Supreme Court has succinctly reminded dealers to once again look carefully at the reason or basis for a challenged employment decision. Religious practices and work rules often collide on the job. The Court has made clear that mere suspicions and unconfirmed assumptions about religious practices may trigger Title VII liability. Employers can generally avoid this quagmire by not guessing whether an employee (or applicant) is religious or will need a change in a work requirement for religious reasons. [It is]best to wait for the employee or applicant to ask for something and let the employee or applicant explain if the accommodation is needed because of a sincerely held religious belief or practice." ■

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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

Full Members

Greg Johnson
G Johnson Law PLLC
Apple Valley, MN

Neal Johnson
Pohanka Automotive Group
Capitol Heights, MD

Fellow Members

Megan Collelo
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Pamela Kingsley
Tiffany & Bosco, P.A.
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Please send any job postings to:
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