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Save the Date:

**NADC 2015
Fall Conference
November 1-3, 2015**

**Chicago, IL
Trump International Hotel & Tower**



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Koenigsberg

Drive Down Your Client's Chances of Being Sued in an ADA Lawsuit

By Marc Koenigsberg, *Greenberg Traurig*

Monica Baumann, *California New Car Dealers Association*

In recent months, a handful of serial plaintiffs have filed lawsuits against automobile dealerships in San Diego, California claiming these dealerships are discriminating against them in violation of the Americans with Disabilities Act of 1990 (ADA) and related state laws. Although we are not aware of these types of suits being filed in other places, dealers nationwide should be aware of these claims. The plaintiffs claim the dealerships refused to provide and install hand control devices on vehicles for persons with disabilities to test drive the dealers' vehicles. The complaints are nearly identical in each instance, and the plaintiffs are represented by the same law firm. In fact, the plaintiff is the same man in all but one of the nine cases we identified.

Defendant dealerships have filed motions to dismiss several of these cases, and the results to date are mixed. Most judges reviewing these cases have found that the plaintiffs' legal theory is insufficient. Another judge denied a motion to dismiss on the grounds that the complaint stated a legally sufficient cause of action and the case is moving forward. As of this writing, there are five more cases in which are pending the respective defendants' motions to have the cases dismissed, and another case was filed the week of August 10.

Dealers across California who have not yet been sued are put in positions of uncertainty. On the one hand, the plaintiffs' theory is a

novel application of the ADA. The arguments made in the successful motions to dismiss could provide a roadmap to defending your dealership should it be sued. On the other hand, at least one court has found that this ADA theory is enough to keep the case alive – at least at the pleading stage. The uncertainty of the situation must be factored into any decision regarding how to respond to this new wave of litigation.

If the plaintiffs see some success in these ADA claims, it is likely that similar cases will be filed against more California dealers, and perhaps across the country. Dealers everywhere, and counsel advising them, may wish to consider various courses of action. Two options are: (1) creating a plan to accommodate disabled customers, or (2) preparing to defend an ADA lawsuit.

The most conservative approach is to devise a policy to accommodate your client's disabled customers with hand controls. Your clients should determine how long it would take their dealerships to acquire and install hand controls on a vehicle, and require in their policies sufficient notice from a potential customer in order to achieve the accommodation. Once your clients have policies in place, they should communicate that policy to any potential customer who may require an accommodation – including in dealership brochures and on websites, among others. The dealers' employees should be trained on policies and procedure for accommodating

customers requesting hand controls on vehicles they would like to test drive. Dealers should consider posting on their websites their ADA policies, including those related to any notice required to request a test vehicle with hand controls.

During a client's investigation, it may be discovered that the cost or difficulty of installing hand controls is prohibitive. If this is the case, your client should document its investigation and retain these documents. The ADA only requires "reasonable" accommodations. If a dealership decides not to implement an accommodation policy, it will want to have evidence supporting its determination that the installation of hand controls as an accommodation was unreasonable and not readily achievable based on its individualized circumstances – which, of course, are highly fact intensive.

The ADA is a complicated and nuanced area of the law. The accommodations required by the ADA will differ between dealerships, as will the determination of what is readily achievable. It is recommended any dealer consult with an experienced ADA lawyer to talk about its specific situation and prepare the best approach to avoiding liability while at the same time providing as much access to all customers as is possible. ■

Marc Koenigsberg is a commercial litigator in the Sacramento office of the international law firm Greenberg Traurig. A significant part of his practice includes counseling and representing property owners and store owners in ADA matters. He can be reached at KoenigsbergM@gtlaw.com or at 916-442-1111.

Monica Baumann, the Director of Legal and Regulatory Affairs for the California New Car Dealers Association, can be reached at MBaumann@cncda.org or at 916-441-2599.

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.

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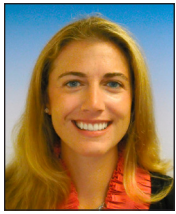
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Executive Director's Message



Erin H. Murphy
NADC Executive Director

Our Fall Conference is fast approaching. We will be meeting at the Trump International Hotel & Tower in Chicago, November 1-3, 2015. For the third 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 will include topics on Arbitration, Dealer Data Security, Dealer Fraud, Buy/Sells, the Factory's Tutorial to Network Actions, Labor and Employment, Ethics, Sales and Use Tax Audits, and other similar topics of interest to dealer lawyers. The conference schedule is as follows:

2015 NADC Fall Conference NOVEMBER 1-3, 2015 ■ CHICAGO, IL

SUNDAY, NOVEMBER 1

| | |
|----------------|----------------------|
| 3:00–5:00 pm | Board Meeting |
| 5:30 pm | New Member Reception |
| 6:00 – 7:30 pm | Reception |

MONDAY, NOVEMBER 2

| | |
|------------------|--|
| 7:30 – 8:30 am | Breakfast |
| 8:30 – 8:45 am | Opening Remarks |
| 8:45 – 9:45 am | Session 1: NADA Update Andy Koblenz, <i>NADA</i> Paul Metrey, <i>NADA</i> |
| 9:45 – 10:00 am | Break |
| 10:00 – 11:00 am | Session 2: Arbitration Update: CFPB Rule-Making and Consumer Arbitration Update Kellie Christianson, <i>Atkinson, Andelson, Loya, Ruud & Romo</i> Tom Hudson, <i>Hudson Cook LLP</i> Chris Scali, <i>The Scali Law Firm</i> |
| 11:00 – 11:15 am | Break |
| 11:15 – 12:15 pm | Session 3: Dealer Data – Security, Privacy and More: The Latest in a Quickly Changing Landscape Brad Miller, <i>NADA</i> |

| | |
|-----------------|---|
| 12:15 – 1:30 pm | Lunch |
| 1:30 – 2:30 pm | Session 4: Dealer Fraud: Using Data to Detect Employee and Consumer Fraud Diane Cafritz, <i>CarMax</i> Craig Cronheim, <i>CarMax</i> |
| 2:30 – 2:45 pm | Break |
| 2:45 – 3:45 pm | Session 5: Buy / Sell Update Michael McKean, <i>OCD Consulting, LLC</i> Eric Melzer, <i>Greenbaum, Rowe, Smith & Davis LLP</i> Ken Rosenfield, <i>Rosenfield & Co.</i> |
| 3:45 – 4:00 pm | Break |
| 4:00 – 5:15 pm | Session 6: The Factory's Tutorial to Network Actions – What to Anticipate and Prepare for (A Behind the Scenes Guide to Advice from USAI and the Factory Attorney) Robert Byerts, <i>Bass Sox Mercer</i> Russ McRory, <i>Arent Fox LLP</i> Joseph Roesner, <i>The Fontana Group</i> |
| 5:15 – 6:30 pm | Reception |

TUESDAY, NOVEMBER 3

| | |
|------------------------|--|
| 7:30 – 8:30 am | Breakfast |
| 8:30 – 9:30 am | Session 7: 2015 Labor and Employment Look Back / The DOL's Proposed Overtime Regulations and Dealership Wage-Hour Law Lauren Bailey, <i>NADA</i> Doug Greenhaus, <i>NADA</i> Matthew Simpson, <i>Fisher & Phillips LLP</i> |
| 9:30 – 9:45 am | Break |
| 9:45 – 11:15 am | Session 8: Ethics: The Fear Factor: How Good Lawyers Get Into Bad Ethical Trouble Stuart Teicher, Esq., <i>Teicher Professional Growth, LLC</i> |
| 11:15 – 11:30 am | Break |
| 11:30 am – 12:30 pm | Session 9: Dealerships Under Fire: How to Successfully Navigate Sales & Use Tax Audits and Appeals and Prevent Liability David Blum, <i>Levenfeld Pearlstein, LLC</i> Daniel Hunt, <i>Chief Financial Officer, McGrath Group</i> |
| 12:30 – 12:45 pm | Closing Remarks and Adjourn |
| 12:45 – 1:30 pm | Lunch |

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 585 minutes (including 90 minutes of ethics) 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](#)

HOTEL RESERVATIONS

Hotel reservations can be made by calling **1-877-45-TRUMP**. Please reference the **2015 NADC Fall Conference** to receive the group rate of \$315 per night. The group rate will be available three (3) days pre and post conference based upon hotel availability. A deposit equal to one night's stay is required to hold each individual's reservation. A valid American Express, Visa, MasterCard, Diner's Club Card, or Carte Blanche card number and expiration date are acceptable. The rates are subject to a 16.4% tax per room per night. These rates are subject to change by law.

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Watts



Ji

“My Social Anxiety Disorder Made Me Do It!” ADA Traps for Dealership Employers

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

Josh Ji, *Ogletree, Deakins, Nash, Smoak & Stewart PC*

Many dealer employees speak with the public as an essential part of their job. What should a dealer do if a new hire (or a newly promoted employee) says she would like to be reassigned to a position that does not require face-to-face interaction? She claims she experiences intense anxiety when faced with questions – especially questions to which she does not know the answer. So, the dealer can terminate her for failure to perform her job duties, right? Not so fast. According to a recent Fourth Circuit decision, you may have a legal obligation to engage in a good-faith, interactive process to reasonably accommodate social anxiety disorder, a disability under the Americans with Disabilities Act (ADA).

In *Jacobs v. N.C. Administrative Office of the Courts*, 2015 WL 1626377 (4th Cir. Mar. 12, 2015), Christina Jacobs was hired as an office assistant at the North Carolina Administrative Office of the Courts (AOC). Initially, her job consisted of microfilming and filing, but later Jacobs was promoted to a front counter position, which required face-to-face interaction with the public. Jacobs began to experience extreme stress and panic attacks in her new position, and she became particularly panicked when asked questions to which she did not know the answer. Jacobs told her supervisors about her symptoms and that she had previously been diagnosed with social anxiety disorder. She asked that she be trained to fill a different role and work at the front counter only once a week.

Unaware of any potential ADA exposure, the AOC failed to engage in any interactive process with Jacobs. Instead, without discussing her request for a reasonable accommodation, the AOC allowed her to pursue excellence elsewhere -- or in other words, terminated her because she was not “getting it.”

She subsequently filed a charge with the U.S. Equal Employment Opportunity Commission (EEOC), received a favorable determination, and filed a federal lawsuit. The federal district court disagreed with the EEOC and found that social anxiety disorder was not a disability as a matter of law under the ADA. On March 12, 2015, however, the Fourth Circuit reversed the district court’s dismissal, agreeing with EEOC’s view that social anxiety disorder may be viewed as a disability under the ADA that requires the interactive process and reasonable accommodations.

Accommodating Social Anxiety Disorder Under the ADA

What does this mean for dealers? To establish a claim for disability discrimination under the ADA, an employee must prove, among other things, that she has a disability. Before *Jacobs*, an employee with social anxiety disorder might hesitate to bring an ADA discrimination suit because “social anxiety” was not recognized as a disability. After this decision, however, litigious employees have precedent in their corner. To minimize litigation exposure, dealers should engage in a good-faith interactive process to reasonably accommodate any employee who has expressed “an intense anxiety or distress” in the performance of her job duties or risk a disability discrimination suit.

What are you looking for? According to the Fourth Circuit, social anxiety disorder is a condition that interferes significantly with a person’s normal routine, occupational functioning, or social activities or relationships. The disorder causes a person to either avoid feared social or performance situations, or endure them with intense anxiety or distress. So, if an employee reports feeling “intense anxiety or distress” as a result of a job duty, dealers must engage in a good-faith interactive process to identify any potential reasonable accommodation under the ADA. This duty is triggered when an employee communicates her disability and desire for an accommodation—even if the employee fails to identify a specific, reasonable accommodation.

Interestingly, the Fourth Circuit noted that a job position requiring public speaking may cause social anxiety disorder in someone who never before needed to speak in public. Based on this finding, it appears the condition need not be pre-existing or documented, but instead may be triggered by a promotion. Dealers need to be wary of employees who say that they feel anxiety if they are required to engage with the public, with speaking just the beginning. If you run into this scenario, you should definitely consider consulting Labor & Employment counsel to make your situation as defensible as possible. ■

Keith A. Watts is the Office Managing Shareholder of the Orange County (“The OC”) office of Ogletree, Deakins, Nash, Smoak & Stewart PC and a member of the firm’s Dealership Practice and Traditional Labor Relations Practice Groups. He can be reached at keith.watts@ogletreedeakins.com.

Josh Ji is a Law Clerk, who is also in the Orange County (“The OC”) office of Ogletree, Deakins, Nash, Smoak & Stewart PC. He can be reached at josh.ji@ogletreedeakins.com



NADC Regulatory Compliance Webinar

The Latest in Dealership Fair Credit Compliance:

With the recent Texas Dept. of Housing and Community Affairs vs. The Inclusive Communities Project decision, the American Honda Finance settlement, and the quickly approaching supervisory authority over captive finance companies, the Consumer Financial Protection Bureau is acting as if it has wind in its sails in its assault on indirect auto financing, notwithstanding serious questions that have been raised concerning its disparate impact testing methodology and significant political pressure from Congress.

This webinar will discuss these latest developments in Fair Credit, what dealers are hearing from their finance sources, and how dealers can respond. The webinar will also discuss fair credit programs that seek to address the CFPB's concerns (such as the NADA-NAMAD-AIADA Fair Credit Compliance Policy & Program), practical implementation issues that have arisen in adopting such programs, and how dealers are addressing such issues.

Speakers:

Randy Henrick, *DealerTrack Technologies, Inc.*
Paul Metrey, *NADA*
Jonathan Morrison, *Auto Advisory Services, Inc.*

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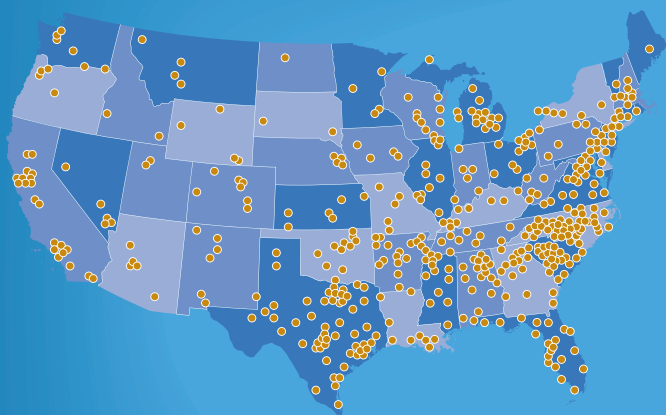
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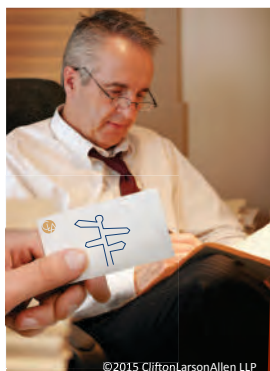
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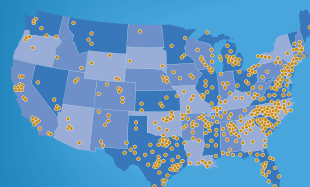


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