NADC
National Association of Dealer Counsel

DEFENDER

The National Association of Dealer Counsel Newsletter SEPTEMBER 2015

In this Issue:

Contact Us:

NADC
1155 15th Street, NW
Suite 500
Washington, DC 20005
Phone: 202-293-1454
Fax: 202-530-0659
info@dealercounsel.com
www.dealercounsel.com

Beware the "Or" Title

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

Every once in a while, we see an unusual claim in the Dealership world. Certainly, we expect slips and falls, vehicle collisions, and even a theft or two. However, when we get taken in a scheme, it hits us deeply, especially when the insurance coverage is unclear due to the circumstances.

The example I wish to discuss in this article is vehicle titles. Who would have thought these could be an issue?

One of my vehicles is titled Steven and Alicia Gibson; another is titled just in my name. No problem, right? When I trade, the Dealership simply collects the signature from me and/or my spouse and me depending on how the unit title is registered. With that title properly signed, the Dealership can retail or wholesale the vehicle at its discretion, transferring the title when the sale is completed.

However, sometimes titles are listed "or." In our case, it could be Steven or Alicia Gibson giving both parties full rights of ownership to the vehicle with both having the ability to transact a trade, refinance, or sell the unit.

The problem can arise during the time that the title is "open."

In 26 years of handling insurance for Dealerships, I have seen two instances where "or" titles provided the basis for rather ingenious schemes. Schemes that left the Dealers scratching their heads and their lawyers reading the Inventory policies searching for coverage. In each situation, the losses were substantial and aggravating.

In both cases, the Dealership initiated the transaction based on the good faith of the customer and, his/her legal ability to complete the transaction. After all, if the title read Steve or Alicia, either of us would have the legal rights to the vehicle and the ability to transact business at the Dealership using the unit as a base. So, the deal was done, signature collected, and paperwork properly and legally signed.

It is what happened next that left the respective General Managers and Counsel frustrated.

In the days following the supposed sale, the other ownership party…the "or" party… filed for registration/title solely under their name. According to the records provided to the tag agency or state, there had been no transaction and/or encumbrance on the vehicle. Thus the party filing for sole title/registration had every right of ownership to the vehicle just as the customer at the Dealership had every legal right to effect the transaction.

In the first case, the transaction was a simple refinance. The Dealer paid off the initial Lender and secured a lien with a second source…all without knowing what was transpiring at the Title Office.

The second case was more intriguing. The customer traded "down" with his late model Porsche to a used BMW 3 series. He drove off with the BMW and cash, leaving the Used Car

manager salivating about his latest inventory item. After a week or so, the unit was sold to a wholesaler who transferred it to a used car lot that promptly sold it to a customer. Tracking the unit the entire time was the "or" title holder who had promptly amended the title and, with full authorization of ownership, engaged a repo company to collect his Porsche…after which it was quickly put into a container at the port and shipped to a prepaid overseas buyer.

Clear Title BMW, Cash, Porsche/Cash… not a bad 2 weeks for the perpetrator.

Bottom line, in both cases…the vehicles are still missing and the Dealerships are left with only legal means to try and recover the damages and deal with the other affected parties.

Is there coverage under the Dealership Inventory policy? Possibly, under the False Pretense clause, but it is a stretch, and the investigation and process will be daunting.

Is this a procedural problem? Certainly. Or titles must be treated the same as and titles with all persons signatures properly collected, or "No Deal.'

In the end, these are the little "snafus" that can sour a month. $30,000 to $50,000 may not be a lot of money to a successful Dealer, but this type of loss is personal and very frustrating when we have to engage the time of both Counsel and Management.

Be mindful of the names on the titles. Our advice to the Dealership is to always "slow down" and make sure you have completed the deal properly and completely. Remember, we have to be right 100% of the time…being wrong even once is expensive. ■

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.

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

There was a flurry lot of activity at NADC this summer. Both the Board and Fall Conference Planning Committee held meetings and worked on a number of projects. A priority was, of course, planning for the Fall Conference. Our Executive Director Erin Murphy has highlighted in her *Defender* article last month the topics which will be presented. The Planning Committee had many excellent proposals. I think you will agree that the final program content is timely and informative. I would like to publicly thank the following people who served with me on the Planning Committee: Andy Weil, Ron Smith, Eric Baker, Diane Cafritz, Scott Silverman, Mike Dommermuth and Bob Weller. One Fall Conference presentation is especially noteworthy. We will have a 1.5 hour ethics presentation by Stuart Teicher, Esq. Many of you may remember that Stuart presented at the 2012 Fall Conference and was well received. His presentation is always engaging and entertaining. Please come to hear Stuart and the other well qualified presenters.

With respect to Board activity over the summer, a number of matters are significant. The Board approved a new and improved exhibition booth for use at NADA and other meetings. The booth is considerably larger (10' by 20') and will afford ample room for our materials, our volunteer hosts (or hostesses) and a special plus–room to meet with clients, colleagues or potential clients.

NADC Booth Rendering

In addition, the Board discussed and agreed to pursue a database/website integration project to improve administrative capabilities, member communications and enhanced search functions. Erin recently sent out a request for volunteers who have an interest and/or experience in databases and websites. We are hoping that the committee will get under way shortly on this important project.

Another project that is underway is an NADC Trademark Policy. The Board has formed a task force to look into developing a trademark policy for NADC and whether or not NADC should register its name and logo with the U.S. Patent and Trademark Office. This policy would outline the guidelines for members who wish to use NADC Marks in promoting their practice. This promotion tool for use by NADC members could be mutually beneficial for our over 535 members and for NADC.

Finally, a staffing update. You may have noticed that we have a new team member—Christina McGrath as Program Manager. Charlotte Valentine, who was our Program Manager for four years, decided to return to school and pursue an MBA at Georgetown University. Sad to say good bye to Charlotte--she did a great job. We all look forward to working with Christina. And I look forward to seeing everyone in Chicago in November. Travel safely. ■

Thank You to the 2015 Fall Conference Sponsors!

AEG ANDERSON ECONOMIC GROUP

BMO Harris Bank

CounselorLibrary®

DRS Dealer Risk Services

FG THE FONTANA GROUP, INC.

KERRIGAN ADVISORS

MOSS-ADAMS LLP
Certified Public Accountants
Business Consultants

Portfolio
25 Years of Building Wealth
for America's Auto Dealers

ROSENFIELD & Co. PLLC
TRADITIONAL VALUES | EXTRAORDINARY RESULTS

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.

NADC Job Board

Please remember to check the NADC Job Board in the members only section of the website if you are seeking employment.

Please send any job postings to: emurphy@dealercounsel.com

Challenging the Admissibility of Opinions of a Manufacturer's Expert

Feature Article

By Mike Charapp
Charapp & Weiss, LLP

Your client is concerned by a notice from its franchisor that another dealer will be allowed to relocate or build a competing, closer dealership. You file a protest under state law on your client's behalf and commence discovery. You get the report from the factory's expert and . . . by some happenstance . . . the expert concludes that the location at which the new or relocating dealer wishes to establish its dealership is exactly the right spot for it.

You suspect a cousin of voodoo economics – voodoo statistics – allowed the expert to start with an answer and work backward to prove it. Unfortunately, the witness has been qualified as an expert in dozens of cases and is using "accepted" methodology. So you think your only hope is that your own expert will be considered more authoritative. That is not your only option.

You may have the opportunity to challenge the admissibility of the opinions of the manufacturer's expert by filing what has come to be called a *Daubert* Motion.

A *Daubert* Motion

Rule 702 of the Federal Rules of Evidence provides the standard for admitting expert testimony in a federal trial. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702 requires that the evidence or testimony offered by the expert "assist the trier of fact to understand the evidence or to determine a fact in issue," "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." [*Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 591, 113 S. Ct. 2786, 2795 (1993)].

Today, most states have a corresponding rule of evidence or statute for the admission of expert testimony in conformity with the principles under what is commonly referred to as the *Daubert* standard, or some variation of that standard. In *Daubert,* the U.S. Supreme Court recognized there are "[m]any factors [that] will bear on the inquiry" of whether the particular expert testimony proffered will assist the trier of fact and identified the following relevant factors: 1) whether the expert's theory or technique can be or has been tested (*i.e.* the scientific method); 2) whether the theory or technique has been subject to peer review and/or publication; 3) the known or potential rate of error of the particular theory of technique employed by the expert; and 4) whether there is general acceptance of that particular theory or technique within the expert's community. [*See Daubert,* 509 U.S. at 593-94]

The inquiry under Rule 702 and *Daubert* is flexible with the overarching subject being the validity of the expert's opinions and testimony – relevance and reliability. The focus in any *Daubert* analysis is on the principles and methodology employed by the expert and not the mere conclusions. [*See Daubert,* 509 U.S. at 595]

Under *Daubert*, [509 U.S. at 590], "the subject of an expert's testimony must be 'scientific knowledge.'" "Scientific knowledge" requires that "an inference or assertion must be derived by the scientific method."

> **The touchstone of the scientific method is empirical testing — developing hypotheses and testing them through blind experiments to see if they can be verified.** Id. at 593; see also Black's Law Dictionary 1465-66 (9th ed. 2009) ("[S]cientific method [is] [a]n analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation.").

[Perez v. Bell South Telecomms, Inc., 138 So. 3d 492, at 498. (Fla. Dist. Ct. App. 3d Dist. 2014)(emphasis added)]

In any **Daubert** inquiry, the key question is whether the proposed testimony qualifies as "scientific knowledge" as it is understood and applied in the field of science to aid the trier of fact with information that **actually can be or has been tested within the scientific method.**" [See id. (emphasis added)]

Rule 702 deals with "scientific, technical, or other specialized knowledge." However, because *Daubert* referred only to "scientific" knowledge there was confusion and some courts were only applying the *Daubert* standard to expert testimony on scientific evidence. However, the U.S. Supreme Court in *Daubert* clarified that if was referring to "scientific" knowledge and testimony in its analysis "because that was the nature of the expertise" at issue in that case. [See *Daubert*, 509 U.S. at 590, n. 8] The U.S. Supreme Court later confirmed this clarification further. [*Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S. Ct. 1167 (1999)]

The U.S. Supreme Court in *Kumho Tire Co., Ltd.* clarified that the function of interpreting and applying the principles of expert testimony in conformity with *Daubert* is not limited to only "scientific" testimony, but to all expert testimony, regardless if that expert testimony is based on technical or other specialized knowledge including experience-based expert testimony. [*See Kumho Tire Co., Ltd.,* 526 U.S. at 148] The U.S. Supreme Court emphasized that the Daubert factors are not a definitive checklist or test and rather any Daubert inquiry must be a flexible one because "[t]oo much depends upon the particular circumstances of the particular case at issue." [*Kumho Tire Co., Ltd.,* 526 U.S. at 150-151]

In *Kumho Tire Col, Ltd.,* the Supreme Court agreed with the trial court's application of the *Daubert* standard in which it excluded a tire failure analyst's testimony that a blowout resulted from a defect in the tire's manufacture or designed. The tire failure analyst's opinion was based upon a visual and tactile inspection of the tire and upon the theory that absent at least two of four specific, physical symptoms indicating tire abuse, the blowout was caused by a defect. However, during the tire failure analyst's deposition, he could not say whether the tire had traveled 10, 20, 30, 40, 50 or a thousand miles by a visual and tactile inspection, but he somehow was able to determine whether the tread wear was caused by abuse by that same visual and tactile inspection. The tire failure analyst testified that in the absence of at least two of four signs of abuse (greater tread wear on the shoulder, grooves caused by beads, discolored sidewalls, and marks on the rim flange), the tire failure was caused by a defect. However, the tire showed evidence of the signs of abuse identified by the expert and two punctures. Finally, none of the *Daubert* factors was satisfied when the trial court went through the *Daubert* checklist.

A trial court considering the admission of expert testimony and evidence under Rule 702, and the application of the *Daubert* standard, does so in its discretion and any court reviewing the trial court's decision applies an abuse of discretion standard. [*See General Electric Co. v. Joiner,* 522 U.S. 136, 138-39, 118 S. Ct. 512 (1997)]

A *Daubert* Motion to Challenge a Franchisor's Expert

Prior to *Daubert*, there was little basis for a challenge to the admissibility of the opinions of a franchisor's expert. The factory simply needed a witness with scientific, technical, or other specialized knowledge using a theory or scientific principle that has been generally accepted. After *Daubert* that is no longer enough.

A court must use the *Daubert* factors in exercising its discretion to accept expert testimony. Those factors provide a solid basis to challenge the admissibility of opinions, and they provide a basis for an appeal on the court's abuse of discretion to allow the opinions when the factors are not met.

To return to your client's case in which the expert opines that the very spot that the new or relocating dealer wants to go is just the right spot for it, what are the bases for the opinion? The expert probably has the education, training and knowledge to apply standard statistical theory. But what are the factors that were used in the calculations? Just as important, what variables did the expert not consider?

Have the statistical methods applied to the factors considered and ignored been the subject of peer review and testing. Has the expert even tested them to determine the rate of error? In establishing the expert's credentials, the factory's attorney will surely have the expert recite the dozens of relocation and new point cases which he has analyzed. However, has the expert ever gone back to test his findings in those cases? You are likely to find that, not only have the expert's methods and theories not been peer reviewed and tested in the circumstances in which he is using them, the expert himself has not even done so despite numerous opportunities.

Tactical Benefits of a *Daubert* Motion

It will take a bold administrative law judge or trial judge to grant a *Daubert* motion to block the opinions of a factory expert. But, there will be substantial tactical benefits even if denied.

Discovery – To prepare a motion, you will need not only all the facts underlying the expert's assumptions, you will need the facts on variables the expert has not considered. Under most discovery rules, the former should be discoverable. However, the factory may use unsavory tactics to attempt to block you from learning facts it deems undiscoverable because they are not relevant to the expert's opinions. Consideration of what the expert has not considered for a *Daubert* motion may be the rationale you need to force the factory to disgorge the information.

Impact on the Fact Finder – Even though the expert's testimony may be admitted by the court, the weight given to the expert's opinions can be affected by argument over their sufficiency. The motion itself may affect the weight of the expert's testimony even if the motion is denied.

Basis for Appeal – Much of the law interpreting *Daubert* has been from courts of appeal. While the trial court or the administrative tribunal may not agree that the expert's opinions should be excluded, a court of appeal may disagree. Knock out the expert, and you knock out the factory's case when it is remanded. ■

Mike Charapp is a Partner in the firm of Charapp & Weiss, LLP. Currently, he represents and advises numerous business clients, including well over 200 automobile dealers and several automobile dealer trade associations. Mike is a founding board member and a past President of the National Association of Dealer Counsel.

SAVE THE DATE

NADC 2016 Annual Member Conference

May 15-17, 2016

Four Seasons Resort Palm Beach
Palm Beach, FL

NADC Welcomes New Members

Full Member

Andrew Starling
Starling Automotive Group
St. Cloud, FL

Fellow Members

Steven Blatt
Bellavia Blatt & Crossett, P.C.
Mineola, NY

Charles Gallaer
Bellavia Blatt & Crossett, P.C.
Mineola, NY

Carol Crossett
Bellavia Blatt & Crossett, P.C.
Mineola, NY

Shaun Malone
Bellavia Blatt & Crossett, P.C.
Mineola, NY

Debra Doyle
Greenberg Traurig LLP
Chicago, IL

Michael Semanie
Killgore, Pearlman, Stamp, Ornstein & Squires
Orlando, FL

Successor Liability for Employee Claims in an Asset Purchase

By Oren Tasini
Haile, Shaw & Pfaffenberger, P.A.

It is common wisdom that an asset purchase is much safer than a stock purchase agreement because the purchaser takes the assets free of obligations of the seller, except those expressly assumed by contract. However, this protection can be eviscerated through imposition of purchaser's liability for the seller's obligations for claims by its employees under a number of federal statutes unless the purchaser is careful. Thus, in drafting an agreement to purchase assets of a business, the lawyer should caution the purchaser about this potential liability. The agreement should address this issue by provisions in the parties' agreement imposing ultimate liability on the Seller and its owners, by way of indemnities by both the selling entity and its principals.

Federal courts have fashioned the concept of the purchaser's liability for the seller's obligations to its employees as a matter of federal common law. *Teed v. Thomas & Betts Power Solution, LLC,* 711 F.3d 763 (7th Cir. 2013) is an illustration of the point. The case is also worth a look because it collects a number of cases applying federal common law to find a successor liable for the sins of its predecessor under a number of federal statutes giving rise to employee claims. As the Court stated in *Teed*, after acknowledging the general law that state law precludes successor liability, the same is not true "when liability is based on a violation of a federal statute relating to labor relations or employment." In such case, a "federal common law of successor liability is applied that is more favorable to plaintiffs." The *Teed* Court laid out the five part test used in federal common law to determine whether successor liability applies. The Court applied the factors and held the buyer was liable as a successor to the seller for claims by the seller's employees for nonpayment of overtime in violation of the Fair Labor Standards Act.

Given the federal law in this area, it is important that an asset purchase agreement have representations and warranties by the seller, and the seller's principals individually, that the seller has been in compliance with all federal labor and employment laws and that no liability exists to Seller's employees. (Of course, this is somewhat of a double edged sword since one of the tests of successor liability is whether the successor has notice of the pending lawsuit, and the disclosure by the Seller of a potential claim is not an entirely positive development.) The agreement should then provide a sufficient mechanism for relief to the Buyer in the event the representations and warranties turn out to be untrue. At a minimum, the Seller's principal owner or owners should agree personally to defend and indemnify the buyer for any claims by any employees. Another added layer of protection is to obtain an indemnity from an affiliate of the seller that will remain in business after the seller has gone out of business following the sale. Of course both of these safeguards depend on the "collectability" of the indemnitor, so it is worth a conversation with your client to determine how much underwriting of the Seller can be done. For example if the Seller's principal is married, an indemnity without spousal joinder could prove to be illusory. One should also consider the possibility of the Buyer withholding a portion of the purchase price for some period of time equal to the statute of limitations periods for employee claims. This latter suggestion tends to be a nonstarter in many negotiations, but is worth examining. Finally, and perhaps the most obvious for a known claim, is a commensurate reduction of the purchase price, which again is often met with resistance.

Given the expanding number of claims and litigation involving claims by employees alleging violation of their federal protections, a lawyer must consider this issue when negotiating an asset purchase agreement. See *e.g.* http://www.workplaceclassaction.com/2015/03/statistics-released-by-the-administrative-office-of-the-u-s-courts-confirm-that-wage-hour-cases-represent-the-most-significant-exposure-to-employers-under-workplace-laws/. The lawyer should quantify any potential exposure and then develop insulation for the buyer against liabilities that should be borne by the Seller. ■

Oren Tasini is a shareholder with the law firm of Haile, Shaw & Pfaffenberger, P.A. in Palm Beach, Florida. Mr. Tasini acts as corporate legal counsel to both large and small businesses with a concentration in the automotive industry, including sales and purchases of automotive franchises.

Get Noticed!

Advertise in the *Defender.*

DEFENDER – Advertising Opportunities

Yes! I would like to purchase an ad in the *NADC Defender.*

☐ ½ page ad $150.00 5″ high x 7.5″ wide, no bleeds
☐ ¼ page ad $100.00 5″ high 3.75″ wide, no bleeds

Issue Months:

☐ October 2015
☐ November/December 2015

Contact: _____

Company: _____

Address _____

Phone: _____

Email: _____

Method of Payment: ☐ Check ☐ Invoice me
☐ American Express ☐ Mastercard ☐ Visa

_____
Credit Card No.

_____
Expiration Date

_____
Signature

NADC, 1155 15th Street, NW, Suite 500, Washington, DC 20005
Phone: 202-293-1454 **Fax: 202-530-0659**
Questions: Erin Murphy, emurphy@dealercounsel.com

NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

Volume XI, Number 8
SEPTEMBER, 2015

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
1155 15th Street, NW, Suite 500, Washington, DC 20005
Phone: 202-293-1454 • Fax: 202-530-0659 • www.dealercounsel.com

BE A CONTRIBUTOR!

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