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DEFENDER

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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

Auto Dealers and the VW Emissions Crisis: Some Early Advice from a Damages Expert

By Patrick L. Anderson, *Anderson Economic Group*

The revelation that Volkswagen had systematically evaded emissions regulations on certain diesel-engine vehicles sold in the U.S. and Europe stunned the auto industry. For many auto dealers—particularly Volkswagen dealers—it was more than a shock; it was an event with potentially severe economic consequences.

Given the structure of the franchised automobile industry in the United States, it is almost certain that an event causing this much damage to the brand equity of the franchisor will also affect negatively the franchisees. There are already unambiguous costs that VW's actions have imposed upon its franchised dealers. It is not premature to consider how dealers might be damaged, and how counsel to auto dealers might prepare for claims regarding these damages that might be made in the future.

Of course, at this early stage, much of the information needed to estimate damages properly is not yet available. Based on our experience in estimating commercial damages for franchisees, as well as observing how U.S. courts have approved damages awards, we can suggest some critical factors to watch and a few steps that some dealers will want to take immediately. We also can identify a small set of past damage cases that might provide a model for compensating both consumers and businesses over the next several years.

Here are five recommendations to dealers and their attorneys at this early stage:

1. *Do not jump to conclusions yet about the scope of the scandal, the remedy for the affected parties, or the way in which dealers will be treated.*

The EPA issued a Notice of Violation to Volkswagen, specifically accusing it of violating U.S. laws (two provisions of the Clean Air Act) that carry potentially ruinous total penalties. The evidence for at least a narrowly defined violation of the law appears incontrovertible at this point--the EPA flatly asserts that VW has "admitted that the cars contained defeat devices." Furthermore, Volkswagen's board has now both implicitly and explicitly accepted responsibility for evading U.S. emissions standards.

However, there are still quite a few key facts that are unknown. These include:

- Will more vehicles be found noncompliant? The EPA's September 18, 2015 Notice of Violation lists 4-cylinder VW (Golf, Jetta, Beetle, and Passat) and Audi (A3) vehicles with "TDI" diesel engines. However, the portfolio of diesel-powered vehicles that contain VW engines, engine management software from VW's supplier or related components is larger. Further, the "defeat device" the EPA cited in its Notice is actually a "software algorithm." Because there are many "software algorithms" that affect emissions in a vehicle, and, as these algorithms are designed to maximize performance within some kind of mileage

or emissions constraints, more affected vehicles could emerge from the intense scrutiny now facing VW and potentially other manufacturers. In fact, at least a small increase in the number of affected vehicles has already occurred: the use of an "auxiliary emissions control device" on some 2016 models was acknowledged in mid-October by VW, which decided to delay the introduction of the models while it examines the software.

- What will be VW-owners' reaction to VW's noncompliance? Public reaction to the scandal has been swift, negative, and harsh. VW's iconic brand image has clearly been tarnished, if not seriously damaged. Its classic 1970's-era advertising (such as the "lemon" ad) have now been parodied by cartoonists (such as Henry Payne of *The Detroit News)* and by magazine editors (such as those of *The Economist,* which put a smoke-belching Beetle on its cover.) Public reaction is not the same as the reaction of car owners that have already selected that brand. Recall that some widely-criticized vehicles (such as GM's Hummer, the Pontiac Aztek, "gas guzzling" large SUVs, and even the VW Beetle back in the 1970s) remained popular among a small group of consumers. Many VW owners are clearly unhappy, if not outraged. These owners will probably be selling their VWs and buying another brand. What everyone else will do is not yet clear—partially because of the next question.

- What will be the mechanical fix proposed by VW, and how will it affect vehicle performance? VW is under intense pressure to recall, and fix, its nearly half-million vehicles covered by the EPA notice in the U.S. At the same time, the number of VW vehicles on the road worldwide with similar problems is at least 20 times larger (and has been estimated at 11 million). The future recall and repair effort will be a huge undertaking. VW's U.S. CEO, in October 2015 testimony to Congress, indicated he felt it could take more than one year. It is important to remember that consumers, not the manufacturer, that decide whether to participate in a recall. In the past, a significant fraction of consumers simply ignored recall notices, even though the promised repairs would be done free of charge. (Such consumers, of course, also valued their own time, so they did not view the repairs as truly "free.") In this case, a substantial share of owners may refuse to have a "fix" installed if they perceive

that it would improve emissions, but reduce the vehicle's performance. Indeed, VW's congressional October testimony suggests that the forthcoming repair will affect performance at least slightly.

The answers to all these questions will affect VW dealers as well as VW owners.

2. *Start keeping records now regarding any "stop sale" vehicles; related floor plan, storage, and related costs; and any reimbursement from VW.*

One unambiguous cause of damages to dealers is the cost of holding vehicles covered by the "stop sale" order on 2015 and 2016 TDI vehicles listed in the EPA notice. The EPA asserts that sale of the new vehicles covered by its Notice of Violation is not allowed but advises owners of vehicles sold in the past that "the cars remain legal to drive and resell."

For VW and Audi dealers holding such "stop sale" vehicles in inventory, we advise that they record related storage, floor-plan, and other costs for use in any future damages claim. Dealers should also keep track of any assistance or payments received from VW in the aftermath of the diesel scandal. Such records should be held, whenever possible.

3. *Dealers should be prepared to identify any changes in value of used car inventory, new car inventory, or service revenue that appears to have been caused by the VW emissions scandal.*

Because of the unknown factors listed above, we cannot yet confidently predict whether VW dealers will suffer significant damage in the future on their inventory of vehicles that are not directly affected by the current (and any future) EPA notices of violation.

At least for some time, car buyers likely will, demonstrate a reluctance to buy any VW diesel, and indeed any diesel vehicle. Kelly Blue Book estimated a 13% drop in resale value of used VW TDI models in October. Thus, it is almost certain that VW dealers (and others holding VW diesel models covered by the EPA notice) have suffered at least some short-term financial losses.

We saw this occur during widespread media coverage, which may or may not signal a persistent loss in value of used VW products. To the extent this signals a persistent loss in customer willingness to buy diesels, it will affect VW, Audi, BMW, and even Porsche and Chevrolet dealers, in addition to some truck dealers.

VW's U.S. CEO, in October testimony, has already acknowledged that the company may compensate owners for a loss in value of their diesel vehicles. It is possible that dealers may ultimately be compensated for loss in inventory value, and if so, it will be important to be able to demonstrate that loss. We discuss the quantification of such losses further below.

4. *Dealers should remember to represent the brand and the products and services their local customer's desire, consistent with laws and their franchise agreements. This imperative will mean different decisions to different dealers.*

The genius of the franchise system is that local dealers are incentivized to sell products their local customers need, which needs vary considerably across the country. In this unusual situation, we should expect that some customers will react differently than others. Dealers must take action to ensure they serve their customers and stay in business. For some dealers, that will mean moving quickly to reduce diesel vehicle inventory and focus on other vehicles; for other dealers, their local customers may just want the diesel problem fixed.

Franchise agreements require a dealer to represent the brand in its local area. That will be challenging for many VW dealers in the near future, especially with new car sales. Dealers should be ready to recognize the reaction of their local customers to this evolving situation and take the appropriate course of action.

5. *Attorneys should closely watch a handful of significant cases where damages were awarded to franchisees and consumers.*

Volkswagen will undoubtedly be forced to pay a large penalty for its actions, and indeed has already set aside over $7 billion for this purpose. Attorneys who represent dealers, consumers, and others affected by VW's actions may want to consider how damages were awarded in a handful of significant cases that provide some guidance for upcoming VW cases. Although we acknowledge again the questions that remain unsettled for the VW matter, there are a handful of signal cases worth noting for potential claimants against VW.

For consumers owning VW vehicles, potential damages could follow one of these models:

- A first candidate is the 2013 settlement in the Toyota case, in which "sudden acceleration" was alleged to have affected some vehicles, and where the resulting negative publicity reduced the resale value of many Toyotas. Toyota denied that sudden acceleration was caused by its products, and agreed in a settlement to pay for "alleged diminished value." Toyota set aside (in addition to other amounts) a specific payment of $250 million in an escrow fund for payments to consumers. Expert testimony on the effects of "adverse publicity" was the basis for diminished value estimates.
- A second candidate is the settlement in the overstated fuel-economy case involving Hyundai and Kia vehicles. A 2014 tentative settlement agreement proposed payments to current and past owners based on a formula that implicitly assumed the owners kept the same vehicles for a very long time. The "lifetime reimbursement program" in the tentative settlement agreement allows a motivated owner to request reimbursement multiple times over multiple years or receive a lump sum payment. As has been pointed out by an Anderson Economic Group expert, this approach

provides compensation to owners that are only partially related to their actual loss. Some owners sustained minimal damages (those driving few miles or who sold their vehicles without any loss in value), and others sustained much higher losses. It ignores the fact that owners can choose to retain or sell their vehicles, and their own mileage expectations will play into those decisions.

- A third candidate is the settlement, of the Beck's beer case, scheduled to be approved in late October 2015, which involves misrepresentation of the country of origin of the iconic German brand of beer. In this matter, the court is likely to approve a settlement based on the damages theory that consumers should be compensated for the difference in the retail price between a premium U.S. beer and a premium German beer. Expert testimony (in this case, given by me) provided the basis for these damages estimates.

This is analogous to a similar theory for VW diesel owners: they are damaged by the difference in the resale value of the vehicles. These three recent cases suggest forms of reimbursement that may ultimately be available to VW dealers and VW owners, and also underline how careful work in establishing the basis for actual damages can have a strong effect on the equity of the resulting remedy.

There will be much more to occur in the VW emissions saga. These recommendations should help forward-thinking attorneys and their clients take some positive steps early in the game. ■

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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.

Patrick L. Anderson is Principal & CEO of Anderson Economic Group, a consulting firm with expertise in the automotive franchise industry and in commercial damages. Their experts have assisted hundreds of auto franchisees and their attorneys, as well as selected franchisors in multiple industries, across the United States. Extended and additional information on the VW matter, including additional references on topics discussed in this article, is available from the website at: www.andersoneconomicgroup.com.

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Executive Director's Message

Erin H. Murphy
NADC Executive Director

October is a great time to reflect on the goals you have set for 2015 and to plan for the 2016 year ahead!

NADC has some exciting events and opportunities coming up in 2016:

Attorney Directory
Once again, the NADC Attorney Directory will be handed out at the NADA Convention & Expo (March 31 – April 3, 2016 in Las Vegas, NV) and mailed to all members. Contact information from the directory will be obtained from your profile on the NADC website. Please log in to make sure your profile is updated by January 29, 2016. You can also purchase entry upgrades and ad space. Please contact Christina McGrath at cmcgrath@dealercounsel.com for more details.

NADC Booth at NADA Convention & Expo
NADC will have a new and improved booth at the 2016 NADA Convention & Expo. This year, the NADC booth will be 10x20 in size and will offer space for members to meet with clients, colleagues and prospective NADC members. Please contact Erin Murphy at emurphy@dealercounsel.com for more information on reserving space at the booth and/or to volunteer time to work the NADC Booth. Please plan on visiting us at Booth #512C across from the NADA Pavilion.

12th Annual NADC Member Conference
Additionally, we hope you will join us at the 12th Annual NADC Member Conference being held May 15-17, 2016 at the Four Seasons Resort in Palm Beach, FL. The conference will be a two day program designed to provide you with updates, best practices, lessons learned and other useful information. If you are interested in submitting a session proposal for the conference please send the following information to emurphy@dealercounsel.com:

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

Please check the website www.dealercounsel.com for more information in the "Events" section.

Article Submissions for *The Defender*
NADC is dedicated to providing you with invaluable resources for your auto dealer practice. We rely on the NADC community to share their expertise and knowledge through articles published in *The Defender*. Please send your contributions or proposals for articles to Editor Jami Farris at jamifarris@parkerpoe.com.

2016 NADC Fall Conference
Please save the date for the 2016 NADC Fall Conference. The conference will be held October 23-25, 2016 at the Radisson Blu Aqua Hotel Chicago. These dates will piggy back the ATAE Conference in an effort to accommodate those of you attending both meetings.

As always, we invite you to share your ideas on how we at the NADC can support you in your dealer practice. Thank you for your involvement! ■

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Should the ADA Require Dealerships to Provide Hand Controls For Test Drives?

Feature Article

By Eric Falbe
Falbe Law, PLLC

A paraplegic individual who uses a wheelchair for mobility visits a dealership and wants to test drive a vehicle. What should a dealership do? This is the situation that was presented to numerous automobile dealerships in Southern California over the past year, resulting in numerous lawsuits. In these cases, each plaintiff is a paraplegic individual who uses a wheelchair for mobility and is also a frequent flier under the Americans with Disabilities Act (ADA) and represented by the same legal counsel. The plaintiffs contend under the ADA a dealership is required to install temporary hand controls on any vehicle they would like to test drive. Some of these cases are being litigated, some have settled, and a couple of dealerships have won on motions to dismiss, now on appeal in the United States Court of Appeals for the Ninth Circuit. The United States Department of Justice recently filed an Amicus brief supporting the Plaintiffs in each of the cases pending before the ninth circuit and suggesting the ADA should require dealerships to install temporary hand controls on vehicles.

Although the question remains unsettled, an analysis of the applicable ADA provisions illustrates dealerships should not be required to take this drastic step.

Dealership Inventory Is Different from an Architectural Barrier that Is Structural in Nature

In general Title III of the ADA requires places of public accommodation to "remove physical barriers that have the result of excluding persons with disabilities from fully enjoying goods, services, privileges, or advantages." As the Seventh Circuit explained, "The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons. Had Congress purposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, we think it would have made its intention clearer and would at least have imposed some standards." *Doe v. Mutual Omaha Ins. Co.,* 179 F.3d 557, 560 (7th Cir. 1999). A dealership's vehicles are its inventory, although not an architectural barrier arising from the structure of its public accommodations. The economic burden on dealerships would be vast and possibly violate the prohibition against modifying a vehicle's safety systems, as discussed below.

A Dealership Is Different from a Rental Car Company

Plaintiffs in these cases cite 28 C.F.R. § 36.304(b)(21), which lists "installing vehicle hand controls" as an example of "steps to remove barriers." However, while regulations require a business to remove "architectural barriers . . . that are structural in nature," they do not require a business to "alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. § 36.307(a). The claimants point out the Department of Justice's Technical Assistance Manual addresses the installation of temporary hand controls for a rental car company. 28 C.F.R. § 36.304(b)(21). However, a rental car company is in the business of providing a service – the temporary use of a vehicle. A car dealership, on the other hand, is offering goods, and its vehicles are its inventory. From both a legal and a practical standpoint, this distinction is important.

A disabled individual requiring the use of hand controls would not be able to rent a vehicle under any circumstances without the installation of hand controls. Therefore, a disabled individual would be denied "full and equal enjoyment" of the "privileges and advantages or accommodations" offered by a rental car company if vehicles with hand controls were not made available. Quite to the contrary, an automobile dealership is in the business of selling cars (as its inventory); it is not a service business offering test drives. While a test drive may be a desired step in the selling process, a customer's inability to test drive a vehicle does not mean the customer has been denied the ability to purchase the vehicle. In fact, every day thousands of customers purchase vehicles without a test drive. Some vehicles are not kept in stock and must be ordered. Many customers might test drive one vehicle and order or purchase a different vehicle. In contrast to a rental car company, a person with a disability can readily gain full and equal enjoyment of the products offered by an automobile dealership without the dealership having to place temporary hand controls on each vehicle offered for sale.

A Dealership Is Different From a Laundromat

The plaintiffs also assert that having temporary hand controls is a necessity under the Department of Justice's Technical Assistance Manual (TAM) since it expands the definition of an architectural barrier to include "physical elements of a facility that impede access by people with disabilities." This appears to be a significant leap from

the statutory language of the ADA and the very noble purpose that it serves. The claimants base their argument on a portion of the TAM that states a public accommodation has the obligation, if readily achievable, to take measures, such as altering the height of equipment controls and operating devices in order to provide access to goods and services. The example set forth in the TAM pertains to removing barriers to allow access to washing machines at laundromats. Lowering controls and operating devices to allow disabled customers to use the equipment at laundromats is markedly different from installing hand controls on vehicles for sale at automobile dealerships to allow persons with a disability to test drive vehicles on the open road. Just like the rental car companies, laundry machines at laundromats are integral equipment used by customers at the laundry facility. The vehicles at an automobile dealership are finished goods for sale. If the ADA requires dealerships to install temporary hand controls would it require Best Buy to install lower controls on all of its laundry equipment it uses as displays?

Installation of Temporary Hand Controls Is Not a Reasonable Accommodation

Even if hand controls constituted structural architectural barriers (which would seem to be a departure from current jurisprudence), car dealerships should still not be required to install hand controls on every vehicle for test drives, as it would be prohibitively expensive and not a readily achievable accommodation.

There is no "one size fits all" temporary hand control device that would be safe and suitable for all persons with disabilities and appropriate for installation on all vehicles. There is a vast array of aftermarket adaptive products that are available to drivers with varying degrees and kind of disabilities. The National Highway Traffic Safety Administration (NHTSA) understands this fact and recommends that expert advice be sought and a set of steps be taken, unique to each individual, before an aftermarket device is added to a vehicle. Specifically, NHTSA recommends the disabled driver be comprehensively evaluated by a qualified physician, select the correct vehicle and aftermarket device on the basis of that evaluation of his or her disability, obtain the physician's consent regarding the device and vehicle to purchase, ensure that all modifications be performed by a qualified after market manufacturer and installer, and be specifically trained, on and off road, to safely use the installed adaptive equipment.

Moreover, the installation of these after market devices might cause other adverse consequences. The installation of these devices might damage the vehicle. The installation of the devices could render some of the other safety features of the vehicle inoperable. The device might reduce the efficacy of the airbags or the way the steering column is designed to prevent injuries. The installation of these devices might also void the manufacturer's warranty on the vehicle. Under the Federal Motor Vehicle Safety Act, 49 U.S.C. § 30122(b), a dealership is not allowed to install equipment that makes any part of a safety device or element of design on a motor vehicle in operative. In a 2001 report on hand control safety and usage, the U.S. Department of Transportation, National Highway Traffic Safety Administration noted; (1) section 4.21. prohibits "modifications to vehicle safety systems"; (2) that "[n]one of the tested hand controls passed the Environmental test"; and (3) "contrary to Section 4.2.1, we had to modify the knee bolster component of the occupant restraint system to accommodate the installation of the hand controls."

To require dealerships to install generic hand controls on each vehicle, new or used, offered for sale would greatly and adversely affect the operation of the dealership's business and expose it, the disabled community, and the general public to potentially dire and unsafe consequences. Operations would be negatively impacted in a range of ways. A dealership would be required to maintain on hand temporary vehicle hand controls appropriate for each make and model of each vehicle it sells. This would be nearly impossible considering the vast array of new and used vehicles that dealerships could sell. Dealerships would have to train employees and mechanics to safely install the myriad of temporary vehicle hand controls on each specific vehicle. Dealerships would have to place installation of the temporary devices on vehicles ahead of other work orders, delaying other revenue producing work. The installation of these devices might damage the vehicle, or void the manufacturer's warranty on the vehicle.

Even more importantly, the installation of these aftermarket devices might lead to potentially dire and unsafe consequences to the disabled driver as well as the general public. For example, the installation of the devices could render some of the other safety features of the vehicle inoperable. Specifically, the device might reduce the efficacy of the airbags or the way the steering column is designed to prevent injuries. Dealerships would have to assume the disabled consumer is capable of safely operating the specific vehicle with its specific hand controls on public streets and highways with a dealership employee or salesperson riding as a passenger. There is no guarantee the disabled driver would in fact have the experience necessary to safely operate the vehicle. Additionally, such a requirement would obligate the dealership to inquire into the extent of the customer's disability, an inquiry specifically prohibited by the ADA.

Temporary Hand Control Policies

So what should a dealership do? Policies vary among dealers about whether they install and allow test drives with temporary hand controls and whether or not they are required to do so under the ADA. Dealerships should consider the following when implementing such a policy: 1) the type of hand controls to have on hand; (2) the training of sales employees on the policy; (3) the training of employees on the installation of the hand controls; (4) whether such installation might void any manufacturer warranties; (5) whether the driver is licensed to drive the vehicle with the temporary hand controls;(6) whether the installation of the hand controls voids any insurance coverage; and (7) what types of questions can be asked of the driver. Until the courts provide clarity on the issue, best practices dictate implementing a policy that takes into account these business and legal risks. ■

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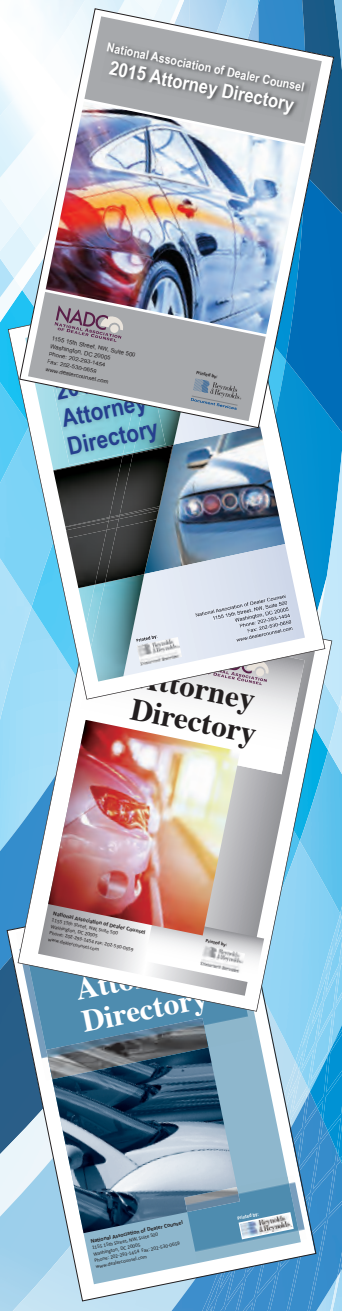

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Questions: Erin Murphy, emurphy@dealercounsel.com

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Jami Farris, Editor
jamifarris@parkerpoe.com

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

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