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Vital Signs

By Tom Hudson
Hudson Cook, LLP

My experience with dealers is that they tend to be, shall we say, frugal when it comes to spending money on F&I-related compliance. A full-blown review of all dealership F&I policies, procedures, documents and related matters can quickly run into real money, and while many dealers have come to the conclusion that such a review makes sense in light of the heat coming from the Federal Trade Commission, the Consumer Financial Protection Bureau, state attorneys general and plaintiffs' lawyers, many others have not seen a threat large enough to justify a large expense.

For these dealers who haven't seen the light, I sometimes recommend a deal jacket review. The cost of plowing through a half-dozen or so representative deal jackets is substantially less than a full compliance review. It can be a useful first step in identifying compliance problems and in convincing a dealer to undertake a more comprehensive effort. I tell dealers that it's a bit like a doctor checking your pulse, blood pressure, temperature and respiration. If something's amiss with one of those vitals, that's a symptom that something else – something more serious – might be going on.

What sorts of things do we find when we do these reviews? Here are a few examples.

Rubbish Bin Files. Do the deal jackets look like miniature landfills, jumbled messes containing all sorts of extraneous stuff that shouldn't be there? Each deal jacket should have a table of contents and checklist, and each

document listed in the table of contents should appear, in that order, in the deal jacket. Nothing that doesn't belong in the deal jacket should be there, and nothing that is required should be missing. If the files are a mess and contain everything, including the kitchen sink, it suggests that the dealership isn't organized, and that there is no (lawyer-approved) document retention program. It also means that the quality control imposed by the uniform organization of the deal jackets is missing.

Signatures Would be Nice. Many of the documents in the deal jacket constitute agreements of some sort between the dealership and the buyer(s). Usually these documents have signature lines with a space for a date, so that the parties can evidence that they have agreed to the terms of the document and when. It isn't unusual, in our experience, for these documents to lack a required signature. Even when the dealership representatives are diligent about having the buyer(s) sign documents, dealership signatures sometimes will be omitted. Unsigned documents can have dire consequences – the court refuses to enforce an arbitration agreement because the dealer didn't sign it, so the dealer's attempt to thwart a class action lawsuit is unsuccessful. The deal jacket table of contents might highlight all deal jacket documents that need signatures, another form of quality control.

Coloring Inside the Lines. Dealership computer systems are supposed to be programmed to print specific data entries in specific places on the various forms that are used

in the sales and financing transaction. You'd be surprised how often the strike points for printing are off enough to give the buyer's lawyer an argument that the disclosures are incorrect. "Close" doesn't cut it.

Contracts So Old They Are Written on Parchment. Buyer's orders, retail installment sales contracts and leases are not cast in stone. The companies that provide these forms to dealers frequently change the forms, and alert dealers when they do. Invariably, some dealers don't get the word, or choose to ignore the news in order to exhaust the supply of old forms on hand. That can lead to disclosure or substantive violations for every deal in which those forms are used. It's usually easy to check on whether a particular form is a vendor's latest iteration – either checking online or making a quick phone call can get you the form's most recent revision date.

Safe Harbor? What Safe Harbor? Some laws are complicated, and the regulators who enforce those laws are considerate enough to provide "safe harbor" versions of legal forms required by those laws. As an example, the FTC has published a safe harbor version of the privacy notice required by the FTC's privacy regulations. If I open a deal jacket and see a privacy notice that isn't in the safe harbor format, I know the dealership's F&I forms and processes are not receiving a lawyer's attentions.

One Form Too Many? One arbitration agreement is enough. Some dealers use a form of retail installment sale agreement that contains an arbitration clause, a buyer's order with a different arbitration clause and one or more documents evidencing the sale of ancillary products with still-different arbitration clauses. A judge looking at that sort of hodgepodge will likely throw up his hands and refuse to enforce any of the arbitration clauses, leaving the dealership without the protection from class actions when it is most needed.

Small Tricks and Traps. An outdoorsman tracking game can sometimes track an animal from the smallest hints – crushed grass here, a broken twig there. Likewise, a quick scan through the dealer's forms can tell you whether

a good lawyer has laid hands on them. Does the buyer's order contain the notice required by the FTC Used Car Rule? Is the notice conspicuous? If the dealer negotiates deals in Spanish, does the notice also appear in Spanish? Is the dealer's disclaimer of implied warranties in an "as-is" sale conspicuous? Is the notice required by the FTC's Preservation of Consumer Claims and Defenses Trade Regulation Rule in 10-point, bold-faced type?

These are just a few examples of the sorts of clues a deal jacket review will pick up. I'm

sure others could be added to this list.

Does the patient have a fever? Pulse rate high? Shallow breathing? Blood pressure off the charts? Maybe it's just a reaction to something the patient ate, but perhaps these are signs of much more serious health problems.

And if a dealer's deal jackets can't pass common-sense tests like the ones discussed above, you can be pretty sure that there are deeper F&I compliance problems that need to be addressed. ■



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President's Message



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

Should 2016 continue the way it started, it will be a very interesting year for the automobile industry and NADC. With regard to our industry, we started the year with continuing discussions regarding the Consumer Finance Protection Bureau and its future followed by concerns arising from a one-day FTC workshop. Entitled "Auto Distribution Current Issues & Future Trends," this workshop was held for the announced purpose of exploring competition and related issues in the context of state regulation of motor vehicle distribution and how these regulations affect businesses and consumers. Three of our members (Paul Norman, Aaron Jacoby and Rich Sox) participated in the workshop and capably presented the dealer's perspective. Unfortunately, many of us believed that the FTC workshop record, when considered as a whole, was far from objective. As a result, our Board of Directors encouraged NADC members to supplement the FTC workshop record with their comments. The activities of the FTC and the CFPB remind all of us of the need for NADC and the wisdom of our founders in creating an association of legal counsel who assist and support the nation's automobile dealers.

January also saw considerable activity at the NADC Board of Director and committee level. As you may know, NADC "contracts" its administrative and operational functions to an association management firm, Association Management Strategies (AMS). Annually, the Board of Directors does a performance evaluation of AMS and its employees who are assigned to serve us (Erin Murphy and Christina McGrath). As has been true in the

past, the Board members actively participated in the evaluative process. The result was many constructive comments and confirmation of the continuing satisfaction with our working relationship with AMS. It "passed" with flying colors.

The Board of Directors held its quarterly meeting by conference call on January 26th. We announced the results of the AMS evaluation project and also considered the survey responses received from the 2015 Fall Conference at the Trump International Hotel & Tower in Chicago. We also reviewed, in detail, and approved the 2016 NADC budget. The rest of the meeting dealt with our continuing efforts to provide new and added benefits to our membership. An update was given by the Database/Website Integration Project Committee charged with considering the unification of all of NADC's data into one system and integrating the website with this database. The Committee has agreed upon a potential vendor and has scheduled a meeting to preview various features and capabilities of the new website. Also, the Board heard about the progress made on the weekly News Alert Project. NADC has purchased the content curation software to aggregate the most relevant news items for members and have begun the process of identifying "keywords" and sources. The software would allow NADC to publish pertinent and timely content each week to a news site that would be integrated with dealercounsel.com. The content will also be sent to the membership in the form of a weekly newsletter. The trademark committee, headed by Ron Smith, has submitted a form policy to the Board for consideration and the registration of NADC's tradename and trademark has begun. Finally, the Board is continuing to develop new policies including document retention, conflict of interest and whistleblower.

Our close relationship with NADA continues into 2016. From March 31 to April 3, NADA will hold its annual Convention & Expo in Las Vegas, Nevada. In a past President's report, I mentioned that NADC

SEE US AT THE NADA 2016 Convention & Expo

Please visit us at the NADC Booth #512C during the 2016 NADA Convention & Expo, March 31 – April 3 in Las Vegas, NV.



has purchased a new, larger booth to be located in the exhibit hall. Several of us will be in attendance to discuss NADC's role in the automobile industry with NADA members. If you are planning to attend NADA and you are willing to assist NADC at our booth, please contact Erin to volunteer.

Last, but not least, the planning committee has been hard at work planning the 2016 Annual Member Conference (to be held from May 15-17) at the Four Seasons Resort in Palm Beach, FL. The planning committee (consisting of Johnnie Brown, Eric Baker, Diane Cafritz, Bruce Anderson, Tim Sparks, Ron Smith, Jami Farris, Jonathan Morrison, Kevin Hochman and me) has been spending time putting together a timely and relevant program. Programs will include the ever popular NADA update, top issues facing dealers, recent ADA compliance issues, the challenges of market share performance programs, the risk and rewards of dealership participation programs, dealer advertising issues in a digital world, structuring concepts to remove transaction road blocks, proving dealer damages in territory incursions and bank and finance company compliance management issues. I encourage you to make reservations sooner rather than later. This event promises to be well attended by our members. I hope to see all of you in May in sunny Florida. ■

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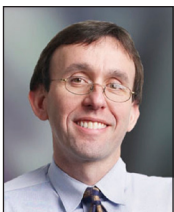
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Supreme Court Agrees to Review Automotive Dealership Service Advisors' Exempt Status Under FLSA

By Jonathan Crotty
Parker Poe

Retail automotive dealerships enjoy a special exemption from the overtime provisions of the Fair Labor Standards Act. Section 13(b)(10)(A) of the FLSA provides an overtime exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles..." For decades, automobile dealerships and the Department of Labor (DOL) have struggled with the application of the industry exemption to jobs which are similar but not specifically listed in the statute. These include finance and insurance sales, paint and body shop employees, and service advisors.

In a modern dealership, service advisors serve as liaisons between customers and mechanics. They provide estimates, arrange for loaner cars, and resolve problems with repairs or delays in repairs. Over the years, DOL has taken differing positions with regard to the exempt status of automobile dealership service advisors. In recent years, the agency issued an opinion letter stating that these workers do not meet the qualifications for the Section 13(b)(10)(A) exemption. Federal courts have largely disagreed with this interpretation, but last year in *Encino Motorcars, LLC v. Navarro*, the Ninth Circuit Court of Appeals deferred to the DOL opinion, concluding that service advisors fall outside the statutory overtime exemption.

On January 15, 2016, the U.S. Supreme Court accepted review of *Navarro*. The Court's decision should resolve the circuit court split and provide guidance on the scope of the automotive industry overtime exemption. Although the decision could limit its application to service advisors, a broad reading of the statutory exemption could prompt dealerships to extend exempt status to other related occupations.

The Section 13(b)(10)(A) exemption only applies to overtime and not minimum wage. Unless service advisors fall within another FLSA exemption (some dealerships classify service advisors as exempt commissioned employees), dealerships would be required to maintain accurate records of hours worked to assure that minimum wages are paid. Also, individual states have the ability to pass stricter laws applying overtime requirements to these employees. The Court should reach a decision in *Navarro* by late spring.

Jonathan Crotty heads Parker Poe's Employment and Benefits practice group and represents employers in all aspects of the employment relationship, from hiring to discharge. A partner in the firm's Charlotte office, Mr. Crotty provides guidance to employers as they navigate the complex array of laws and regulations applicable to the employment relationship, including employment discrimination laws, OSHA compliance, FMLA, and wage and hour matters. ■

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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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Get Ready — The Minimum Required Salary for an Exempt Employee is About to Double

By Jerry "Jay" L. Stovall, Jr.
Breazeale, Sachse & Wilson, L.L.P.

Feature Article

On June 30, 2015 the Department of Labor (DOL) issued its long-anticipated Notice of Proposed Rulemaking (NPR) updating the Fair Labor Standards Act (FLSA) regulations governing white-collar employees. There is still time for the NPR to be amended, so it is not yet the law of the land. The NPR is subject to a public comment period of at least sixty days and will probably not become effective until 2016. However, dealerships should be prepared for the proposed changes.

The FLSA requires that all non-exempt employees be paid time and a half their regular rate of pay for all hours worked over forty in a work week. Specific exemptions to this overtime requirement include executive, administrative, professional, outside sales and some computer employees. The two key components of the exemptions are: 1) the employee must be paid on a salary basis of at least a minimum amount; and 2) the employee's job must generally be comprised of

exempt duties. Thus, we have traditionally referred to the "salary" and "duties" tests when discussing white collar exemptions. Both tests must generally be satisfied in order for an employee to be classified as exempt.

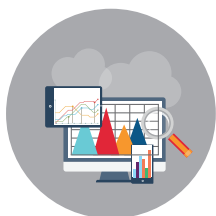
The minimum salary required under the "salary test" has been \$455 per week, or \$23,600 per year, for many years. Under the NPR, the minimum required salary will increase to the 40th percentile of weekly earnings for full-time salaried workers as reported by the Bureau of Labor Standards. This amount is currently approximately \$921 per week or \$47,892 per year, and it will increase to \$970 per week or \$50,440 per year in 2016. Since the minimum salary will now be tied to BLS data, employers should expect it to increase every year.

Under the former rules, employees making more than \$100,000 per year were classified as "highly compensated," and they qualified for the exemption regardless of their duties. Under the NPR, this amount will

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increase to a minimum of the 90th percentile of earnings of full-time salaried workers, which is currently approximately \$122,148. Although many commentators expected the NPR to also propose modifications to the “duties” tests, and hoped that the DOL would offer us some clarity on this issue, it has not yet done so.

Dealerships should begin to plan for a significant increases in the amount of salary they must pay their exempt employees in order to maintain their exempt status or convert them to hourly, nonexempt status. In some instances, it may make more sense to raise an employee’s salary above the minimum level rather than convert them to a non-exempt classification and pay them overtime. Either way, this NPR is going to become law in some form in the relatively near future, and it will require dealerships to make significant changes to the way that they classify and compensate many of their employees. ■

Jerry L. Stovall, Jr. concentrates his practice in the areas of labor & employment law, corporate formation, business, corporate and fiduciary litigation. Mr. Stovall represents individuals, private employers and public entities. Mr. Stovall is a frequent speaker, author and trainer, primarily in the areas of labor & employment law.



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- NADA Update
- Top Issues Facing Dealers Today
- ADA Compliance – The Store, The Website and The Test Drive
- Lunch and FTC Workshop Discussion
- Compliance Management Systems from the Financing Perspective: What are the Banks / Financing Companies Really Having to Do?
- Structuring Concepts to Remove Transaction Road Blocks
- Managing the Risks and Rewards of Dealership Participation
- Programs for VSC and Ancillary Products
- Trial Presentation of Market Share Performance Challenge: A Case Study from a Farm Equipment Dealership Termination Jury Trial
- Proving Dealer Damages in Territory Incursions
- New and Developing Issues in Dealer Advertising

Agenda topics are subject to change.

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Travel Plans: Please arrange your travel to join NADC at the opening cocktail reception on Sunday, May 15 from 6:00 – 7:30 pm. The conference will conclude on Tuesday, May 17th at 2:30 pm. Only a select number of rooms are available pre and post the meeting dates. Please make your reservations today to secure additional dates if available.

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