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The Defrauder

By Shari Patish, *Hall Automotive, LLC*

Eventually every dealer will be victimized by a "Defrauder" masquerading as a customer. The best protection is to be aware, proactive in prevention, and respond appropriately.

Making your dealer client aware of the goals and common techniques of Defrauders is the first step in protecting their dealership. The Defrauders goal is to leave the dealership with a vehicle. They often don't care about the type of vehicle, how long the tags will be good, or how long it will take the dealer to discover the fraud. Some will either export the vehicle as a whole or break it into saleable parts. Some will use the vehicle for their own transportation or sell the use of it to others and then abandon it for an alternative as soon as they feel the pressure of the dealer's recovery attempts.

Today's Defrauders are very educated. Dealers put their inventory online where Defrauders can pre-select what they know they can profit from and track the aging to gauge how eager you will be to move the vehicles. They know sales staff have sales goals and that pressure increases at the end of the month, quarter, or year. They know Dealers have less opportunity to verify information in the evenings and on weekends. They know Dealers have less staff to offer support early in the morning and what times of day staff are too busy to have time for proper review of their deal. They know the sales

processes, what questions the staff will ask, and what documents the dealer will request so they will have answers and documents ready. They even know what products to buy in order to entice the Dealership into a deal it might not otherwise approve.

The internet is full of websites that have made the Defrauders job easy. In the past, fraudulent pay stubs were easy to spot when they didn't contain the names of legitimate companies or the math didn't add up, and there are still some of those out there. But now, Defrauders can go online to websites and pay \$9.99 to create a legitimate looking pay stub. They enter a company name and address, wages, and deductions, and the website does the rest. The same is true for W-2s and 109's. Defrauders will commonly give sales staff copies of stips instead of original documents. Copies of utility bills, rental agreements, insurance cards, and others are easy for the computer literate thirteen year old to modify online, much less an experience Defrauder. And there is still the professional identity thief out there who will use someone else's identity and good credit to defraud your Dealer client.

The best prevention is training. Aside from knowing the goals and techniques here, Dealers should train their staff on common indicators of fraud. A Defrauder will likely have no

Disclaimer: The *Defender* articles do not constitute legal advice and are not independently verified. Any opinions or statements contained in articles do not reflect the views of NADC. Cases cited in articles should be researched and analyzed before use.

investment in the deal. They will have no trade vehicle, have no sales or service history with the Dealer, have minimal down payment often paid by starter check, and will not spend much time negotiating the vehicle price. They walk away leaving nothing behind and the Dealer will have nothing as well. Train sales staff to review slips for both the form of the document and the information contained. Train sales management to compare the slips with the credit application to be sure they verify what the customer has asserted. Train F&I personnel to compare the credit report with the credit application for common discrepancies like date of birth, date of issuance of social security number, and place of employment, as well as the inquiry history.

Despite using best practices, your Dealer client WILL get hit by a Defrauder and often their response will determine if they have a problem or a nightmare. Make them aware of the statutory and contractual remedies available in their state as well as the “MUST NOT” tactics. Does their contract with the customer permit self-help to recover the vehicle or is court action necessary? It is always a best practice to use a professional repossession agent instead of Dealership personnel to recover a vehicle when permitted. A good credit application will have an affirmation of accuracy signed by the customer that will be helpful in make allegations of criminal fraud or obtaining credit under false pretenses should your dealer decide to pursue the Defrauder with criminal charges. Dealers should be aware of their lender agreements and know which ones have recourse provisions. Educate F&I managers so that they don't use those lenders when delivery is a close call. When entering into lender agreements, your Dealers should be sure they are warranting information obtained from the customer as accurate “to the best of their knowledge.” This, and exercising due diligence, will prevent a lender from turning to the Dealer for indemnification from the best Defrauders. Suggest the Dealer designate someone at the dealership level to take and distribute fraud alerts that come from management, related dealers in a group, their local Dealer

Association, and local law enforcement. Have both an immediate distribution method for those frantic calls from Dealer staff as well as review in daily or weekly sales meetings.

Finally, here is a warning: Not all Defrauders have committed a criminal act, so caution your Dealers about making hasty accusations. Losing a vehicle to a Defrauder can be costly, but a badly handled customer can be a public relations nightmare and severely damage your Dealer's reputation. Caution your Dealers not to allow frustration and embarrassment

to be factors in determining their response. Thoughtful review of both the actions of the Defrauder and the Dealer staff should determine their response. Deals drive your Dealer's staff and that often creates competing interests between meeting sales projections and protecting the Dealership's assets. Urge your Dealer to get behind a good fraud prevention program, and it will bridge that gap. ■

Shari Patish is Corporate Counsel for Hall Automotive, LLC.



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NADC Member Announcements

In June of 2016, DHG Dealerships officially welcomed former IRS Motor Vehicle Industry Specialist, **Terri Harris**, to the firm. Having spent more than 28 years with the IRS, 15 of which were spent leading the Motor Vehicle Industry Program, the IRS looked up to Terri as the organization's number one industry expert. DHG Dealerships Managing Partner, Tim York, calls Terri's strategic addition to the firm's national dealership group "and indication of notable and impactful strides towards the continued development and maturation of [DHG Dealerships'] tax practice."



Do you have an announcement or accomplishment that you would like to share with the NADC community? Please send any news that you would like to share to emurphy@dealercounsel.com.

Updated Member Contact Information

Please make sure to notify NADC Staff (info@dealercounsel.com) if your contact information has changed so that your records can be updated accordingly. We will begin to list updated contact information in *The Defender* so all members can be aware of the change.



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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 Radisson Blu Aqua Hotel in Chicago, October 23-25, 2016. For the fourth 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 schedule is as follows:

SUNDAY, OCTOBER 23

3:00 to 5:00 pm	Board Meeting
5:30 pm	New Member Reception
6:00 to 7:30 pm	Reception

MONDAY, OCTOBER 24

7:00 to 8:00 am	Breakfast
8:00 to 8:15 am	Opening Remarks
8:15 to 9:45 am	Session 1: Litigating and Preparing for Sales Performance, Price Discrimination and Facility Cases after Beck Chevrolet Chris DeVito, <i>Morganstern, MacAdams & DeVito</i> Russ McRory, <i>Arent Fox</i> Joe Roesner, <i>Fontana Group</i>
9:45 to 10:15 am	Break
10:15 to 11:15 am	Session 2: Succession Planning Andrew Dana, <i>Parker Poe Adams & Bernstein LLP</i> Richard J. Kollauf, <i>BMO Harris</i>
11:15 to 11:45 am	Break
11:45 am to 12:45 pm	Session 3: Obama Administration Swan Songs: DOL "White Collar" Overtime Rule, DOL Persuader Rule, OSHA Electronic Reporting Rule, and Encino Motorcars Lauren Bailey, <i>NADA</i> Doug Greenhaus, <i>NADA</i>

12:45 to 2:15 pm
2:15 to 3:15 pm

3:15 to 3:45 pm
3:45 to 4:45 pm

5:00 to 6:30 pm

TUESDAY, OCTOBER 25

7:30 to 8:30 am	Breakfast
8:30 to 10:00 am	Session 6: NADA Update Andy Koblenz, <i>NADA</i> Paul Metrey, <i>NADA</i>
10:00 to 10:15 am	Break
10:15 to 11:15 am	Session 7: Recent Developments in "Digital" Issues Affecting Dealers Adam Crowell, <i>Premier Data Management</i> Steve Gibson, <i>Dealer Risk Services</i> Brad Miller, <i>NADA</i>
11:15 to 11:30 am	Break
11:30 to 12:30 pm	Session 8: Ethics - Malpractice Primer for Dealer Counsel Don St. Denis, <i>St. Denis & Davey</i>
12:30 to 12:45 pm	Closing Remarks

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 will be available for the 540 minutes (including 60 minutes of ethics) of educational program pending approval in your state (9 credits for states that calculate 60 minutes per credit; 10.8 for states that use 50 minutes per credit). Checkout the NADC website, www.dealercounsel.com for a detailed agenda and to [Register](#).

See you in Chicago!

Lunch

Session 4: Rising Stakes: The Importance of Real Estate in Auto Retail Transactions

Ryan Kerrigan, *Kerrigan Advisors*

Gabe Robleto, *CARS*

Jay Statland, *Burke, Warren, MacKay & Serritella, P.C.*

Break

Session 5: Buy Side vs. Sell Side – Let the Negotiations Begin!

John Davis, *DHG Dealerships*

Alan Haig, *Haig Partners*

Reception

Hotel Information

Reservations must be made directly with The Radisson Blu Aqua Hotel [online](#) or by calling (312) 565-5258. Reference the 2016 NADC Fall Conference (**Online promotional code: NADC16**) to receive our discounted rate of \$279 plus tax. Only a select number of rooms are available pre and post the meeting dates. Please call the number above to check the availability and to secure additional dates if available.

The room block deadline for hotel reservations is **October 3, 2016**. Make your reservation early to avoid the room block selling out.

[Reserve your room now!](#)

The hotel deposit will be refunded if notice of cancellation is received at least three (3) working days prior to arrival, and a cancellation number is obtained.



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Mobile Device Privacy Considerations for the Retail Automotive Industry

Feature Article

By Sarah Hutchins, *Parker Poe Adams & Bernstein LLP*

The use of mobile devices in the workplace, including cell phones, tablets, and other devices, has generated significant risks for all employers, both in terms of data security and of litigation strategy. Access to these devices is an expected and important aspect of modern business where fast communication is highly valued. Mobile device ownership, either individually or through an employer, is the norm. As of October 2014, 64% of Americans owned a smartphone, each being one of many different varieties and operating systems.¹ A recent study found that over 80% of organizations' employees use mobile devices for work matters on a regular basis² and over 30% of work-related documents are created through mobile devices.³

The automobile industry is not immune to this issue. Especially given the number and degree of turnover of employees, an automobile dealer's ability to manage the influx of devices used for work purposes can require a significant investment in asset management or security infrastructure to protect the organization from potential financial risks resulting from legal sanctions or data breaches. Advising dealership clients on the security of data, both internally among affiliates, and to protect against external threats, will be imperative. The following considerations are some of many that an attorney must consider when addressing mobile device policies for auto-industry clients.

Perform an Initial Assessment

Attorneys should ensure that any dealership clients first conduct an initial assessment of the state of their security systems, policies, and device policies (or lack thereof). To perform this assessment, the attorney should gather together members of company management, IT, Human Resources, Physical Security, Legal and any required external vendors to flesh out the organization's mobile device management status and requirements. First, review goals, then review current capabilities. As dealerships better understand their capabilities, they may begin to see immediate risks, such as data loss from a departing sales person or other employee. These immediate risks can become action items that must be addressed before a complete long-term strategy can be enumerated.

Device Policy: COPE and BYOD

Developing a general mobile device policy framework for your dealership client is an integral first step. The two most common frameworks are Bring Your Own Device ("BYOD") policies and Corporate Owned-Personnel Enabled ("COPE") policies. BYOD

policies are currently more popular than COPE policies with 75% of employers allowing employees to BYOD to work.⁴

In the BYOD model, a dealership does not provide the actual device but will subsidize or reimburse an employee for his or her usage of the device for work matters. The user/employee obtains the device directly through the retailer of their choice and then seeks reimbursement from the organization for any work-related usage on the device. In the recent case of *Cochran v. Schwan's Home Service*, 228 Cal.App.4th 1137 (Ca. 2014), the court found that an employer must reimburse the employee for a reasonable percentage of the cell phone bill if the employee is required to use his or her personal cell phone to make work-related calls. BYOD policies allow the employee flexibility in type of device and replacement schedule. For dealerships, the significant benefit is the resulting lower technology costs required to purchase, replace, upgrade or maintain the devices. BYOD policies should clearly spell out all parties' expectations as to employer and employee privacy and access to confidential information. Without controls, BYOD policies for mobile devices add a greater chance of data spoliation and of inadvertent or intended internal theft of company data.

COPE differs from the antiquated process of simply assigning company-issued phones and devices to employees, and instead allows employees to select devices best suited to their needs from those devices available through their dealership's mobile device policy. COPE can encourage more collaboration among departments to ensure proper control of the data that lies within employee devices. For example, it is easier for IT to implement mobile device management software and other security measures to help with data security and data breach risks. COPE can result in increased technology costs for organizations as they become responsible for the purchase of both the devices and their services along with their continued maintenance, replacement and storage.



Mobile Device and Use Policies

Whether you advise that a dealership adopt a BYOD or COPE policy, it is also important to institute a corresponding Mobile Device Policy, which may include use of a Mobile Device Management (“MDM”) tool. MDM can include software that restricts use or allows remote deletion. Initiating the use of mobile device management software should be done with explicit explanation of the features, informed consent, and a retained written acknowledgement by the employee. You should advise a dealership whether to limit access to company data to employees who agree to the policy and should encourage the removal of company data from devices out of compliance when not in use or pursuant to the policy. Your client should be able to identify the location of any potentially relevant data and preserve a method of accessing it.

Importantly, if a dealership removes data from devices that are out of compliance, it should be through documented and defensible processes, specifically with an eye towards potential future litigation.

When providing advice, other more general computer use policies should not be overlooked. Organizations should consider general computer use policies to establish proper use and security practices for all dealership-owned devices, as well as other devices that are allowed access to dealership information and data. Active written acknowledgment of said policies and procedures, as well as renewed trainings and repeated communications about approved use, will help reinforce these policies.

Robust Security Practices

When drafting any policy or advising your client, it is important to employ (and practice) robust security. Established and enumerated policies around personal information security can help mitigate potential breaches. These policies should meet the established requirements found in federal and state statutes.

Through a third-party mobile device management tool, a dealership should implement features such as remote wipe and remote lock requirements, allowing the organization to wipe or lock down a phone if it is lost or stolen. MDM tools can also allow for a “jailbreak alert” that notifies IT and Legal if an employee attempts to override an operating system to access restricted data. Malware detection is also important for mobile devices. Additional features should include a required physical passcode on the device and encrypted backups that prevent the imaging of the device without an administrative password. Make sure your client considers if it will allow access to company information from unsecured networks. Enumeration of expectations when an employee wishes to upgrade a device should also be in place.

It is very important that your client contemplate protection of sensitive business information. Though protection of all information should be described, it may be prudent to single out sensitive information for protected treatment during the life of the device and destruction upon the end of the employment relationship or termination of the device. Such information can include customer

information, financial information, legal information, or other confidential business information.⁵

Employees should understand these policies, acknowledge their application in writing, and appreciate their importance.

Weigh Privacy Concerns

While focusing on security of company data and ability to review employee use, advise your client to be mindful of employee privacy and note applicable restrictions on the review of employee personal information. The Computer Fraud and Abuse Act and the Stored Communications Act may prohibit a dealership from accessing (or exceeding their authorized access to) employee’s private information on their privately owned device.⁶

Dealerships are best served by limiting their review of personal information, even if they preserve their right to access it. Though courts have been skeptical of over-reach, some review in certain jurisdictions has been permitted. Courts continue to refine where the line of personal and company begins and ends.

Remember that if your client requires usage of devices, either provided or owned by the employee, that dealership should ensure that they are not in violation of the Fair Labor Standards Act or the Wage and Hour Act by allowing off-hours work access. Note that applicable rules and regulations concerning employee rights and privacy can vary greatly by geographic location.

Data Breach Protocol

Post-data breach is not the time for your client to develop a response plan. Help the dealership plan ahead and develop a plan with the response team, which should include IT, Legal, Human Resources, outside vendors, crisis response management, and public relations. Become familiar with relevant data security and data breach notification and remedy law applicable to your client’s business and geographic location. Almost every state has some statute or regulation addressing notification in the event of a breach.⁷ In almost all circumstances, time is of the essence. Make sure that your client’s employees are aware of a duty to notify the dealership of a loss or theft of a device. Failure to enforce security policies may be cited to by plaintiffs or the Government in the event of a breach. Finally, ensure that your client has data breach insurance.

Help the Dealership Plan for Employee Departures

Advise your client to develop an employee departure strategy that includes a detailed data interview listing all potential locations of company data, a written procedure on the defensible deletion of data from personal devices once it has been properly preserved, and the protocol for how to dispose of or retain the original source device (*i.e.*, keeping a forensic copy of the data off of a mobile device before wiping and reissuing the device for further use) after an employee has departed. Finally, ensure that your client instructs its employees of what they must do before disposing of a device that has access to

company data and email. Ensure that the plan addresses upgrades to phones and contains a destruction plan for the old device or at least provides the employer with access to the device to delete any confidential information before the phone is sold or repurposed. Include data security and review as part of the exit interview process when an employee leaves an organization.

Data and Litigation

The prevalence of mobile devices has not only complicated a company's data security protocol, but also it has added complexity to the discovery process if a company finds itself in litigation. Mobile devices have increased the number and variety of locations from which a litigant must collect information. Companies must now also incorporate mobile devices into their data retention plans.

Under the Federal Rules of Civil Procedure and in many states, Rule 34 requires the production of information and materials in the litigant's "possession, custody, or control." Some circuits, including the Ninth Circuit, require litigants to produce information it has the right to demand.⁸ Other circuits impose a higher burden and require a party to produce material it can demand as well as the "right, authority or practical ability" to obtain from a non-party.⁹ Finally, some jurisdictions go a step further and require the litigant to notify an adverse party of additional information that may be in the hands of a third party.¹⁰

Depending on your client's location or location of its employees, access to data may be limited by interpretation of various federal regulations, including the Computer Fraud and Abuse Act that prohibits unauthorized access to protected devices or the Stored Communications Act that protects the privacy of certain stored communications such as on servers, or state regulations.

Help your client plan for other issues involving data and litigation. Review in detail how legal holds will be implemented and what expectations employees should have once included as part of a legal hold. Develop a defensible deletion policy so that the organization is not required to maintain all potential data.

Data security, especially that of mobile devices, should be a focus for all industries, including the automotive industry. As advisors, it is important for attorneys to be versed in data security issues so as to assist their clients on setting up the best possible defenses and plans to avoid common pitfalls. ■

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3. Osterman Research, http://www.ostermanresearch.com/whitepapers/orwp_0213.pdf; <http://www.slideshare.net/informationsecurity/byod-mobile-security-report>.
4. <http://www.techproresearch.com/downloads/wearables-byod-and-iot-current-and-future-plans-in-the-enterprise/>.
5. For more information on protecting a business' confidential information and trade secrets, please access *Avoiding Competitive Landmines—Confidentiality, Trade Secrets, and Competition Concerns in Business Entry and Expansion*, a webinar in the Parker Poe Presents series, located at <http://www.parkerpoe.com/practices/international-business#tab/leadership>.
6. For more information on the Computer Fraud and Abuse Act, see "Fighting Theft Of Company Data Through The CFAA," *Law360*, New York, July 16, 2010.
7. See e.g. N.C. Gen. Stat. § 75-65.
8. See "The 'Bring Your Own Device' to Work Movement: Engineering Practical Employment and Labor Law Compliance Solutions," at 19, *The Littler Report*, May 2012; see also *Gerling Int'l Ins. Co. v. C.I.R.*, 839 F.2d 131, 140 (3d Cir. 1988).
9. *Id.*; see also *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 515 (D. Md. 2009).
10. *Id.*; see also *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010).

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