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On Moral Certainty

By Jonathan P. Harvey, Esq.
Jonathan P. Harvey Law Firm, PLLC

It has been fourteen years since the National Association of Dealer Counsel began, and nearly that long since publication of a Defender message about our obligation to act with integrity and honor, and in so doing, to set an example for our clients. Automobile manufacturers have produced significant technical advances since then, and although that is a good thing, it is surely a matter of great concern that multiple manufacturers have not acted with integrity and honor.

I write not of manufacturing defects which happen in the best run companies, but rather of the proliferation of inexcusable and morally unacceptable behavior in the design and sale of vehicles and in the testing of products. More challenging is the worrisome notion that the public appears to take this conduct in stride. Consider a manufacturer and supplier participating in the design and concealment of an emissions-rigging control system which disengages except during compliance testing. What inference must we draw about the moral obligations of our society? It is clear that this illegal "defeat device" appeared in a significant sector of the industry, resulted in multi-billion dollar fines, customer payments, buy-backs, criminal prosecution, and pleas of guilt. This bad conduct seems to be today's message, and

it is not one that society at large ought to be sending. No one can possibly argue that lies, concealment, and fraud are acceptable in the market place, or anywhere else.

You may wonder what this bad conduct has to do with us, and so I remind you of The Old Curiosity Shop in which Dickens wrote, "If there were no bad people there would be no good lawyers." We must, when faced with bad conduct, remember, "what the lawyer does is to establish, develop or illuminate rules which are to govern the conduct of men for centuries; to set in motion principles and influences which shape the thought and action of generations which know not by whose command they move." Oliver Wendell Holmes, Answer to Resolutions of the Bar, Boston (Mar. 23, 1889). This year marks the 90th anniversary of Chief Judge Cardozo's opinion in *Meinhard v. Salmon*, 249 N.Y. 458, 464-65, 164 N.E. 545 (1928), a case involving the conduct of joint adventurers, about whom the Judge wrote: "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the

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.

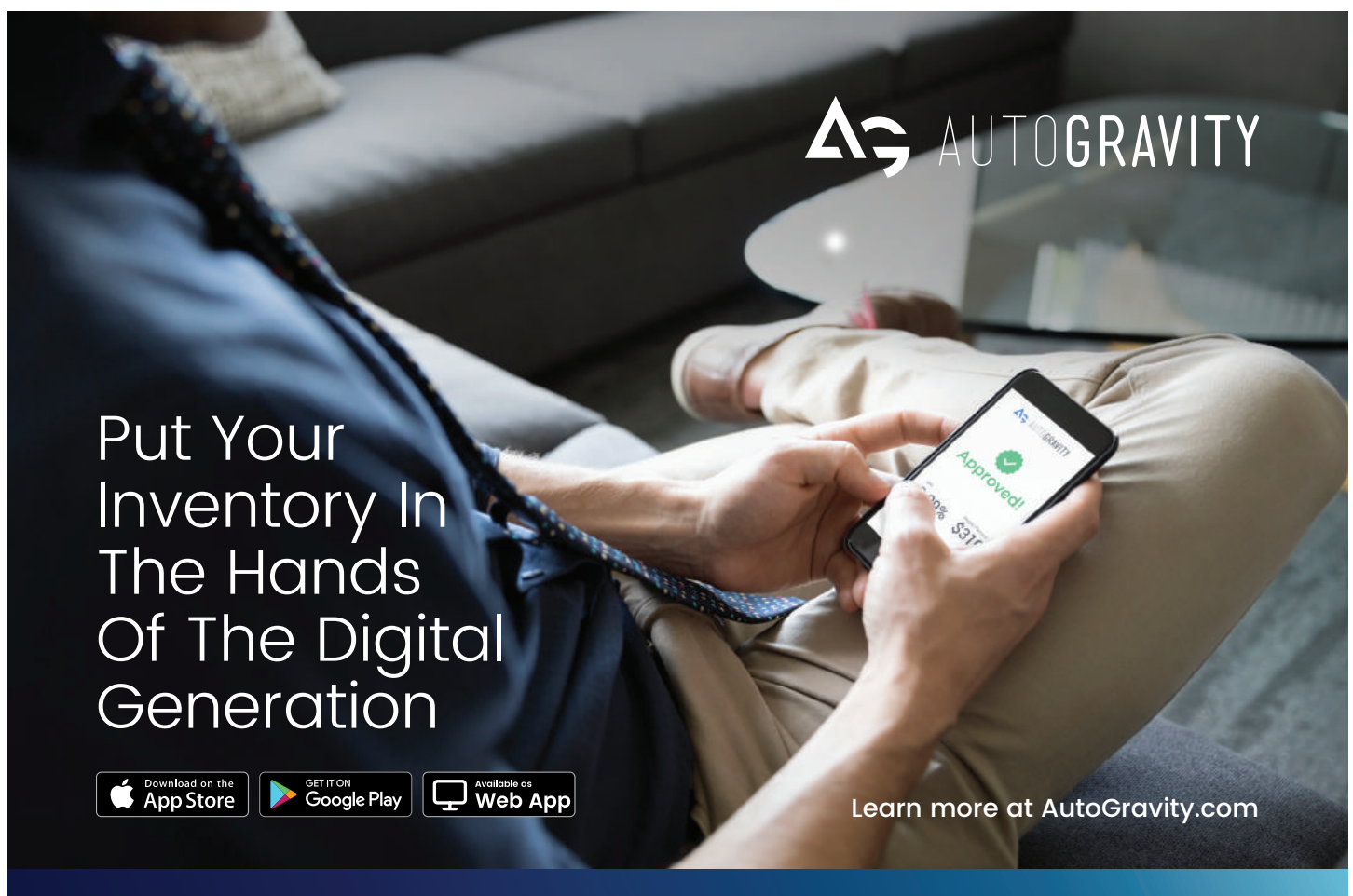
market place. **Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.**" (emphasis added).

No doubt, critics of this reference to *Meinhard v. Salmon* might argue that auto manufacturers and their franchised dealers are not joint adventurers or copartners, or that manufacturers do not owe a fiduciary duty to their dealers or the car buying public. That might be legally accurate, but it ignores the natural moral obligation. Consider *Manhattan Motorcars v. Lamborghini*, 244 F.R.D. 204, 215 (S.D.N.Y. 2007), in which Southern District of New York District Judge Shira A. Scheindlin wrote regarding relations between plaintiff dealer and Automobili Lamborghini, "Nevertheless, 'a distributorship agreement may, in some rare instances, create a confidential relationship out of which a duty of fiduciary care arises.'" (citation omitted). Scheindlin, like Cardozo, held, "A fiduciary is obliged to exercise the 'highest degree of good faith, honesty, integrity, fairness and fidelity' in its dealings with those to whom the duty is owed." *Id.* (citation omitted). In refusing to dismiss the plaintiff's breach of fiduciary duty cause of action against Lamborghini, the Court found that the plaintiff dealer pled circumstances sufficiently extraordinary to allow its claims for breach of fiduciary duty to proceed. The decision was not appealed.

There is a moral imperative argument that a manufacturer's rigging of an emissions control system, with the resulting mischief

to dealers, owners and the environment, is a breach of that manufacturer's obligation to its dealers, and to the public, separate from contractual, statutory, or criminal violation. It cannot be argued that this manufacturer rigging scandal constituted good faith, honesty, integrity, fairness, and fidelity, nor can such transgressions be whitewashed or sugar coated.

Following closely on the heels of the "diesel cheating scandal" came the allegations of a worldwide price fixing scheme involving multiple manufacturers whose employees are alleged to have "conspired to limit competition, fix prices, and compress the profit margins" of dealers. See Complaint, *Estate Motors, Inc., et al. v. Mercedes-Benz USA, LLC, et al.*, Civil Action No. 17-cv-8400 MCA/MAH, U.S. District Court (filed Oct. 16, 2017 for the District of New Jersey). Next, there is the recent disclosure of manufacturer-financed testing of diesel emissions on human beings and animals, about which Volkswagen Chairman Hans Dieter Pötsch said he would "do everything possible to ensure that this matter is investigated in detail. Whoever is responsible for this must of course be held accountable." Ivana Kottasov, *Volkswagen suspends chief lobbyist over exhaust tests on monkeys*, www.money.cnn.com (Jan. 30, 2018). Reuters wrote that this emissions study was designed to defend diesel engine technology following revelations that the fuel's exhaust fumes were carcinogenic. The Chairman's



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response regarding responsibility and accountability fell short and ignored his and his company's moral obligation to have acted with a sense of conscience in accord with natural justice.

About the anti-competitive price fixing cases, it was reported in *Der Spiegel* on July 21, 2017 that "there was a conspiracy of shocking depth, scope, duration and magnitude among members of Germany's powerful automotive industry." See Complaint, *Estate Motors, Inc., supra*. It was also reported that there were manufacturer admissions of multiple meetings over twenty years among representatives of five different manufacturers to coordinate this decades long scheme. Frank Dohmen and Dietmar Hawranek, *Collusion Between Germany's biggest Carmakers*. www.spiegel.de (July 27, 2017). In another context, Reuters, quoting *Der Spiegel*, wrote that certain manufacturers "may have colluded to fix the prices of diesel emissions treatment systems using industry committees." *German carmakers may have colluded on diesel systems: Spiegel*, Reuters Business News (July 21, 2017). In 2016 the European Commission fined certain truck manufacturers for price fixing. And, on July 4, 2016, Volkswagen is alleged to have filed a voluntary declaration with the European Commission and the German Federal Cartel Office admitting that it had participated in antitrust violations. See Class Action Complaint, *Anthony Hughes,*

Individually and on Behalf of All Others Similarly Situated v. Volkswagen AG, et al., Case No. 2:17-cv-6588, U.S. District Court for the District of New Jersey (Aug. 31, 2017).

And so we ask, must dishonesty, concealment, and trickery be the gold standard? Is today's business world irredeemably toxic? Must the pursuit of wealth be the ultimate trump card? Have we all forgotten the sign on President Truman's desk? My answer to each of these questions is "No." I believe and urge you to believe that inch by inch we can and will set in motion those principles and influences about which Holmes so eloquently spoke. In each matter for which we are engaged, let us insist upon the highest ethical standard and act with integrity, honor and conscience. This then will be our history, our path, and our legacy. ■

Jonathan had the idea for and is a founding member and first President of the NADC. He practices law in upstate New York and concentrates on advising high line dealerships and their owners. He and his wife Margaret have an oceanfront cottage in Gloucester, Massachusetts where Jonathan successfully races RESOLUTE, his wooden Herreshoff Special Class sailboat designed in 1914.



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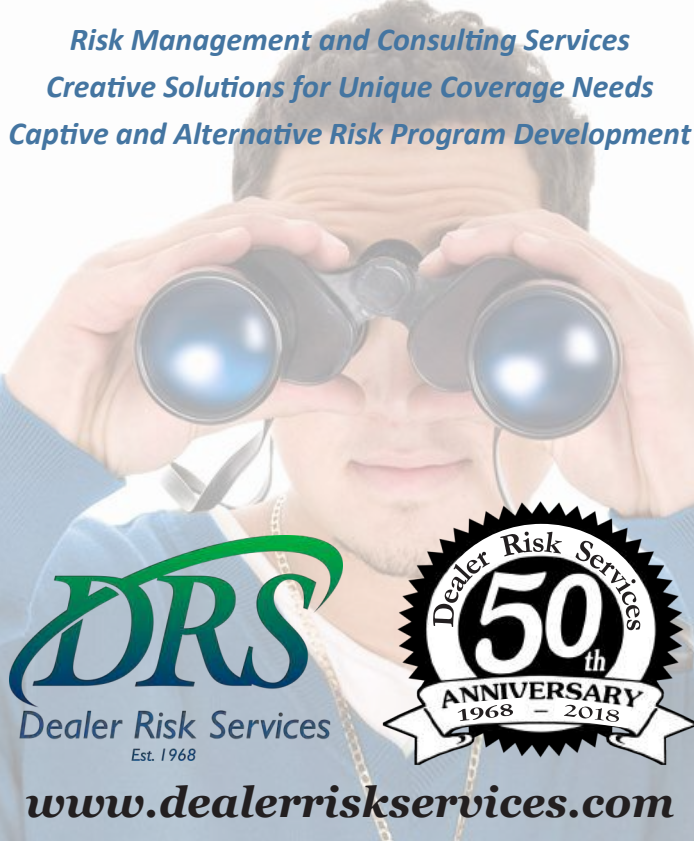
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Officer's Message



Jami Farris
Parker Poe
NADC Treasurer

Despite having the weather force an unexpected change in plans, the NADC selected another amazing location for the 2018 Spring Conference. From what I hear, the Ritz in Naples is unparalleled, and the golf options are certainly better than Miami!

The NADC Planning Committee, consisting of Andrew Weill, Scott Silverman, Oren Tasini, Eric Baker, Michael Dommermuth, Deborah Dorman, Donald Gould, and Ronald Smith, has assembled an all star lineup of presenters and topics for when you are not enjoying the Naples amenities. The meeting starts off with a bang with Andy Koblenz and Paul Metrey providing the latest updates from the NADA. We are fortunate to have access to these gentlemen and to have the most timely information to use in advising our automotive clients. Eric Chase and Michael Charapp will expand on Eric's January Defender article, outlining the major legal issues for the automotive industry in 2018. They will also reflect on what actually happened in 2017, and how accurate Eric was in his predictions. (I would not bet against him!)

As the NADC listserv reflects, TCPA Compliance is one of the hottest topics and one about which there is little clarity. Michele Shuster, the former Chief to the Ohio Attorney General's Consumer Protection Service, and her colleague Adam Todd will provide unique insight from other sides of this issue - the enforcers and those struggling to comply. This presentation is a great example of NADC members bringing back ideas for the good of the group. Michael Dommermuth and I had the opportunity to hear Michele present on this topic at the NADA Annual Meeting in New Orleans in 2017. Michael suggested Michele present at an NADC conference. The Planning Committees are always looking for new, timely topics and new speakers. Please let us know if you run across an opportunity.

Two presentations deal with timely issues in the employment area. Doug Greenhaus and Lauren Bailey, also with the NADA, will provide insight on the Trump administration's Labor Policy and what to expect this year. Erin Tenner, Timothy Davis, and Shirley Wang will update the latest legal trends in sexual harassment claims and how to prepare and defend our dealer clients. As the MeToo movement continues to gain momentum, we can certainly anticipate the automotive industry will not be immune.

Oren Tasini, Alisa Reinhardt, and Jonathan Tsarong-Blomker will apprise of new trends in vehicle technology and what challenges



2018 NADA Show Best Booth Awards

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and opportunities it presents for our clients. Also in the tech realm, cybersecurity is another issue our clients have to face on a daily basis, and the technology continues to change. Thomas Wojcinski and Michael Mader will speak on effective methods to manage this continued risk.

Several presentations are on topics that are near and dear to our clients' hearts – making and keeping money. Patrick Anderson and his colleague Cristina Benton will present on protecting their market and increasing profits. A large panel will help us navigate tax reform. Russ McRory, Joe Roesner, and Todd Milbury will provide a "primer" on conditional incentives.

In addition to gaining valuable knowledge on the current issues facing dealers and getting CLE credit, I also look forward to spending time with the membership. I appreciate the fact that if I have a client with an issue in other states, I have colleagues who are experts in the field who are willing to help. More importantly, I have made friendships which will last well beyond NADC. ■



NADC Welcomes New Members

Full Member

Carol Crossett

Tully Rinckey, PLLC, *New York, NY*

Fellow Members

Christian Claude Dorismond

Off Lease Only, Inc., *North Lauderdale, FL*

Jonathan Haist

CarMax, Inc., *Richmond, VA*

Greg Sperla

Scali Rasmussen, *Sacramento, CA*

Debbie Vesco

Earnhardt Auto Group, *Chandler, AZ*



CONFERENCE SCHEDULE

SUNDAY, April 22, 2018

1:00 - 3:00 pm | Salon IV

Dealer Counsel 101: A General Legal Introduction to Automotive Dealerships

Deborah Dorman, Eastern New York Coalition of Automotive Retailers

Stuart A. Rosenthal, Attorney at Law

Melinda Levy-Storms, The Niello Company

3:00 - 5:00 pm | Estuary
Board Meeting

5:30 - 6:00 pm | Center Court

New Member and First Time Attendee Welcome Reception

*Inclement Weather Location: Salon 1 & II

6:00 - 7:30 pm | Center Court
Reception

*Inclement Weather Location: Salon 1 & II

MONDAY, April 23

7:00 - 8:00 am | Salon II Foyer
Registration

7:00 - 8:00 am | Vanderbilt II & III
Breakfast

7:00 - 8:00 am | Port Royal

In-House Counsel Breakout Session: Sitting Second Chair at Trial

Les Stracher, Napleton Dealership Group

8:00 - 8:30 am | Ritz-Carlton Ballroom
Opening Remarks and General Meeting of Members

8:30 - 10:00 am | Ritz-Carlton Ballroom

Session 1: NADA Update

Andy Koblenz, NADA

Paul Metrey, NADA

10:00 - 10:15 am | Salon II Foyer
Break

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10:15 am - 11:45 pm | Ritz-Carlton Ballroom
Session 2: Top Legal Issues for Dealers in 2018

Eric L. Chase, Bressler, Amery & Ross, P.C.

Michael G. Charapp, Charapp & Weiss, LLP

11:45 am - 1:00 pm | Vanderbilt II & III

Lunch and The Trump Administration's Labor Policy: Looking Back One Year and Forward One Year

Douglas Greenhaus, NADA

Lauren Bailey, NADA

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1:00 - 2:00 pm | Ritz-Carlton Ballroom

Session 3: Teleservices Compliance 2018 - Regulations for Texting & Calling Consumer & Risk Mitigation Strategies

Michele Shuster, Mac Murray & Shuster LLP

Adam Todd, Mac Murray & Shuster LLP

2:00 - 2:15 pm | Salon II Foyer
Break

2:15 - 3:45 pm | Ritz-Carlton Ballroom

Session 4: Automotive Technology: Disruption and the Death Star. Can Luke Skywalker Save Us?

Oren Tasini, Qvale Auto Group

Alisa Reinhardt, California New Car Dealers Association

Jonathan Tsarong-Blomker, Anderson Economic Group LLC

Association

3:45 - 4:00 pm | Salon II Foyer
Break

4:00 - 5:00 pm | Ritz-Carlton Ballroom

Session 5: Conditional Incentive Programs: A Primer on Current Programs, Trends, and Benefits Versus Injury

Russell McRory, Arent Fox LLP

Todd Milbury, NADA

Joseph Roesner, The Fontana Group, Inc.

5:00 - 6:30 pm | Vanderbilt Courtyard
Reception

*Inclement Weather Location: Vanderbilt II & III

Reception Sponsored by:



TUESDAY, April 24

7:15 - 8:15 am | Vanderbilt II & III
Breakfast

8:15 - 8:30 am | Ritz-Carlton Ballroom
Opening Remarks

8:30 - 10:00 am | Ritz-Carlton Ballroom
Session 6: Tax Reform: What Dealers Need to Know

Rex A. Collins, HBK CPAs and Consultants

Robert Davis, Dixon Hughes Goodman LLP

Buddy Dearman, Dixon Hughes Goodman LLP

Jennifer Kobylarz, Rosenfield and Company, PLLC

Amy Stillwell, Moss Adams LLP

10:00 - 10:15 am | Salon II Foyer
Break

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10:15 - 11:15 am | Ritz-Carlton Ballroom

Session 7: Managing your Market Territory—Improving Profitability and Reducing Risk

Patrick L. Anderson, Anderson Economic Group

Cristina Benton, Anderson Economic Group

11:15 am - 12:15 pm | Ritz-Carlton Ballroom

Session 8: Sustainable Cybersecurity Management for Dealerships: Why it's Critical to Review Your Program Now

Michael Mader, Baker Tilly Virchow Krause

Tom Wojcinski, Baker Tilly Virchow Krause

12:15 - 1:00 pm | Vanderbilt II & III
Lunch

1:00 - 2:00 pm | Ritz-Carlton Ballroom

Session 9: Latest Legal Trends in Sexual Harassment Law and What Attorneys Advising Auto Dealers Need to be Thinking About

Timothy C. Davis, Davis Wang, PLC

Erin K. Tenner, Gray Duffy LLP

Shirley C. Wang, Davis Wang, PLC

2:00 pm | Ritz-Carlton Ballroom
Closing Remarks and Adjourn

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Cyber Crimes: Why Dealers Should be Very Afraid

By Michael G. Charapp, *Charapp & Weiss, LLP*

Feature Article

You get a frantic call from a dealership client. It wanted to balance its new vehicle inventory. It sold ten new vehicles to another dealer to reduce its day's supply. The buying dealer picked up the vehicles, but your client did not get paid. The buyer says it sent a wire transfer for \$350,000 that your client says it never received. Your client's floorplan source is demanding the vehicles be paid off. What went wrong?

You are tempted to assume that the buyer is crooked and never paid, but that may not be so. Instead, both dealers may have been the victims of a cyber crime in which a scam artist sent wire transfer instructions to the buyer for an account the scammer emptied immediately. Because of their high dollar transactions, dealers are especially vulnerable to large losses due to the compromise of an employee e-mail account. Seemingly legitimate communications and requests may actually be from a fraudster attempting to commit a scam called Business E-Mail Compromise (BEC).

How does this scam work? The goal is to compromise business e-mail accounts and trick employees or other individuals into wiring funds to scammers' accounts. Criminals utilize various techniques to compromise accounts:

- **Phishing:** A perpetrator utilizes e-mails, text messages, or phone calls to dupe an individual into revealing sensitive information. A fraudster may send an e-mail with a link to a recognizable—but fake—website that prompts the recipient to enter his or her credentials;
- **Spoofing:** A fraudster creates a fake, albeit similar, e-mail account to impersonate an individual and deceive others; and
- **Malware:** This is malicious software that a fraudster employs to infiltrate a system and collect information, intercept communications, or steal credentials. A bad guy will seek to convince an individual to click on a link or download an attachment containing the malware program. With the advance of technology, hacking via malware is much easier than you may think – many malware kits cost as little as \$50.

If an e-mail account is compromised through hacking, a sophisticated con artist may stay dormant for weeks and evaluate a company's vendors, buyers, accounting information, travel schedules, and communication styles. The actor may target and impersonate a company officer, such as the CEO, and send urgent wire transfer requests to employees. The actor may also wait for a large business deal to develop and then jump



into the conversation to redirect payments. To keep the scheme and communications concealed from the hacked individual, a scammer may implement forwarding rules to redirect the victim's incoming e-mails to a spoofed e-mail account or a hidden folder within the compromised account. Utilizing a technique called Man in the Middle, a scammer may even go beyond the traditional BEC scam to brazenly inject himself between a victim and its bank during an online session to intercept credentials and make wire transfers. Criminals continue to find weaknesses and, "the criminal organizations that perpetrate these frauds are continually honing their techniques to exploit unsuspecting victims," according to Martin Licciardo, Special Agent stationed at the FBI's Washington Field Office.

In the aftermath of the crime, parties often become involved in protracted liability disputes. Often, the authorities cannot apprehend the criminal or recover the stolen funds, and the remaining parties are left to fight amongst themselves. So, which party is liable for losses? Determining blame is not so easy.

Banks are usually the first party to blame since they are trusted as experts and expected to safeguard sensitive financial accounts. The Federal Financial Institutions Examination Council (FFIEC) and Uniform Commercial Code (UCC) have set forth requirements and guidelines for banks to protect customers from being bilked out of their money, but some aspects are codified using vague language such as "commercially reasonable security procedures." Banks can offer various security options such as secure token technology, out-of-band authentication (calling to verify), dual customer authorization, and behavior/anomaly monitoring. However, customers often decline multiple—sometimes inconvenient—security options, and not all

of the security measures are required to pass a UCC commercially reasonable test or abide by FFIEC layered security guidelines. The ambiguous language of the requirements and guidelines can limit banks' liability for pecuniary losses

A buyer can often be the real loser in this crime. If the fraudster tricked a buyer into a wire transfer to a scam account, courts can deem the buyer to be in breach of contract and demand the buyer (re)pay the seller in full. If the buyer failed to call the seller to verify the wire transfer request—especially when payments are routinely provided via checks—or did not secure company e-mail systems or flag suspicious requests, many of which are in broken English, the buyer could be held liable for losses.

A seller may also fall into financial trouble. If goods were transferred before receiving payment, the seller may suffer cash flow issues. And if the seller failed to secure company e-mail systems and flag irregular requests or suspicious buyer e-mail correspondence, the seller could be held liable for losses.

Insurance companies may be thought of as a safety net, but they may not offer a solution. Crime and computer fraud policies may not cover specific attacks like BEC, and if they do, they may not offer the extent of coverage that a business needs. Courts have addressed this matter, but rulings are split across the country; one court even ruled that BEC was not covered by forgery, computer fraud, or funds

transfer fraud provisions.

Unfortunately, these scams are not going away soon. The FBI reported that between January 2015 and December 2016, there was a 2,370% increase in identified exposed losses, and between 2013-16, known losses for BEC totaled over \$5 billion worldwide. These staggering numbers herald a growing and grave threat to businesses. On a more personal note for attorneys, criminals have used these scams to hijack real estate sale proceeds and court settlement funds from title companies and law firms.

So what should a client do?

No technique or technology is absolutely secure, but creating a layered wall around the business can help prevent and deter scammers. Make sure computer protections are state of the art and constantly updated. Scammer techniques are constantly updated, and their abilities are augmented by rapidly changing technologies. A dealer can only keep up by requiring its computer vendor to maintain state of the art protections and by following directions for implementation and use.

Employee awareness training is a crucial aspect of any cyber security umbrella. Employees must know of crimes like BEC and the related infiltration techniques. They must understand that a company that is a victim of a cybercrime can be crippled or destroyed, leading to the loss of jobs.

Regularly monitor employee use of protections. Develop protocols

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to protect against hackers. These are not difficult. One can find suggestions throughout the internet such as do not share passwords, do not write down passwords, do not click on links in emails from unknown senders, etc. One can implement those suggestions. But how often do dealers follow up to see if employees are paying attention? The first time it is done, a dealer will be horrified to see how many passwords are written on stickies or on blotters, how often passwords are shared, and how susceptible the business is to employees clicking on phishing links. This must be handled like any other management challenge – set standards, train, monitor, and discipline for violations.

Be especially careful of wire transfer scams. A seller should establish immediately the method by which it will be paid. In each email an employee sends or document created, use a message warning against fraud, such as: "Because of the possibility of fraud, only accept payment directions such as wire transfer instructions if you personally verify the information by a telephone call to our publicly advertised phone number." A buyer should never accept payment directions, such as wire transfer information, without calling a known person at the seller using the publicly advertised phone number. ■

Michael G. Charapp is a lawyer in the Washington, D.C. metro area who represents car dealers and dealer associations. He is a founding board member and past President of NADC.

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 list updated contact information in *The Defender* so all members can be aware of the change.



Updated Information:

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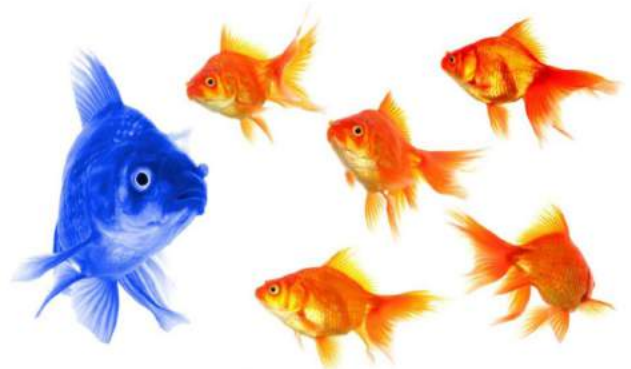
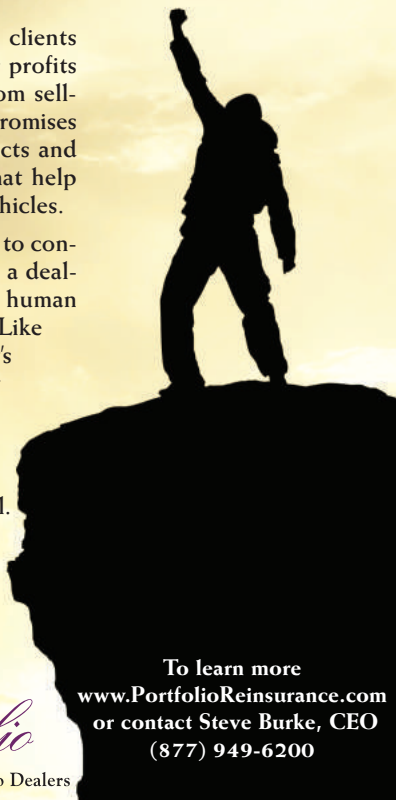
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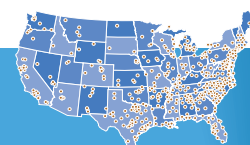


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