



In this Issue:

- Feature Articles 1, 7
- Executive Director's Message ..3
- New Members6
- Advertising Opportunity 12
- Board of Directors..... 13

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Damage Vehicle Exposure



By Shari Patish
Hall Automotive, LLC

Mother Nature has been hurling herself at parts of the country all summer, and we are looking out for flooded vehicles swimming around the marketplace. (I know the pun was awful.) Dealers are focused on the damage weather can cause, but they might not focus on other sources of vehicle damage and that can be a very costly mistake.

Damaged vehicles come into dealership inventory in many ways. New and used vehicles can be damaged in transport, while on test drives, on loan/rental to customers, or simply when the lot attendant backs into a tree. How to cover the financial cost of repair is a topic for another article. Instead, focus your dealers on damage disclosure.

Most states have statutes that permit a dealer to reject acceptance of damaged new inventory that is delivered by transport arranged by the manufacturer. These statutes are usually found in your state's franchise laws and often require damage to be a certain percentage of MSRP to qualify for this rejection. If the dealer decides not to reject acceptance, most of these laws require the dealer to disclose the damage, even if repaired, to a potential buyer. Some state laws even offer a safe harbor from litigation if the damage is repaired using OEM parts and disclosed prior to sale.

Your state could also have statutory disclosure requirements for customers trading in vehicles with prior damage or for a dealer selling a vehicle with repaired damage. There are often forms provided by your state's Motor Vehicle Division or kindly provided by your state's incarnation of the NADA.

The greatest liability, however, comes from your state's version of the Consumer Protection Act. Failure to disclose damage or repairs to a vehicle is often a UDAAP violation. Dealers can be accused of misrepresenting the certification, qualities or grade of goods; failing to advertise that goods are reconditioned or blemished; or misrepresenting that repairs, alterations, or modifications have been performed. The main exposure with CPA violations is that individual causes of action can include minimum damage awards as well as attorney fee provisions that could have no relation to the amount of damage. These provisions make these types of cases very attractive for consumer rights attorneys who may count on the dealer's potential loss of reputation to maximize settlement opportunities or open windows for discovery that could result in class action suits. State CPAs can also provide for government agencies to investigate your dealer's practices.

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.

To minimize this exposure advise your dealers to take three steps:

1. Detect damage - Make sure your trade evaluation forms require customers to disclose if their vehicle has been involved in an accident and information on the repairs that were performed. Use automotive history reports at the time a vehicle comes into your inventory AND prior to selling as some vehicle history reporting on automotive history can be much delayed. Service departments that check in vehicles should be examining the vehicles for existing damage and repaired damage. As an expert your dealer will be held to knowledge a lay person would not. Review your dealer's service history and that of sister stores if your dealer is part of a group, for repair of damage.

2. Notate damage - Now that you know about damage, it is important to notate it somewhere that is visible to sales staff and management. Screens in AMS where sales management go to determine pricing is a great place to notate damage. Sales managers always look there to be sure they will make money selling a unit. If your dealer is still using folders for vehicles, placing a copy of an RO or completed damage disclosure form in the file is also helpful.

3. Train to sell damage - Dealers should train their staff to present the benefits of damage repaired with OEM parts by manufacturer certified mechanics. This is important to prevent sales staff from glossing over this issue during the sales process. Also, be sure F&I managers are trained on how/when to use disclosure documents. They protect you from he said/she said litigation later on.

Until your dealer can purchase a crystal ball from its favorite parts resource, some damage will always slip through the best of processes, but due diligence goes a long way to minimize your dealer's exposure to loss. ■

Shari is Corporate Counsel for Hall Automotive, LLC in Virginia Beach, VA. Shari serves on the NADC Board of Directors.



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Executive Director's Message



Erin H. Murphy
NADC Executive Director

I'm pleased to report that our 14th Annual NADC Member Conference in Naples, FL, April 22-24, was yet another successful event! The last minute change of venue (due to damage at the Ritz-Carlton, Miami from the hurricane) did not dampen attendance. 211 NADC members attended the conference! I think everyone in attendance would agree that the Ritz-Carlton, Naples was a beautiful property – Red Tide and all! The warm weather and beautiful sunsets could only be matched by the excellent program. Thanks to the Conference Planning Committee for providing attendees with an outstanding, timely program.

The conference opened with the annual meeting of the membership during which the NADC membership elected five directors to their second consecutive term. Eric Baker, Boardman & Clark; Kevin Hochman, Keyes Motors, Inc.; Jim Sewell, Smith Law Firm, P.C.; Todd Shadid, Klenda Austerman LLC; and Bob Weller, Abbott Nicholson, P.C. The directors will serve a three year term.

The officers were then elected to a second year in office by the Board of Directors. Andrew Weill of Weill & Mazer was elected President. Johnnie Brown of Pullin, Fowler, Flanagan, Brown & Poe, PLLC was elected Vice President. Jami Farris of Parker Poe Adams & Bernstein was elected Treasurer, and Scott Silverman of Prime Motor Group & Capstone Automotive Group was elected Secretary. Steve Linzer of Tiffany & Bosco, P.A. will continue to serve as Immediate Past President.

Andy Koblenz, Executive Vice President of Legal and Regulatory Affairs and General Counsel for NADA, and Paul Metrey, Chief Regulatory Counsel, Financial Services, Privacy, and Tax for NADA kicked off the conference program by highlighting salient and breaking federal regulatory developments affecting auto dealers, with a deeper dive on the challenges created by DOD's December 2017 Interpretation of the Military Lending Act regulation.

Next, Eric Chase with Bressler, Amery & Ross, P.C. and Mike Charapp with Charapp & Weiss, LLP discussed some of the most important and timely legal issues for dealers during 2018. Always a popular presentation!

During lunch, Lauren Bailey and Doug Greenhaus with NADA provided attendees with an update on the Trump Administration's Labor Policy.

After lunch, Michele Shuster and Adam Todd with Mac Murray & Shuster LLP kicked off the afternoon with a session on TCPA Compliance and how to avoid compliance landmines.

Next, Alisa Reinhardt with the California New Car Dealers Association, Oren Tasini with Qvale Auto Group and Jonathan Tsarong-Blomker with the Anderson Economic Group gave an interactive presentation on technology that is impacting the auto industry. The audience was able to participate via live polling questions!

During the last session of the day, Russell McRory with Arent Fox, Todd Milbury with NADA and Joseph Roesner with The Fontana Group, Inc. addressed Manufacturer Incentive Programs including Stair-Step Programs.

The second day of the conference opened with a presentation on tax reform and what dealers need to know. Buddy Dearman with DHG Dealerships was the moderator. A five person panel rounded out the session: Rex A. Collins, HBK CPAs and Consultants; Amy L. Dalen, HBK CPAs and Consultants; Robert Davis, DHG Dealerships; Jennifer Kobylarz, Rosenfield and Company, PLLC; and Amy Stillwell, Moss Adams LLP.

Following that session, Patrick Anderson and Cristina Benton with Anderson Economic Group gave a presentation on managing your market territory and how to improve profitability and reduce risk.

Mike Mader and Tom Wojcinski with Baker Tilly Virchow Krause next presented on sustainable cybersecurity management for dealerships.



NADC Member Announcements

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.

The last session of the conference was a presentation by Tim Davis and Shirley Wang with Davis Wang, PLC and Erin Tenner with Gray Duffy LLP on the latest legal trends in sexual harassment law. One hour was clearly not long enough for this session as attendees asked questions well past the 2:00 pm adjournment time. A great way to end the conference!

On Monday morning, a breakfast session was offered to the in-house counsel members of NADC. Les Stracher with the Napleton Dealership Group presented a session on sitting second chair at trial.

On Sunday afternoon, NADC offered an introductory level course for attorneys who are new to practicing auto dealer law or attorneys who wanted a refresher on dealership operations. This course was led by Deborah Dorman with ENYCAR, Stuart Rosenthal, and Melinda Levy-Storms with The Niello Company.

Thank you to all of the speakers who presented at the conference. I encourage all of you not in attendance to visit our website at www.dealercounsel.com and benefit from the conference materials that will be uploaded. Please look under the Conference, Workshop and Webinar Handouts section in the eLibrary (14th Annual NADC Member Conference).

I would like to thank all of our event sponsors for their contributions to the Annual Conference. These sponsors help to elevate the quality

of the event while keeping the cost low for our members. Many thanks to Bank of America, Capital Automotive Real Estate Services, Inc. (CARS), CNA National, CounselorLibrary.com/Hudson Cook, LLP, DHG Dealerships, GW Marketing Services, Haig Partners LLC, Kerrigan Advisors, Moss Adams, Portfolio, Rosenfield & Company, The Fontana Group, Inc., and The Presidio Group

Be sure to Save the Date for the 2018 Fall Conference! The Conference will be held October 7-9 at the Four Seasons Chicago. All NADC educational programs rely on members' suggestions for topics and speakers. If you have a suggested session and/or topic you think should be covered at Fall Conference please email me at emurphy@dealercounsel.com. ■

Updated Member Contact Information

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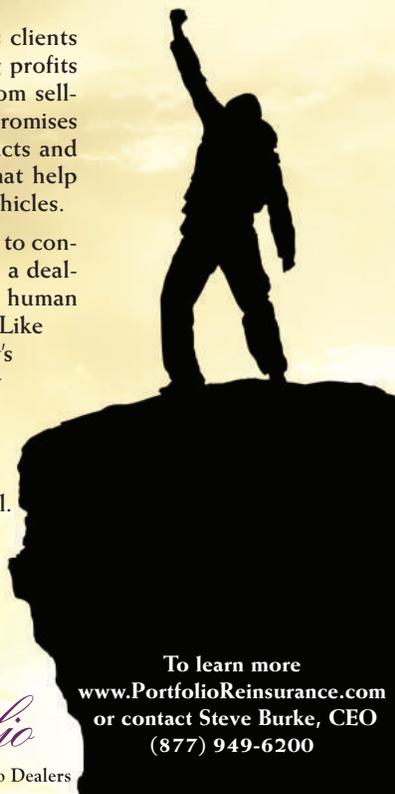
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Controlled Change

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

Feature Article

Among the tech crowd, disruption is a magic word. It creates an opportunity. The techies favor disruption, because they are the ones that hope to profit from it. If they can damage an existing industry, they can provide the virtual solution.

For established businesses, disruption is generally not a good thing. For those that must do business day to day, disruption upsets the work force and forces management to lose focus on the primary goal – serving customers. Not that change is the enemy of established business. Businesses must change to survive, but slow and steady is the answer. Change is good. Disruption is not.

For dealers, controlling change is hard work. Dealers are no strangers to change. They have been doing that for years. They evolved from hand written buyers orders and retail installment sale contracts, to machine printed versions, and now to integrated systems which turn out all the paperwork for a deal. Some are even venturing into digital documentation. It has been the same with marketing. For years, newspapers carried the bulk of dealer advertising. Then dealers moved into broadcast media. When the internet became hot, dealers moved into that space. Now dealers are working with apps.

Disruptors want to quickly break down what has worked. Disruption is not in the best interest of dealers, their families, or their employees. While dealers have historically coped with substantial changes in the way they do business, they now face challenges unlike they have ever seen. The breadth and pace of change can be staggering. There are numerous challenges that dealers face.

- *What to sell?* For years, what a car dealer sells was not an issue – four wheeled, light duty vehicles with internal combustion engines. Today, many contend that the internal combustion engine must give way to electric propulsion, while others contend that electric propulsion on a wide scale is impossible. So far, consumers are skeptical of the electrical revolution, with only a small segment preferring electrical propulsion and often only because of expensive government subsidies. The next revolution to disrupt dealers, we are told, is how vehicles are driven. This was never an issue since vehicles were sold to drivers. However, we are told that drivers will soon be passé. Computer controlled autobots will be safer and more efficient. Once again, there may be difficulty convincing most American consumers that riding around in a four wheeled appliance is consistent with their concept of freedom of mobility.
- *Who sells the vehicles?* For years, there was no issue on who sells vehicles. Dealers do. The efficiencies and business sense of that for the manufacturers was not challenged. Today, it is challenged most prominently by a manufacturer of electric vehicles. Soon it may be joined by traditional manufacturers increasingly buying into the future of self-driving appliances on wheels. Under that dream consumers will not own cars. Companies will (and preferably they will be subsidiaries of existing manufacturers), and those companies will contract with multiple passengers to pick them up in the appliances and take them to their destinations throughout the day. Since consumers will no longer see it necessary to own a car, it is argued there will be no reason for dealers to sell them.
- *How do you sell?* For years there was no question about how a dealer sold vehicles. A customer may have called, written, or emailed to set up an appointment, but the sale invariably took place at the dealership. There is some question on whether that must take place today. Can everything be done virtually, with the vehicle being dropped off at the customer's home? Most consumers who, contrary to what "everyone knows", actually like the process of buying a new car would disagree.
- *Do dealers sell?* For years, there was no issue that transactions took place at dealerships. Today, internet brokers want to change the prevailing model to virtual sales. They would like to make the sale on the internet or through an app. Brick and mortar dealerships would become delivery points or delivery agents.

So what do dealers do?

- *Support dealer trade associations.* National and state dealer trade associations are now more important than ever. There are reasons for the franchise and licensing laws passed during the last sixty years. The franchise laws incentivize dealers to invest their own capital, and risk their livelihoods, to own and operate an independent business franchised by an OEM. Their life's work should not be at the whim of that franchisor, and state legislators have appreciated the need to protect entrepreneurs from those whims through franchise legislation. Just as important are licensing statutes. We have all heard that car issues are the

number one source of consumer complaints by consumers. That is questionable, but legislators do not want to hear from their constituents that they have been ripped off in what is often their largest purchase. Laws have been passed to be sure that those who sell vehicles have a brick and mortar presence so customers who buy cars who need relief can find them and have licenses so regulators who wish to discipline dealers for not adequately protecting consumers can do that. Those carefully determined laws should not be cast aside because techies think it is time to disrupt an industry that has worked for a century. A dealer's ability to work with other dealers to maintain and strengthen legislation to control change depends on national and state trade associations.

- *Embrace controlled change.* Given the pace of developments, change is inevitable. A dealer should embrace it. Understand it. Implement it in the dealership. However, dealers must understand the changes they implement. They should not get caught up in the latest fad. They should investigate before buying a new product or service. Find out how it works. Make sure the contract for the product or service will ensure that it will meet certain standards. Nothing lasts forever, but make sure the investment is one that will provide a reasonable return.

- *Train personnel.* Nothing is more important in coping with the change dealers face than training personnel. Like everyone else, dealership personnel develop ingrained habits. Those may or may not work to keep up with the change dealers embrace. The only way for people to understand the change and to adjust to it is to train them, oversee them, and retrain them.

Adapting to the changes sure to come will require hard work. However, the franchised car dealer system has lasted for over a century for a reason—it works. It permits local business people to provide sales, maintenance, and repair services to consumers that OEMs cannot afford and cannot do effectively. The system will survive disruption if dealers are dedicated to it and do the hard work to protect it. ■

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.

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