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In this Issue:

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California's New Privacy Law: What You Need to Know

By Christian Scali and Monica Baumann, *Scali Rasmussen*

Scali

Baumann

Earlier this year, a millionaire businessman gathered signatures in California to put a privacy measure on the 2018 state ballot that many in the business community considered to be draconian and unworkable. Then, just before the deadline for the measure to qualify for the ballot, the California legislature introduced and passed new privacy legislation developed through intense negotiations among the initiative's supporters, legislators looking to have a hand in the policy, and a coalition of business interests lead by tech giants.

On June 28 Governor Jerry Brown signed AB 375, the strongest privacy law in the U.S. The new law gives consumers several new rights, aiming to bring more control and transparency to the murky trade and use of people's personal data. It also, for the first time, provides consumers with the ability to sue companies that mishandle their data without ever having to prove harm due to the misuse.

Like the European Union General Data Protection Regulation (GDPR), on which it is partially modeled, AB 375 will allow customers to request that businesses erase data stored about them. It will also allow customers to find out what type of data is stored about them, and, if a business "sells" that data, to opt out of future sales. The Act's broad definitions and the vague scope of some of its exceptions are likely to be the subject of fierce lobbying in the next eighteen months. As of now, the scope of these exceptions is unclear, leaving the possibility that huge categories of data, such as videotape surveillance and GPS device location data – depending on how it is stored and what it identifies – may be included within the Act's scope.

The law also creates a private right of action. It allows customers to sue over unauthorized access to personal information. Customers need not show actual damage from the access and instead can just seek statutory penalties. Most importantly, business may not force customers to arbitrate these claims under AB 375, notwithstanding any contractual agreement. Further, current law requires California businesses to inform customers of data breaches, which could invite lawsuits seeking tens or even hundreds of thousands of dollars in statutory penalties. If attempts to amend the law to delete this provision fail, we predict this will trigger a

new wave consumer class actions filed against dealerships.

But, there is no need to panic – yet. The law's requirements are effective January 1, 2020, giving California businesses nearly eighteen months to prepare. Further, due to the hasty nature of the legislative process, there is every reason to think business groups will mount a counteroffensive in the 2019 legislative session to round some of the law's sharp edges.

In the meantime, dealerships should get to work now figuring out whether the law applies to them and how to comply. Dealers who have strong data security and privacy policies will find that compliance with AB 375, no matter what form it takes in the end, will be much easier. Those who do not may be in for a bumpy ride – and potentially devastating litigation.

To What Types of Businesses Does the Law Apply?

The threshold question for each business, including dealerships, is whether the law applies. AB 375 does not cover all business entities operating in California. It applies to for-profit businesses that do business in California and meet any one of the following criteria: 1) have annual gross revenue of $25 million or more; 2) collect, sell or share for commercial purposes the personal information of at least 50,000 consumers, households or devices; or 3) derive at least 50% of their annual revenues from selling consumers' personal information.[1]

Dealers should note that the annual gross revenue threshold includes both sales of goods and of services. Even if your dealership does not sell more than $25 million in cars and parts in a year, it may exceed the threshold once repair and other vehicle services are factored in.

The law also applies to co-branded entities of businesses that meet the above criteria if they share common control, even if the affiliate does not do business in California.[2] So, if you have dealerships in two states that share a trademark and are both owned by the same holding company, the revenue of both dealerships will be counted towards the $25 million threshold.

What Kind of Data Is Covered?

The law applies to "personal information" of a consumer, broadly defined as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[3] Data covered includes, but is not limited to, traditional identifiers like name, postal address, email address, driver's license number, and social security number. It also includes personal characteristics, such as age, race, or national origin; commercial information such as records of purchases of goods or services; biometric data; Internet or other electronic network activity; geolocation data; professional or employment-related data; and education information. However, "publicly available information,"

defined as information lawfully made available from federal, state, or local government records, is not included.[4]

For purposes of the law, "consumer" is defined as a natural person who is a resident of California.[5] Therefore, the law will not protect the privacy interests of businesses or other entities that are not natural persons. More importantly, the law will not protect people who do not reside in California, even if they purchase products and services in California or from California businesses.

Additionally, the covered personal information must be associable with a customer. "Aggregate consumer information," defined as information about a group or category of customer from which individual consumers' identities have been removed, is not personal information.[6]

Similarly, information that has been "deidentified," defined as information that cannot reasonably identify, relate to, describe, or be associated with a particular customer, is also not covered by the law, so long as the business meets four important conditions.[7] These are that the business: 1) has implemented technical safeguards to prohibit reidentification; 2) has implemented policies prohibiting reidentification; 3) has implemented processes to prevent reidentification; and 4) makes no attempt to reidentify the information.[8]

The majority of dealership customer data likely falls within the very broad definition of personal information and, therefore, will fall under the protection of the law. However, dealers should understand the exceptions for aggregate consumer information and deidentified information. This kind of data can be a powerful tool, particularly when used to develop marketing campaigns. It may also become more central to manufacturer data demands in the future.

What Kind of Data Uses Are Restricted?

The privacy rules apply to three different types of data usages: collection of data, disclosure of data, and sale of data. It is important for dealers to know not only what type of data they are collecting, but also what use they intend for the data, as their duties under the law depend on the data usage.

Data collection is the broadest category and triggers the fewest mandates under AB 375. Collection includes:

> "[B]uying, renting, gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means. This includes receiving information from the consumer, either actively or passively, or by observing the consumer's behavior."[9]

Practically, this covers essentially all of the data dealerships collect about their customers, whether received directly from the customer,

from making notes about the customer, or collecting from a third party source. Therefore, even if customer data never leaves the dealership (which is highly unlikely), the dealer must be concerned regarding the requirements that apply to data collection.

The next broadest data usage category is disclosure. While the term is not defined, based on its usage in the statute, it appears to apply to information that is disclosed to a third-party other than the business in question. AB 375 states explicitly that it applies to data disclosed for a "business purpose," defined as an operational purpose.[10] Data disclosure is distinguished from "selling" data, so the category may best be thought of as data usage that benefits or supports the dealership's business operations, as opposed to the business of another.

Data sales is the smallest category, but it is also the most regulated. It is defined as "selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating … a consumer's personal information by the business to another business or a third party for monetary or other valuable consideration."[11] Dealerships should pay special attention to the fact that the definition includes disclosure for valuable consideration, as this may be interpreted to include data disclosed to manufacturers or lenders as part of the business relationship if not done for the dealership's business purpose.

What Does the Law Require?

The new law has four major prongs intended to protect consumer's privacy while also allowing consumers to use services provided by companies that share and sell data. In general terms, businesses will need to tell customers what type of data they collect, what they disclose or sell, and for what purpose they use the data. Businesses may also be required to erase data and, in more limited circumstances, allow customers to "opt out" of certain usages.

Transparency of Data Collection and Processing: Businesses that collect personal data of California residents must disclose to consumers before or at the time of collection the categories of data that will be collected and what purposes the data will be used for. Businesses may not collect additional categories of data or use it for additional uses without first providing the customer with notice. In practical terms, this will be the requirement that most affects the day to day operation of the dealership.

Customers may also make a verified request to businesses to find out what categories and specific data the business has collected.[12] Separately, consumers may also request information regarding the source of any personal data, the types of third parties with which the data has been shared, and the specific purposes for which the data has been used.[13]

Finally, businesses that have online privacy policies must include in those policies the categories of data collected, the categories of personal data sold in the last twelve months, and the categories of data disclosed in the last twelve months. The privacy policy must also include a description of how consumers may request information about their specific information, as well as how to delete stored consumer data or opt out of data sales.[14]

Right to be Forgotten: Unless an exception applies, a business must delete the collected personal data of a California resident on request. Businesses must also direct service providers to whom data has been disclosed to delete data.

This requirement has important exceptions, mostly for data that is necessary for business operations. For example, businesses are not required to honor deletion requests if the data is necessary: 1) to complete the transaction for which the data was collected; 2) to detect or protect against security incidents or illegal activity, or prosecute individuals responsible for illegal activity; 3) to identify and repair errors that impair intended functionality; or 4) to comply with laws and legal obligations.

Notice and Opt-Out: Consumers have the right to request that businesses that sell personal data of the California resident stop selling such data to a third-party. This section is referred to as the right to opt-out. Businesses must provide notice directly to any customer prior to selling data. They must also give notice to consumers regarding how they may make that request in their privacy policy. This right only applies to information that falls under the "sales" category. Dealerships must therefore be aware of what types of data fall into this category.

"Freemium" Limits: A business cannot refuse to provide goods or services to individuals that exercise their privacy rights. However, the business can charge different prices or provide a different level of service to individuals based on their privacy selections but only to the extent that the difference is "reasonably related to" the value provided by the individual's data. If the business offers financial incentives for consumers to provide personal data, the business must notify individuals of the financial incentives, the consumer must expressly opt-in to the program, and the consumer must be able to opt-out at any time.

Public Enforcement

AB 375 does not create a private right of action to enforce the privacy rights discussed above. Instead, the California Attorney General has sole authority to bring enforcement actions for violations.[15] Businesses that are found to have violated the law will first receive a notice and thirty days to cure the violation. If the business does not cure within thirty days, it may face statutory damages up to $2,500 per violation. Intentional violators may face up to an additional $7,500 in statutory damages per violation, for up to $10,000 per violation.

The thirty-day cure window is an important protection for businesses as it will give them an opportunity to fix mishaps and oversights in their privacy compliance programs. However, if a dealership completely fails to implement a policy and process for complying with the requirements of AB 375, the dealership likely will not be able to design and implement a compliance program within thirty days and may be held to have intentionally failed to comply with the law.

Private Right of Action

The law does create a private right of action for consumers for unauthorized access to nonencrypted and nonredacted personal information.[16] It is not a strict liability law; plaintiffs will need to prove that the business failed to implement security measures that are reasonable and appropriate to the kind of personal information in question. However, consumers themselves will not need to prove that they were actually harmed by the unauthorized access. The law will also allow consumers to join together to bring class action law suits.

This section of AB 375 has very little actual relation to the privacy protections discussed above. For example, personal information for the purposes of the private right of action is defined pursuant to California Civil Code § 1798.81.5(d)(1)(A), not the broad definition used in AB 375. This definition is much narrower to mean an individual's first name or first initial and last name in combination with one of

the following:

- Social Security number;
- Driver's license number or California ID number;
- Account number, credit or debit card number, in combination with the requisite security code;
- Medical information; or
- Health insurance information.

If a business is found to have failed to implement reasonable and appropriate security measures and an unauthorized access to the data occurs, plaintiffs may seek between $100–$700 per violation per consumer or actual damages, whichever is higher. California already has a breach disclosure law that requires businesses to notify consumers when there is unauthorized access to their personal information. This law effectively means that if there is a breach, those notices to consumers could be answered with law suits in short order.

This private right of action should be of intense concern for dealers. The typical deal file and customer record is likely to include Social Security numbers and identification numbers. What is more, the law declares that any arbitration clause is against public policy if the business attempts to use it to prevent a customer from bringing a class action. The RISC agreement will therefore be ineffective to prevent catastrophically expensive class actions if a dealership is hacked or there is some other unauthorized access and it is found liable.

Conclusion

California's new privacy law both imposes new requirements on many businesses operating in California and also increases potential liability for breaches of data security. Retailer car dealers need to be aware of these requirements and start now to shore up data security processes. As dealer lawyers, our clients will need extra help identifying their problems and implementing solutions. Today is the day to start – 2020 is just around the corner. ■

Christian Scali has a diverse automotive industry practice that includes advice and counsel and litigation in the following areas: advertising, consumer finance, data security, employment, franchise, corporate shareholder and partnership, flooring, reinsurance and debt financing, privacy and trade secret protection. In addition to regularly advising clients in the automotive, transportation and logistics, retail, internet marketing, media and technology and entertainment industries on these issues, he litigates regulatory and civil matters.

Monica Baumann is a litigator and adviser with extensive experience in the automotive industry and in consumer environmental litigation, including Proposition 65 issues. She advises dealer clients and litigates all aspects of dealership legal and regulatory compliance.

References

1. Civil Code section 1798.140(c)(1).
2. Civil Code section 1798.140(c)(2).
3. Civil Code section 1798.140(o)(1).
4. Civil Code section 1798.140(o)(2).
5. Civil Code section 1798.140(g).
6. Civil Code section 1798.140(a).
7. Civil Code section 1798.140(h).
8. *Id.*
9. Civil Code section 1798.140(e).
10. Civil Code section 1798.140(d).
11. Civil Code section 1798.140(t)(1).
12. Civil Code section 1798.100.
13. 1798.110(a).
14. 1798.130(e).
15. Civil Code section 1798.155(a).
16. Civil Code section 1798.150.

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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.

Reminder:

2019 Attorney Directory:
Update your profile online at www.dealercounsel.com.

Profile updates and upgrade materials are due Friday, November 9, 2018.

The 2019 NADC Attorney Directory will be handed out at the NADC booth during the 2019 NADA Convention & Expo in San Francisco, CA on January 25-27, 2019 and mailed to all NADC members after the event.

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October 7 - 9, 2018

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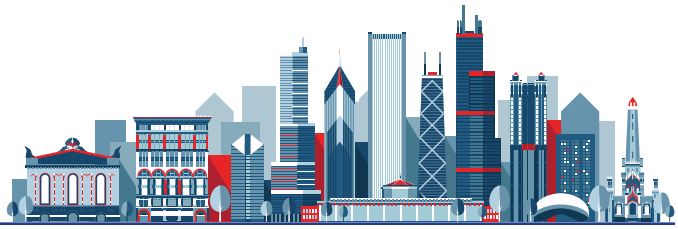

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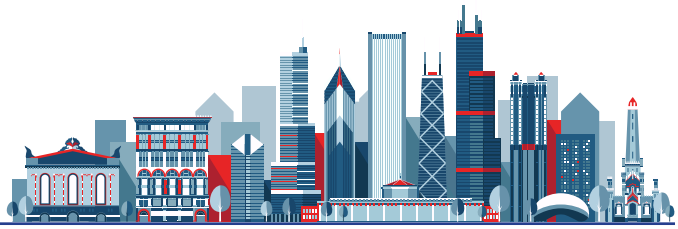

Agenda

SUNDAY, OCTOBER 7

3:00 - 5:00 pm | Walton Room
Board Meeting

5:30 pm | Lakeview Room
New Member Reception

6:00 - 7:30 pm | Lakeview Room
Reception
Opening Cocktail Reception Sponsored by:

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MONDAY, OCTOBER 8

7:30 am | Pre-Assembly Area
Registration

7:30 - 8:30 am | Lakeview ALL
Breakfast
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7:30 - 8:30 am | State Room
In-House Counsel Breakout Session

8:30 - 8:45 am | Grand Ballroom
Opening Remarks

8:45 - 10:15 am | Grand Ballroom
Session 1: NADA Update
Andy Koblenz
Paul Metrey, *NADA*

During this session, NADA attorneys Andy Koblenz and Paul Metrey will highlight an array of salient and breaking federal regulatory developments affecting auto dealers, including a vehicle financing resolution being considered by the American Bar Association and the state of tariff regulation in the auto industry.

10:15 - 10:45 am | Pre- Assembly Area
Break
Monday Break Sponsored by:

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10:45 - 11:45 am | Grand Ballroom
Session 2: Emerging Technology for Dealers – "An Update and a Look at What's Likely to Come"
Brad Miller, *NADA*

This session will focus on the latest legal, regulatory, and related challenges facing dealers with respect to privacy, data security, data access, and vendor issues. We will discuss recent changes, what the regulators are focused on, what is likely to be coming down the road in the near term, and how dealer lawyers can best position their clients for the future.

11:45 am - 12:45 pm | Lakeview ALL
Lunch
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1:00 - 2:00 pm | Grand Ballroom
Session 3: The Application of 20th Century Dealer and Manufacturer Licensing Requirements to 21st Century Sales Models
Jason Allen, *Bass Sox Mercer*
Shawn Mercer, *Bass Sox Mercer*

The session will address dealer licensing considerations when operating non-traditional business models that result in the dealer making sales in jurisdictions outside of its state of license or assigned market.

The session will also examine how the 20th century licensing requirements that are tied to a physical location apply to 21st century sales practices that include sales made online, through an app, via a vending machine, etc.

The session will further address additional issues that will impact the future of the industry, including direct sales, subscription services, autonomous vehicles, vehicle sharing and factory data collection.

2:00 - 2:15 pm | Pre-Assembly Area
Break

2:15 - 3:15 pm | Grand Ballroom
Session 4: Staying Compliant in the Social Media Marketplace
Anthony Cacciatore, *Mac Murray & Shuster LLP*
Michele Shuster, *Mac Murray & Shuster LLP*

From texting to tweeting and everything in between, social media offers some of the most impactful branding and customer engagement tools at a business's disposal, but complex regulations have created a minefield that can make lawfully communicating with customers challenging for even the most savvy marketers. With growing scrutiny from the Federal Trade Commission (FTC) on all forms of social media, even well-intentioned businesses can find themselves on the wrong side of regulatory compliance. Participants will learn "dos and don'ts" for social media marketing campaigns and leave with an understanding of the risks they face as well as practical, implementable techniques to reduce those risks.

3:15 - 3:30 pm | Pre-Assembly Area
Break

3:30 - 5:00 pm | Grand Ballroom
Session 5: Overcoming OEM Refusals to Approve Dealer-Initiated Changes to Franchised Dealerships
Eric Baker, *Boardman Clark LLP*
Paul Norman, *Boardman Clark LLP*
Ted Stockton, *The Fontana Group*

Motor vehicle dealer agreements with Original Equipment Manufacturers ("OEMs") routinely contain provisions requiring OEM prior approval of dealer-initiated changes to the dealership, including changes in ownership or management, transfers to other persons or entities, adding another franchise to a location, or relocating franchise operations to a different location. This presentation will review the variety of state laws that regulate consideration of dealer-initiated changes; additional common law theories that may apply when a manufacturer disapproves of a proposed change; common reasons given for OEM disapproval; pre-litigation efforts to

advocate for dealer proposals; and overcoming OEM disapprovals in litigation.

5:00 - 6:30 pm | Lakeview Room
Reception
Cocktail Reception Co-Sponsored by:

TUESDAY, OCTOBER 9

7:30 am | Pre- Assembly Area
Registration

7:30 - 8:30 am | Lakeview All
Breakfast
Breakfast Sponsored by:

8:30 - 10:00 am | Grand Ballroom
Session 6: Sexual Harassment Law in the #MeTooEra: What Attorneys Advising Auto Dealers Need to be Thinking About
Michelle Macdonald, *Gray Duffy, LLP*
Jack Schaedel, *Scali Rasmussen*
Erin Tenner, *Gray Duffy, LLP*

This session will touch on sexual harassment law, trends, and risks. Panelists will review case studies with detailed facts, and video snippets; lead a discussion on perceptions, biases, and stereotypes; and review best practices on policies, training, investigations, accountability (how to have fun without crossing the line).

10:00 - 10:15 am | Pre-Assembly Area
Break
Tuesday Breaks Sponsored by:

10:15 - 11:15 am | Grand Ballroom
Session 7: Navigating the Road Ahead: Inside Perspectives on Emerging Employment Issues Affecting the Automotive Dealership Industry
Chris Hoffman, *Fisher & Phillips*
Matthew Simpson, *Fisher & Phillips*

From the latest round of pay plan litigation to new strategies in litigating labor and employment lawsuits, there are several emerging employment issues that have forced automotive dealers and their in-house attorneys to adapt quickly. Given the fast-paced nature of these changes, it is paramount for dealers to know what to expect both now and in the future, and to understand the tools at their disposal to manage the changes.

Attorneys from Fisher Phillips' Dealership Practice Group will moderate this in-depth panel discussion with in-house counsel on the top labor and employment issues affecting the automotive dealership industry today, as well as relevant and significant policy changes and how employers should address these issues.

11:15 - 11:30 am | Pre-Assembly Area
Break

11:30 am - 12:30 pm | Grand Ballroom
Session 8: Is the M in M&A Back
Stephen Dietrich, *Holland & Knight*
Alan Haig, *Haig Partners*
Allen Magee, *DHG Dealerships*

A number of experts have predicted auto retail will consolidate more in the next ten years than in the past 100 years. We are starting to see this acceleration, and there is a growing conviction from operators, analysts, and investors that dealers need to get much larger and more efficient to address some challenges to the current business model, respond to changing consumer behavior and be prepared for industry innovation and disruption. But as groups grow through acquisitions, they require large amounts of capital and more management expertise. At some point, even the largest group begins to run into capital constraints. A merger transaction can allow growth without needing to access sizeable outside capital because the growth occurs through a combination of dealer groups.

Our presentation will explore the reasons why mergers may become a growing option for auto dealers and why their advisors need to become more knowledgeable about them

12:30 - 12:45 pm | Grand Ballroom
Closing Remarks

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President's Message

Andy Weill
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NADC President

I have had several experiences that have recently underscored the value of learning about issues outside my area of expertise and the strength of NADC's wide membership.

In particular, there was a recent effort at the ABA to have its House of Delegates adopt a resolution (Resolution 104B) that would have urged federal and state legislatures and agencies to "require a flat percentage fee for dealer compensation" and "disclosure of dealer compensation" in vehicle financing transactions and impose related onerous obligations. Fortunately, our friends at NADA learned about this effort, and alerted me. (Thank you, Andy Koblenz and Paul Metrey and all your colleagues and staff.)

Frankly, the issues regarding dealer compensation in auto financing are not prominent in my daily practice, but I have attended enough conferences and discussed this issue sufficiently with my colleagues to appreciate immediately the importance of this development and its relevance to our clients. My response to NADA was to offer immediate assistance.

NADA asked me to get the word out to the membership at large and ask if any NADC members were also ABA members and were willing to assist in opposing this initiative.

Within the hour we got a message out on the list-serve, and many of you responded and offered significant assistance. That particular effort was stymied, although the situation is still unsettled. We should expect a full report in October when we listen to the NADA update.

I think it is important to take a moment and appreciate how well various components harmonized. We have had enough education of members to understand the issue; we have the strategic relationship with NADA so that communication and cooperation was easy; we have the tools to get the word out; and we have an attentive and resourceful membership that rose to the occasion and played its part.

I am pleased by this outcome, and I think it also offers us lessons. I am trying to expand on this theme and challenge myself: What other issues are likely to arise that will have such general impact? Do we have the strategic alliances our members and clients need for the next sets of challenges? Are there issues about which we need further education to respond in an intelligent way?

As usual, the best source for this is you, the membership. What are you seeing in your practices that worries you? What are your clients dreading? What was a lawsuit, or a regulatory action, or an employee issue that gave you a sinking feeling in your stomach? I have had plenty of those over the years, and the best cure I have had for that over the last fifteen years has been the ability to pick up the phone and call a fellow NADC member who either has experience in the issue or has some good ideas on how to approach it.

More and more, the issues to be addressed will not just be on a case-by-case basis. There will be initiatives that require concerted action. Each of us runs into this from time to time. What are the resources you consult? What trade associations or other advocacy groups do you find helpful? Should some of these people be on our stage at our conferences? Should they be getting articles into Defender?

I look forward to your thoughts, be they by emails, program suggestions, proposals for conference presentations, or list-serve items. We have been trained to be issue spotters, and this organization benefits enormously from your imagination, your creativity, and at times, a bit of healthy paranoia. ■

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Meredith Elder
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St. Louis, MO

Associate Member:

Dave Cantin Group
Dave Cantin
New York, NW

Lease Returns…A Little Attention, Please!

By Steve Gibson, *Dealer Risk Services*

Dealers have a solid grasp on those areas that generate capital: their vehicle inventory, which provides revenues from the sale of vehicles; the Service and Parts Department, where their absorption levels are critical; and the F & I Department, which often provides that ''pot of gold" to dealerships. From an insurance perspective, these areas are pretty straightforward and, with the possible exception of issues arising from the F & I office, claims are pretty much ''cut and dried." It is those areas outside the dealer's daily focus that are often problematic, frustrating and expensive. One of these areas is Lease Returns.

We recently met with a Florida dealer who fumed about Lease Returns, lambasting the lessor and the need to 'even deal with' Lease Returns. Unfortunately, Lease Returns are a necessary part of the dealership's operation. If you lease vehicles, you are most probably going to have Lease Returns on your lot.

The problems arise, because it is on the fringes of the of dealership's revenue sphere and those tasked with handling these vehicles do not have the clear procedural guidance that is necessary --certainly, not the protocols in effect for other areas of dealership operation. The typical scenario is as follows: Lease Return vehicles get ''lost," which almost always means stolen, either by perpetrators or employees acting in collusion. In the end, the dealer is responsible for the value of a late model vehicle with 30,000-40,000 miles.

Lease returns are supposed to be "grounded" and put into a "holding pen" for the eventual return to the Lessor. Proper notification to the lessor is required, and the transfer scheduled. In the interim, however, whatever happens to the unit is the responsibility of the accepting dealer. A simple insurance claim, right? Not so fast --these claims can be tricky.

Lease Returns are not dealer inventory; remember, they belong to the lessor. Without proof of ownership, a loss cannot be paid by the inventory carrier.

So, care, custody and control–a garagekeeper's claim, right? Maybe. It can be argued that the dealer is "holding" a unit that belongs to a commercial customer *i.e.*, (Lexus Financial, Honda Financial, BMW Financial, or other Manufacturer Lease Program). It is a stretch, but a case can be made that this is indeed a garagekeeper's claim. And, as long as the garagekeeper's policy is written on a direct primary basis, the claim is likely viable.

Many of the carriers, however, are moving toward writing garagekeepers on a legal liability basis. In that case, if the unit was properly stored, the keys put away, and the unit is still stolen, the dealer would have to be proven negligent for the legal liability portion to provide coverage. If this were damage to a regular customer's unit, some dealers would enter into a negotiation and offer to pay the deductible on their personal auto policy.

But, I can assure you, when the vehicle belongs to a lender, the situation is much different. Manufacturer lenders have no such personal auto policy or other coverage on Lease Returns in the dealer's care. They will look directly to the dealer for payment.

Further, if the unit is lost because of theft by an employee or employees acting in collusion with other parties outside the dealership, the theft by employee exclusion in the garagekeeper's policy would apply. The exclusion applies whether the policy was written on a direct primary or legal liability basis. In that event, the claim would need to be submitted to the dealership's crime carrier. Crime claims are difficult and the documentation process is often lengthy and exhausting.

All the while, the lessor (whose vehicle cannot be returned) clamors with a demand for payment. And guess who is stuck in the middle? It is the customer who simply returned the lease unit and purchased/leased a new one from the dealer. When the lessor eventually approaches the customer for payment on the vehicle he leased (because the return is not financially satisfied), we can easily see a customer complaint suit brewing. Our once happy customer is happy no more!

Most of this can be prevented with proper protocols and procedures. Someone at the dealership needs to be responsible for the process -- from intake to return and satisfaction with the lessor. Timelines need to be established, keys and the vehicles properly secured, and management awareness of the forms on which the garagekeeper's policy is written. Understanding and discussing the "what if" scenarios always helps in loss prevention and risk management. ■

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.

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

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