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## Dealers' Duty to Make Warranties Available Before Sale

By Timothy D. Robinett, *Partner at Manning, Leaver, Bruder & Berberich, LLP*

Our dealer clients have hundreds, if not thousands, of consumer products that they offer for sale that come with some type of manufacturer warranty. The obvious products are vehicles and parts for the vehicle brands that they sell. Many dealers also sell third party accessories and parts, used vehicles from other manufacturers with remaining warranty coverage, tires, and other wholly unrelated items, some of which may have warranties. When selling these products, retailers typically rely upon the product manufacturers to provide customers with all of the details of the warranties, including the term of the warranty, the buyer's obligations, and any warranty exclusions. However, dealers need to keep in mind that federal law places the burden squarely on the seller to offer consumers complete and accurate information regarding the warranties on the products they offer for sale, irrespective of who is actually providing the warranty.

The Magnuson-Moss Warranty Act (MMWA) authorized the Federal Trade Commission to prescribe rules requiring the disclosure of warranty terms on consumer products. The FTC's Pre-Sale Availability Rule, located in 16 C.F.R. Part 702, requires

all sellers of consumer products that cost more than \$15.00 to make the text of the warranty available to prospective buyers for review prior to their purchases so that they can make fully informed decisions. Dealers can comply with the Rule by either: (1) displaying the warranty in close proximity to the warranted product; or (2) providing it to the prospective customers upon request prior to the sale, and placing signs "reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request." For example, the sign could read: "Upon your request the details of the warranties on the various products we sell are available for your review before purchase." Since dealerships sell all sorts of consumer products that easily exceed the \$15 threshold, these signs should be prominently displayed in the sales department, parts department, and service area (such as in the customer lounge or near the service advisors' kiosks).

The Rule also requires warrantors to provide sellers with all of the warranty materials necessary for the sellers to comply with its obligations. The E-Warranty Act was enacted in 2016 and

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amended the MMWA to allow warrantors to post the terms of their warranties online. The E-Warranty Act similarly allows sellers the ability to comply by making the complete text of warranties available to prospective buyers electronically, but only if the warrantor of the product provides the warranty terms “in an accessible digital format” on the warrantor’s website. If a warrantor elects this option, it must: (1) provide the consumer with the warrantor’s website where the warranty terms can be accessed and reviewed, and provide the phone number, mailing address, or “other reasonable non-Internet based means” for the consumer to request a copy of the warranty terms; (2) provide a hard copy of the warranty terms promptly and free of charge upon the request of a consumer or seller; (3) ensure that the warranty terms are posted in a clear and conspicuous manner and “remain accessible to the consumer” on the warrantor’s website; and (4) provide sufficient information to allow the consumer to readily identify the warranty terms that apply to the specific warranted product.

Although the E-Warranty Act appears to provide a clear path for dealers to comply with the Rule, there are at least a couple of vehicle manufacturers that do not provide full and complete warranty terms for all of their products online or otherwise, thereby potentially exposing dealers to possible enforcement action by the FTC. At least one major manufacturer has recently acknowledged its failure to comply and is working on fixing the problem. In the meantime, we urge dealers

## NADC Member Announcements

NADC member **Mary Caskey** with Haynsworth Sinkler Boyd has received her certification in Bankruptcy and Debtor-Creditor Law by the South Carolina Supreme Court.

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to verify whether the manufacturers of the products that they sell are complying with their obligations to supply all required warranty information. ■

*Tim Robinett is a partner at Manning, Leaver, Bruder & Berberich, LLP in Los Angeles, California. The firm has represented automobile dealers for over ninety-five years in all aspects of litigation, compliance, and transactional work.*



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Weller



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## Forgery & Sloppy Recordkeeping – A Case Study in Risk in the Sales Department

By Bob Weller and Kristen Baiardi, *Abbott Nicholson, P.C.*

### Introduction

The operation of an automobile dealership is a delicate exercise in risk management and delegation. The advice of attorneys most often is directed to dealer principals, who must delegate to ensure that the dealership is able to function on a day to day basis and meet the factory's ever-increasing sales and financial expectations. At the same time, all delegation of duties creates some form of risk that must be understood and managed by the dealer principal to ensure that the dealership maintains compliance with the myriad of applicable state, federal, factory, and other administrative scrutiny of its activities. The following is a case study (with certain details changed to preserve anonymity) of a breakdown of risk management protocol in a large, metropolitan area new car dealership and its far-reaching implications.

### Factual Background

A large, metropolitan new car dealership introduced a new strategy designed to increase aftermarket product sales penetration. Every new vehicle on the dealership's lot was equipped with etching of the vehicle's VIN number prior to sale at no cost to the customer. However, every customer was given the opportunity to purchase a VIN etch aftermarket insurance product that guaranteed certain benefits in the event the vehicle was stolen. If the customer decided to purchase the etch aftermarket product, the customer signed a contract setting forth the terms of the product. Salespeople were permitted to set their own price for the etch product and received compensation based on their sales of aftermarket products.

A customer purchased a new vehicle at the dealership. In connection with the vehicle purchase, he also chose to buy several aftermarket products, including etch. All of the aftermarket products purchased by the customer were listed on a buyer's order, which was signed by the customer. However, the salesperson forgot to have the customer sign the contracts setting forth the terms of the aftermarket products purchased by the customer prior to delivery of the vehicle. In a misguided effort to save time, the salesperson decided to forge the customer's signature on the aftermarket product contracts.

The customer subsequently brought a lemon lawsuit against the vehicle's manufacturer and the dealership, alleging defects in the vehicle and failure to repair by the dealership. The manufacturer assumed its obligation to defend and indemnify the dealership with regard to the lemon/warranty claims.

In discovery, the customer requested copies of all of the documents related to his purchase of the vehicle. When these documents were

provided, the customer was surprised to see his forged signature on the aftermarket product contracts and amended his complaint to add fraud claims against the dealership. The manufacturer tendered defense of the fraud claims back to the dealership after settling the customer's warranty claims.

In addition to pursuing the pending civil litigation against the dealership, the customer filed police reports with the local authorities against the dealership and the salesperson, leading to criminal investigations of the transaction. The customer also filed a fraud complaint with the state's Attorney General and filed a complaint with the Secretary of State, the body responsible for regulating the licensing of motor vehicle dealerships in the state. The customer's complaint with the Secretary of State alleged one of the most serious statutory violations that can lead to revocation of a dealer's license—fraud in the sale of a motor vehicle. Of course, a proven fraud in the sale of a motor vehicle would also constitute a violation of the dealer's sales and service agreement with the manufacturer, threatening the dealer's ability to continue as a franchised new motor vehicle dealer.

The customer's attorney also began soliciting other customers of the dealership in an effort to find other customers who allegedly were victims of forgery, aiming to convert one civil case into a mass or class action for fraud. Defense of the various investigations and complaints arising out of this single transaction carried on for over five years, with significant expenditures for attorney's fees and anxiety for the dealer principal. The civil litigation is stayed pending a decision from the local prosecuting attorney regarding whether to file criminal charges. The dealership entered into a probation agreement with the Secretary of State, resolving the administrative complaint without an admission of guilt. In connection with the probation agreement, the dealership agreed to pay a financial penalty, to participate in training, and to be subject to further inspections to ensure compliance with all applicable laws by the Secretary of State during the probation period.

### Issues Raised

- **Inconsistent aftermarket sales process** – Salespeople did not sell aftermarket products from a fixed “menu.”
- **Sloppy documentation of transactions** – The salesperson was responsible for all aspects of documenting the vehicle sale. The salesperson was not counseled on the importance of having all documents signed by the customer prior to delivering the vehicle.
- **Lack of audit/oversight of transactions** – The dealership did not have an established process pursuant to which transaction files are reviewed by managers to confirm accuracy and completeness.



## Recommended Best Practices

- Implement menu-selling for F&I products – Dealer principals should mandate that all aftermarket products offered by the dealership must be sold from a uniform “menu” that is presented to every customer. Salespeople should not have discretion to quote variable prices for aftermarket products to different customers, as this raises the risk of a disparate impact claim.
- **Review price of aftermarket products to ensure customers are receiving reasonable value** – Dealer principals should understand the aftermarket products being offered to their customers and the value being provided by these products. Is the cost of the product defensible based on the value it provides? The cost of aftermarket products has been a target of regulatory scrutiny in recent years.
- **Implement rigorous training for salespeople** – Dealer principals would be well-served to train all salespeople to conduct transactions using a uniform process and standardized documents, with checklists to ensure that the same process is followed with each customer and all documents are signed at the point of sale. No salesperson can be exempt—the dealership’s most profitable salesperson could also be its worst offender with regard to sloppy documentation of transactions.
- **Implement routine, random review of deals by managers** – Each month, every sales manager should review a random selection

of deal jackets from different salespeople to ensure that the transactions have been documented appropriately and that all protocols are being followed. If errors are discovered, the manager must be empowered to take immediate corrective action to counsel the salesperson on how to eliminate such errors in the future.

## Conclusion

Dealer counsel can serve an important role in helping dealer principals to understand and manage the different types of risk inherent in the operation of an automobile dealership. As this case study shows, while risk will always be present, dealer principals can take active steps to mitigate risk by mandating adherence to best practices in sales techniques and instituting rigorous “checks and balances” to audit deal files. With some minor adjustments in dealership risk management protocols, the occurrence of an incident like that described in the case study will hopefully be rare. ■

*Robert Y. Weller II is a shareholder and co-chair of Abbott Nicholson’s Motor Vehicle Dealer Practice Group and concentrates on commercial litigation and business counseling, with an extensive background in law governing the rights and responsibilities of automobile dealers.*

*Kristen L. Baiardi is an attorney with Abbott Nicholson who primarily works as a litigator and counseling motor vehicle dealership clients. Ms. Baiardi represents auto dealership clients in all types of litigation and regulatory compliance matters, including add-point cases and dealer termination disputes.*

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## Executive Director's Message



Erin H. Murphy  
*NADC Executive Director*

2019 started off strong for NADC! We enjoyed another successful show at the 2019 NADA Convention & Expo in San Francisco, CA January 25-27. The weather in San Francisco was spectacular and the NADC booth's close proximity to the NADA Pavilion allowed us to visit with many of our current members and to meet many new and prospective members. A big thank you to everyone who volunteered their time at the NADC booth. We enjoyed visiting with all of you!

We also released the 2019 NADC Attorney Directory at the NADA Convention & Expo and will be mailing a copy to all of our members in the next couple of weeks. We have organized the directory by state to assist you when you are looking for a referral. NADC Associate Members are listed alphabetically at the end of the directory. We hope you will find the directory a useful tool and an easy reference guide to the NADC community. Should you need additional copies, or an electronic version, of the Attorney Directory please contact Jennifer Polo-Sherk at [jpolo-sherk@dealercounsel.com](mailto:jpolo-sherk@dealercounsel.com).

One of the most valuable benefits of NADC membership is the ability to learn from one another. You all have the ideas, expertise, best practices, and war stories from which the rest of the membership can benefit. This is why we strongly encourage all members to submit articles for publication in the *Defender*. Please send your contributions or article proposals to [jamifarris@parkerpoe.com](mailto:jamifarris@parkerpoe.com) or [emurphy@dealercounsel.com](mailto:emurphy@dealercounsel.com).

Additionally, we hope you will join us at the 15<sup>th</sup> Annual NADC Member Conference being held April 28-30, 2019 at the Monarch Beach Resort in Dana Point, CA. The conference will be a two day program designed to provide you with updates, best practices, lessons learned and other useful information. The planning committee has prepared a great agenda and you will be sure to take home valuable tools that will benefit you and your dealer clients. Please check the website [www.dealercounsel.com](http://www.dealercounsel.com) for a detailed agenda in the "Upcoming Events" section.

NADC is dedicated to continuing to provide valuable networking and educational opportunities in 2019. We strive to be an indispensable resource for your auto dealer practice and thus we are always open to your feedback. Please do not hesitate to share with us your thoughts on how we can make NADC more beneficial. We look forward to working together in 2019! ■



### NADC Welcomes New Members

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Thank you to all who visited and volunteered at the NADC Booth at the NADA Convention & Expo in San Francisco, CA...it was great to see all of you!

## 2019 15<sup>th</sup> Annual NADC Member Conference April 28–30, 2019

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### HOTEL RESERVATIONS

Due to high demand, please make your hotel reservation at the **Monarch Beach Resort** as soon as possible to avoid the room block selling out. Reservations can be made [here](#) to receive the group rate of \$355 per night when booked by **April 5, 2019**. Rates are subject to availability. Additional fees include 10.315 % taxes and a \$3 TBID fee.

In addition to the specified room rates, there will be a Porterage charge of \$15.00 per room, roundtrip and a Maid Gratuity of \$3.00 per room, per night.

A one (1) night room and tax deposit is required at the time of booking.

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Monarch Beach Resort  
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#### Hotel Cancellation Policy

Cancellation is 7 days prior to arrival.

### SESSION TOPICS INCLUDE:

- Dealer 101: A General Legal Introduction to Automotive Dealerships (Registration will be available soon!)
- Tax Breakout Session (Registration will be available soon!)
- NADA Update
- Best Practices for Conducting Internal Workplace Investigations – Tips From the Trenches
- Reviewing and Negotiating F&I Provider Contracts – a Hands-On Presentation
- Cybersecurity and the Dealership
- The Impact of New Vehicle Allocation on Dealership Sales or “You Can’t Sell What You Don’t Have”
- In-House Counsel Breakout Session: Flying in Formation – Cutting Edge Litigation Strategies for In-House Counsel (Registration will be available soon!)
- Top legal issues for Dealers in 2019: What Dealers Need to Know and Do
- Buy/Sells: Beyond the Basics
- From Pulp to Ions – How Electronic Document Law is Effectuated Through Technology
- Subscription Programs – Background and Impact on Dealers

Agenda topics are subject to change.



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