NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL®

DEFENDER

The National Association of Dealer Counsel Newsletter SEPTEMBER 2019

In this Issue:

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Cognitive Bias and the Law*

By Oren Tasini, *Killgore, Pearlman, Semanie, Denius & Squires, P.A.*

The college football season is upon us. On game day, the team captains will meet at the 50-yard line for the coin toss. "Heads or tails?" the referee will ask. The home team gets the seeming advantage of picking their option. It is a 50/50 proposition. Yet, 80% of the time, the captain of the home team will choose heads. Hmmm. Why? The answer may lie in how our brains' function, or, rather, how they malfunction. It is called cognitive bias. In this coin toss example, the cognitive bias is "framing." Because the referee states "heads" as the first option, more people chose "heads."

Daniel Kahneman and Amos Tversky pioneered the research on cognitive bias as part of the field of behavioral science.[1] Kahneman described the theory in his book, *Thinking, Fast and Slow*.[2] According to behavioral scientists, humans are incapable of easily processing large amounts of information. As a result, in decision-making the brain relies on intuition and known experience to make a quick and efficient choice. Kahneman described this process as System 1. System 1 works well when presented with small amounts of information. For example, 2+2 is easily solved as 4. But, what about 27 x 93? This more complex problem cannot be solved by System 1. Instead, the brain must resort to System 2. This requires gathering information and relying on learned skills, such as math, to solve the problem. Here is where the brain falters. Rather than take the time to fully analyze the problem presented, the mind reverts to System 1 thinking.[3]

This mode of thinking is labeled as biased, not in the pejorative sense, but because the method of decision making does not yield the optimal answer. System 1 was necessary and useful when it allowed a quick escape from a lion lying in wait. Fight or flight requires immediate action. A thorough analysis of the odds of being eaten by a lion could end badly.

In the last fifty years, cognitive bias has become widely accepted as an explanation of human decision making relating to microeconomics and legal rights and duties. This was a departure from the neoclassical theory of a rational and efficient marketplace that had gained acceptance

* This is the first of a series of three articles on cognitive bias. The second article will focus on the practical implications of cognitive bias on decision-making by lawyers. The third article will focus on new technologies related to legal decision-making, considering the existence of cognitive biases.

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.

following World War II. This theory was based on the principle that "human behavior can be viewed as involving participants who [1] maximize their utility [2] from a stable set of preferences and [3] accumulate an optimal amount of information and other inputs in a variety of markets." [4] The rational theory posited that each individual decision would be made in order to maximize total wealth, including the acquisition and disposition of legal rights. Different people, with the same information, would reach the same decision. This theory was adopted by lawyers who had a free market view of government–if government stayed out of the way, the decisions of rational actors would properly order legal rights. It is reflected in the Coase Theorem, proposed by Ronald Coase in 1960. The Coase Theorem stated that property rights would be efficiently distributed, as the person who valued it the most at any given time would acquire it.

The impetus behind the work of Kahneman and Tversky was their observation that the theory of rational actors was not an accurate description of human behavior. They conducted numerous experiments, which led them to develop the Prospect Theory.[5] The three principles of the Prospect Theory are: (1) people did not act rationally (bounded rationality); (2) people's actions were influenced by their emotions and feelings, not efficient utility (bounded willpower); and (3) people were self-serving (bounded self-interest). Individual decisions were not part of a greater rational framework where participants looked to maximize their state of wealth. As Kahneman wrote, "The effective carriers of values are gains and losses, or change in wealth, rather than states of wealth as implied by the rational model."[6] The Prospect Theory led to the formulation of the "endowment effect"–people value an item they own more than one they wish to acquire. Because of the endowment effect, sellers make excessive demands for property they own. Buyers refuse to pay, and the property remains with the seller, which may not be the most efficient outcome. Kahneman described this as a "kink" in the supply and demand curves, as property rights did not trade hands efficiently.

Another significant finding related to the endowment effect was that people are risk adverse when dealing with gains, but risk taking when dealing with losses, even when such decisions are not optimal. This is called "loss aversion." For example, investors are reluctant to sell a stock at a loss, even though the best strategy is to sell a losing stock and invest the proceeds in a different stock.[7] Even those most proficient at a skill are affected by loss aversion. An analysis of over 2,500,000 putts in professional golf tournaments over a one year season, showed that the best golfers in the world were much more cautious on birdie putts (gain) so as to ensure a par, rather than a bogey (loss); the golfers were loss adverse on birdie putts in order to ensure at least a par. [8] A golfer who was less risk adverse could lower their aggregate score by one stroke over the season and earn seventeen percent more, or an average of $640,000.00.[9]

There is an ongoing and sometimes bitter debate between the behaviorists and the neoclassicals, particularly as to the use of cognitive bias to shape legal policy.[10] The thrust of the debate is that the rationalists think cognitive bias is junk science. The behaviorists respond that they are only reporting actual results and freely admit that there is no explanation as to why people are subject to cognitive bias.

The criticisms of cognitive bias are not well founded. Consider a 50/50 probability event in another setting. Like a coin toss, roulette is equal odds of a binary choice of the ball landing on black or red. The odds are the same on the first spin and every spin into eternity. However, people fall prey to the idea that prior spins influence the current spin. This cognitive bias is called the "Gambler's Fallacy."[11] In 1913, in a Monte Carlo casino, this thinking was costly. The ball kept landing on black. As word spread quickly, more and more players placed their bets on red. The gamblers believed that so many consecutive spins with the ball landing on black meant that ball had to land on a red number, and soon. Twenty-six consecutive rolls of black proved very expensive to those betting on red. Millions of dollars were lost in a short time span.

Gambler's Fallacy occurs not because people do not know the laws of probability, but rather it occurs because people ignore the laws of probability and other forms of learned thinking.[12] When presented with facts and evidence that contradict our opinions and beliefs, we ignore the information. This is called confirmation bias: the tendency to accept information which validates our opinion, the refusal to seek out information which is contrary to our opinion, and the rejection of information which shows why we are wrong. For example, although statistics show that the casino always wins, gamblers are convinced they have a method or a system that will beat the odds.

Most recently, the use of functional MRI brain imagery and other studies of the brain, show that different parts of the brain are activated consistent with cognitive bias when making decisions under risk.[13] In one study, people who had lesions on their amygdala, the region involved in decision-making showed higher risk taking propensity in loss situations.[14] In another study, the effect of marketing tactics on the brain function confirmed outcomes consistent with cognitive bias.[15]

There is an enormous body of scientific work that validates cognitive bias.[16] The contention of the neoclassical advocates that cognitive bias is not a valid model of human decision making is belied by simple observation, as well as statistical modeling which shows the effect of cognitive bias. The larger debate about what are the best policies and laws is an important one, but it fails to consider that human decision-making is not going to stop while the debate continues. We are constantly bombarded with information and are required to make decisions under risk. The job of a lawyer is to advise clients, which is decision-making. As we will see in next month's article, the impact of cognitive bias on legal decision-making has been widely studied and documented. Lawyers, clients, judges[17], and juries[18], are all subject to cognitive biases. A lawyer who understands cognitive bias and can consider whether to adjust his decision making will have an advantage, which will benefit both the lawyer and his client. ■

References

1. Kahneman won the Nobel Prize in Economic Research in 2002 for his Prospect Theory, which is discussed below. The award is not made posthumously, so Tversky who died in 1996 was ineligible. Their work and life-long friendship is the subject of a book by Michael Lewis, *The Undoing Project*.
2. Daniel Kahneman, *Thinking, Fast and Slow* (2015).
3. Kahneman called these System 1 processes, “heuristics.” A heuristic is a system or process to solve a problem “that employs a practical method, not guaranteed to be optimal, perfect, or rational, but instead sufficient for reaching an immediate goal.”
4. Richard Posner, *Economic Analysis Of Law* (2003).
5. Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk. *Econometrica*, (March 1979), Vol. 47 at 263.
6. Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, The Journal of Business, Vol. 59, No, 4, Part 2: The Behavioral Foundations of Economic Theory, (October 1986), at 251.
7. Odean, Terrance, Are Investors Reluctant to Realize Their Losses? *The Journal Of Finance*, Oct. 1998, Vol. LIII, No. 5 at 1775, (investors sell winning positions too soon and hold losing positions too long, demonstrating cognitive bias of loss aversion); Shlomo Benartzi, Risk Aversion or Myopia? Choices in Repeated Gambles and Retirement Investments, *Management Science,* Mar.1999, Vol. 45, Issue 3 at 297, (retirement investors myopic in short term investment decisions with decided risk aversion).
8. Devin G. Pope, D. G. & Maurice E. Schweitz, *Is Tiger Woods Loss Averse? Persistent Bias in the Face of Experience, Competition, and High Stakes*, Am. Econ. Rev., (February 2011), Vol. 101 at 129. The study is particularly compelling because professional golf uses sophisticated computer programs and GPS to record every stroke, including the exact distance of each putt, as well as the slope and curve of the greens. Sports is a rich area of study of cognitive bias, because of the breadth and depth of statistical measurements.
9. *Id*. At 164.
10. *See, e.g.,* Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L.Rev. 2 (2013); Cass R. Sunstein, Christine Jolls, & Richard H. Thaler, *Theories and Tropes: A Reply to Posner and Kelman*, 50 Standford Law Review, 1593 (1998) There are political agendas apparent in the debate. For example, *Against Endowment Theory,* excoriates the behaviorists for the imposition of unwarranted public policy while members of the Obama Administration, tantamount to an oppression of liberty, including the formation of the CFPB. The behaviorists contend that the science requires that policy be adjusted to help people do what is best for them. Richard Thaler & Cass Sunnstein, *Libertarian Paternelism is not an OxyMoron*. 70 University of Chic. L.Rev. 1159 (2003) University of Chicago Public Law & Legal Theory. (Working Paper No. 43) (2003), (“Equipped with an understanding of behavioral findings of bounded rationality and bounded self-control, libertarian paternalists should attempt to steer people’s choices in welfare-promoting directions without eliminating freedom of choice.”).
11. Gambler’s Fallacy is the tendency to assume that independent random events are influenced by previous random events.
12. The two rules are the Rule of Small Numbers and the Rule of Large Numbers. The Rule of Small Numbers states that a small sampling, *e.g*., twenty-six spins on a roulette wheel, does not adequately represent the possibility of the event occurring. It is a rule that should not be followed. The Rule of Large Numbers states that a sufficiently large sampling does represent the possibility of an event occurring. The results of a million spins of the wheel will show the true odds. This is the rule to apply.
13. Brian Knutson, *et al*., *Neural Antecedents of the Endowment Effect Neuron*, June 2010, Vol. 58, at 814 (brain activity related to exposure of subject to sale and purchase of goods consistent with endowment theory of reference dependent decision making, not rational actor theory); Talluri, *et. al*, *Confirmation Bias Through Selective Overweighting of Choice-Consistent Evidence*. Current Biology, October 2018, Vol. 28, at 3128 (subject responses to stimuli show tendency to reaffirm initial choice consistent with confirmation bias).
14. Deborah Talmi, *et al*., *Framing Effect Following Bilateral Amygdala Lesion*. Neuropsycholgia, May 2010, Vol. 48, at 1823.
15. Hilke Plassmann, *et al*., *Marketing Actions Can Modulate Neural Representations of Experienced Pleasantness*. Proceedings of National Academy of Science, January 2008, Vol. 105, at 1050.
16. *See, e.g.,* Chris Guthrie & Dan Orr. *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis* 21 *Ohio State Journal on Dispute Resolution* 597 (2006) (statistical aggregation of multiple studies on the anchoring effect shows high correlation between anchoring and outcome).

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Welcomes New Members

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Law Office of Debra J Lambek PLLC
Albany, New Yor

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Bass Sox Mercer
Tallahassee, Florida

Lacey Croy
Holland & Knight LLP
Denver, CO

Logan Parker
Bass Sox Mercer
Tallahassee, Florida

17. *See, e.g.*, Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Inside the Judicial Mind*, 86 Cornell L.Rev. 777 (2001) (judges equally susceptible as other decision makers to cognitive bias); Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 Wm. & Mary L.Rev. 2017 (2016) (judicial decisions influenced by judges political views).
18. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for the More You Get: Anchoring in Personal Injury Verdicts*, Applied Cognitive Pyschol., July 2000, Vol. 10, at 519.

Oren Tasini is a Partner with Killgore Pearlman. He was one of the Founding Members of the National Association of Dealer Counsel.

BE A CONTRIBUTOR!

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

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: jpolo-sherk@dealercounsel.com.

President's Message

Johnnie Brown
Pullin, Fowler, Flanagan, Brown & Poe LLC
NADC President

PLEASE NOTE: OUT OF OFFICE
Executive Director Erin Murphy is out on maternity leave and will return in November. Please contact Melissa Forburger, Interim Executive Director, at mforburger@dealercounsel.com or 202-495-3136 in Erin's absence.

At the Annual Meeting in April 2019, the NADC Board of Directors updated its membership criteria and membership pledge. Our Executive Director, Erin Murphy, previously forwarded these new membership documents by email soon after the Annual Meeting, but I wanted to take this opportunity to draw your attention to the new membership pledge and criteria. For ease of viewing, they are posted on the NADC website and available for all. Allow me to first make my lawyerly disclaimer. This article is not intended to be a comprehensive overview or contain any legal opinion; please refer to the membership documents for any specific questions.

Through the fifteen (15) years of the NADC's existence, the Board of Directors has always taken seriously its responsibility to oversee that members comply with the pledge and not be engaged in activities that run counter to the interests of dealers. While there are some exceptions, I wish to assure the membership that the Board of Directors has spent more time on evaluating potential members and whether their memberships are consistent with the pledge than any other single topic. This is a good thing. Occasionally, concerns or complaints are raised to the Board of Directors or the Executive Committee. Those complaints are thoroughly vetted and reviewed, and a fair and equitable decision is made to protect the membership pledge.

The membership pledge and criteria are not intended to represent an ethical conflict of interest standard. They are intended to protect all members who share their knowledge, information, thoughts, and ideas within the NADC community. From the initial questions that are asked of all applicants, we attempt to determine if the applicant has engaged in any adverse activity against dealers in recent years and whether they agree, as a member of the NADC, to represent the interest of dealers and not become engaged in any opposing representation.

The new criteria expanded the definitions of who are "dealers" and what "opposing representation" means. While we have always precluded membership from those who represent manufacturers against dealers, we clarified no representation of employees against a dealer, and no representation of any "affiliated lender" (usually referred to as captive lenders) against a dealer. We did make a distinction between captive lenders and other lenders who may occasionally become adverse to dealers. Conversely, the NADC does not generally prohibit a member from representing one dealer against another dealer and perhaps a business to business dispute that may arise. While there have been other exceptions along the way, those are the primary examples the Board has encountered.

My purpose in emphasizing the membership pledge is to simply let the members of this organization know that when they attend conferences and present questions of strategy and law on the Listserv, it is protected to the best of this Association's ability. To allow anything to chill open discussion and sharing of information between the members is unacceptable to the Board of Directors. All members should have confidence that that they may speak freely, and without concern, that their legal questions or strategy would be revealed to those who fight against our dealers. Because the Board of Directors has taken the issue seriously, the NADC has been able to create this environment, and raised the quality of dealer representation, through the sharing of legal strategy and knowledge. This creates extreme value among the membership body, and for our Association.

Allow me to encourage you to review these documents and know that your Board of Directors exercises oversight and stewardship. I thank you for your willingness to be part of the 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:

James F. Hendricks
Leech Tishman Fuscaldo & Lampl, LLC
Phone: 630-505-1600
Email: jhendricks@leechtishman.com

Conference Registration

Members are welcomed to join us for our fall program which will includes innovative ideas and tackles the complex issues facing dealers and their counsel. Registration is available here. The registration fee is $495 per attendee and includes meeting materials, sessions and meal functions.

Cancellation Policy
Cancellation(s) of the 2019 NADC Fall Conference can be accommodated by NADC up to Friday, September 27, 2019 less a $25.00 processing fee. After September 27, we are not able to process refunds.

CLE Credit
CLE Credit may be available for the 660 minutes of educational program *pending approval in your state* (11 general credits for states that calculate 60 minutes per credit; 13.2 for states that use 50 minutes per credit).

CLE credit will be applied towards the state or states entered in your online registration form.

Contact Jennifer Polo-Sherk at jpolo-sherk@dealercounsel.com, for more information.

Travel Plans
Please arrange your travel to join NADC at the opening cocktail reception on Sunday, October 27 from 6:00 – 7:30 pm. The conference will conclude on Tuesday, October 29 at 12:45 pm. Only a select number of rooms are available pre and post the meeting dates. Please make your reservations today to secure additional dates if available.

REGISTER TODAY!
Click here.

Hotel Reservations

The NADC room block at The Ritz-Carlton, Chicago is sold out. Please contact jpolo-sherk@dealercounsel.com if you would like to be added to the waitlist.

Airport Transportation
Depending on traffic and weather, the Chicago O'Hare International Airport (ORD) is approximately 30 to 60 minutes; Midway International Airport (MDW) is approximately 30 to 45 minutes.

To arrange limousine service, please contact The Ritz-Carlton, Chicago concierge prior to arrival.

Weather
Average High Temperature: 58°F (14°C)
Average Low Temperature: 41°F (5°C)

Despite what the averages say, weather during this month can vary. Packing layers of clothing is recommended.

Suggested Dress
Dress for all conference events is business casual.

QUESTIONS?
Contact Jennifer Polo-Sherk at jpolo-sherk@dealercounsel.com

SUNDAY, OCTOBER 27

3:00 - 5:00 pm
Senica
Board Meeting

5:30 pm
Lakeside
New Member Reception

6:00 - 7:30 pm
Lakeside
Reception
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MONDAY, OCTOBER 28

7:30 am
The Grand Foyer
Registration

7:30 - 8:30 am
St. Clair Ballroom
Breakfast
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7:30 - 8:30 am
Ritz Carlton Ballroom Salon BC
In-House Counsel Breakout Session: The Growing Threat of Forced Disclosure of Attorney Communications with Dealer Association Clients
Moderator: Richard N. Sox, *Bass Sox Mercer*
Jason T. Allen, *Bass Sox Mercer*
James T. Fleming, *Connecticut Automotive Retailers Association*
Matthew Larsgaard, *Automobile Dealers Association of North Dakota*

In this session, recent attempts by OEMs to force production of attorney communications with their dealer association clients and court decisions will be discussed. The panelists have first-hand knowledge of the issue as they were each involved in those recent litigation matters. Current law surrounding attorney-client privileged communications will be addressed along with strategies for ensuring that dealer association communications with their lawyers are maintained as privileged.

8:30 - 8:45 am
Ritz Carlton Ballroom
Opening Remarks

8:45 - 10:15 am
Ritz Carlton Ballroom
Session 1: NADA Update
Andrew Koblenz, *NADA*
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 the FTC's proposed amendments to the Safeguards Rule, the Military Lending Act, the proposed ABA resolution on indirect auto financing, the effect of the interest deduction limitation on bonus depreciation, trade and tariffs, fuel economy, and more.

10:15 - 10:30 am
The Grand Foyer
Break
Monday Breaks Co-Sponsored by:

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DEALER MANAGEMENT GROUP

10:30 - 12:00 pm
Ritz Carlton Ballroom
Session 2: The Code of Kyrptonite: Ethical Limitations on Lawyers' Superpowers
Stuart Teicher, *CLE Performer*

Did the drafters of our ethics code believe that lawyers are superheroes? It seems so. In this unique program, Stuart Teicher, Esq. (the "CLE Performer") weaves together talk of superpowers, superheroes, and other fun stuff to explain important ethics rules and explore both the breadth and limitations on a lawyer's power. Topics include:
- The allocation of decision-making authority between lawyer and client (Rule 1.2)
- The rule about withdrawing from representation (Rule 1.16)
- Our duties as an advisor (Rule 2.1)
- How "Zealousness" has lately been seen as the tool of villains, rather than heroes.

12:00 - 1:00 pm
Saint Clair Ballroom
Lunch
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1:15 - 2:15 pm
Ritz Carlton Ballroom
Session 3: Dealer Advocacy, From Sacramento - Washington, DC: An Interview with NADA President, Peter Welch
Peter Welch, *NADA President*
Rob Cohen, *Auto Advisory Services*

2:15 - 2:30 pm
The Grand Foyer
Break

2:30 - 3:30 pm
Ritz Carlton Ballroom
Session 4A: Issues Impacting the Independent Dealer
Adam Crowell, *ComplyNet*

What keeps independent dealers up at night? What opportunities for success lie at their doorstep? This discussion will cover a range of topics such as the federal and state legislation and regulation uniquely impacting independent dealers, enforcement actions touching the industry, and the status subprime marketplace.

St. Clair Ballroom
Session 4B: Dealership Preparation for New Privacy Laws
Monica Baumann, *Scali Rasmussen*
Alisa Reinhardt, *California New Car Dealers Association*

This presentation will cover the California Privacy Act of 2018 and how compliance with the Act is likely to affect dealerships around the country as manufacturers and lenders work to be in compliance. CNCDA's Regulatory Affairs Director Alisa Reinhardt will cover the history of the bill, implementation in California, and updates at the federal level. Scali Rasmussen's Monica Baumann will discuss what kinds of rights the new law provides California consumers as well as the causes of action it provides for customers.

3:30 - 4:00 pm
The Grand Foyer
Break

4:00 - 5:00 pm
Ritz Carlton Ballroom
Session 5A: The Habits of Highly Effective Outside Counsel: An In-House Counsel Perspective
Moderator: Johnnie Brown, *Pullin, Fowler, Flanagan, Brown & Poe PLLC*
Katherine Kelley, *CarMax*
Harold Oehler, *Lazydays RV*
Steve Straske, *Feman Management Services Corporation*

What are the habits of highly effective outside counsel? Join us for this roundtable discussion to get perspectives from in-house counsel as well as practical recommendations for how to best work with outside counsel.

St. Clair Ballroom
Session 5B: New Technology in Fraud Detection and Prevention . . . A Case Study
Adam Rosenfield, *Rosenfield & Company*
Ken Rosenfield, *Rosenfield & Company*
Michael Semanie, *Kiigore, Pearlman, Semanie, Denius & Squires P.A.*

Using a real live case study, panelists will discuss how to use new data extraction technology in detecting fraud, as well as Benford's law.

5:00 - 6:30 pm
Lakeside
Reception
Co-Sponsored by:

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DCG Dave Cantin Group — Our Business is Your Legacy
GW Marketing Services — We Are the Deal Wizards!

TUESDAY, OCTOBER 29

8:00 am
The Grand Foyer
Registration

8:00 - 9:00 am
The Grand Foyer
Breakfast

9:00 - 10:00 am
Ritz Carlton Ballroom
Session 6: Websites and The Americans With Disabilities Act: Recent Website Accessibility Concerns for Dealersips
Doug Greenhaus, *NADA*
Kaye Lynch Sparks, *NADA*
Frank Hamner, *Holler and Classic Family of Automotive Dealerships*

There has been a recent uptick in claims made against dealerships and other businesses involving whether and to what degree their public-facing websites must be made accessible to the disabled public under the Americans with Disabilities Act (ADA). This session will review website accessibility issues highlighting recent claims activity and NADA's efforts to work with the U.S. Department of Justice, vehicle manufacturers, website vendors, dealerships, and other interested parties to address the legitimate concerns of customers with visual or motor skill impairments. Particular attention will be placed on how to address legal claims that arise and on potential cost-effective website accessibility strategies for dealerships.

10:00 - 10:15 am
The Grand Foyer
Break
Tuesday Breaks Sponsored by: HBK CPAs & Consultants

10:15 - 11:15 am
Ritz Carlton Ballroom
Session 7: NHTSA Regulatory Developments
Jonathan Morrison, *Chief Counsel of NHTSA*

11:15 - 11:30 am
The Grand Foyer
Break

11:30 am - 12:30 pm
Ritz Carlton Ballroom
Session 8: Combatting Constructive Termination: Lessons from an Ohio BMW–MINI Case
Christopher DeVito, *Morganstern, MacAdams & DeVito Co., L.P.A.*
Patrick Anderson, *Anderson Economic Group LLC*

Patrick L. Anderson and Christopher DeVito present a case study on their successful BMW-MINI litigation in Ohio. This case illustrates best practices for dealers and their attorneys that are contesting manufacturer decisions regarding dealer performance evaluations, approval of new dealer-principals, review of buy-sell agreements, and the use of right-of-first-refusal clauses to constructively terminate a dealer's interest.

The presenters will walk through the key lessons learned in this important case, which involved an effort by a manufacturer, purportedly based on fulsomely documented performance evaluations, to prevent the sale of a dealership to a well-qualified individual. The case study illustrates how effective pleading, discovery, and expert testimony can overcome manufacturer decisions that are based on incomplete or faulty data. As the use of data analytics in automotive and other industries grows, the importance of these lessons will increase as well.

12:30 - 12:45 pm
Ritz Carlton Ballroom
Closing Remarks

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Be Ready for the Worst!!!

By Steven P. Gibson
Dealer Risk Services, Inc.

What does it mean when you are told, "Be ready for the worst"? It sounds a bit morbid and depressing. After all, car dealers are selling the excitement of a new ride! But, we all need to prepare for the realities of our world, and in doing so, think from a different, "what if" perspective.

There are a host of unfortunate scenarios that can create havoc at a dealership. Some are caused by acts of nature. Others, sadly, are initiated by acts of our fellow humans. Recognizing these and preparing for such events is a critical part of an effective Risk Management program. After all, it is about protecting the dealership's greatest asset–its people, its customers, and its business.

When asked to think about worst case scenarios, people most often think of tornadoes, hailstorms, floods, hurricanes, and earthquakes. These natural disasters threaten both the dealer's livelihood and its employees. Fortunately, the National Weather Service normally offers enough advanced notice that a dealership can prepare and provide protection, at the very least, for its employees.

Disasters caused by people, however, are much more unpredictable and heart-wrenching. The potential for loss of life and severe reputational harm is much greater. Specifically, I am referring to active shooter incidents, violent acts of terrorism, and arson. These unfortunate events are triggered by human behavior: disagreements that escalate beyond control, mental instability, or extreme reactions to ideological or political differences.

All Disaster Preparedness Plans should begin with a reality check and a frank and honest discussion of what bad things can happen. Not to be an alarmist, but these occurrences can have devastating consequences if the management team is caught off guard. While every disaster situation is different, the questions that need to be addressed are the same. Where do we go? When do we leave? Who is in charge of each part? Where is the "safe zone"? As well, we must proactively promote the "See Something/Say Something" environment to employees. All of these are important elements of any evacuation/disaster preparedness plan.

The second part of the Disaster Preparedness Plan is managing the effects of the event. While this is a more "reactive" approach, it is equally important. The challenges presented to the dealership ***after*** the event may include emotional counseling for employees, a solid public relations effort to handle any reputational harm to the dealership, and loss of income due to the event. The Crisis Management efforts can last weeks, or perhaps months.

Here is where professionals need to be engaged. Many of the top insurers include Crisis Management as a portion of their programs. Alternatively, there are programs available in the marketplace that can be purchased on a standalone basis outside of the insurance industry. Bottom line, a dealership will always need professionals to handle the effects of a disaster. If there is building damage, a contractor is the one to help. If there is emotional stress to employees, a counseling firm specializing in PTSD can assist in this area. If the need is addressing immediate and/or future reputational harm, a strong PR firm is essential. For loss of income from any disaster related event, an insurance professional should be able to assist your specific policy wording and coverage. Different areas require a different set of professionals, but all are Crisis Management.

In the end, simply having a Disaster Preparedness Plan on paper is never enough. It is imperative to test these plans again and again, tweaking them as flaws are discovered and amending them to fit current conditions and exposures. Post event, the response must be immediate and equally effective. Assemble Risk Management and Facilities people and talk about the unthinkable. Develop and devote a team specifically to solidifying the Disaster Preparedness and Crisis Management plans. Remember, it is essential for the dealership to protect its people and the assets. When an event occurs, we ***have*** to "get it right." Prepare for the worst! ■

Steven P. Gibson is the President of Dealer Risk Services, Inc., a Florida based firm that provides insurance expertise to the Automotive Industry. With over 30 years of experience, Gibson leads DRS by specializing in Risk Management, Product Development, and Education for the Dealer community. His firm is the Creator and Program Manager for a Dealer Owned Group Captive. Gibson has presented workshops at NADA, NADC, AutoCPA, and various 20 groups, in addition to authoring articles for various industry publications.

2020 NADC Attorney Directory

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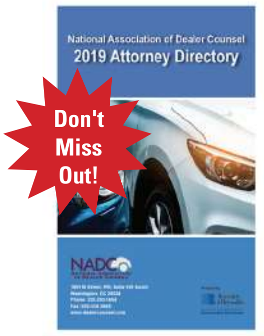

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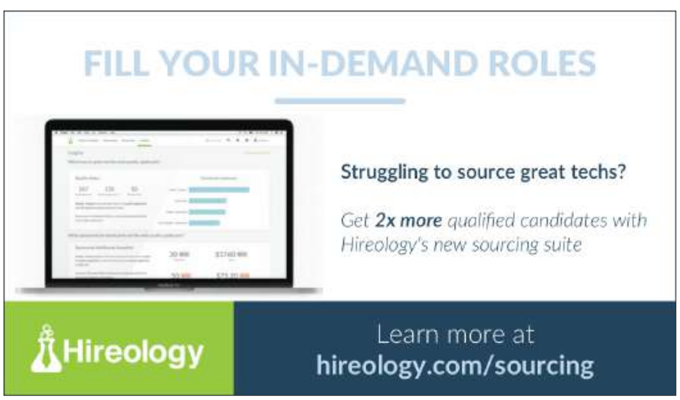
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