Auto Advisory Services

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You "Auto" Know

AAS Announces New Alliance With Reynolds And Reynolds

AAS is pleased to announce a new business alliance formed with Reynolds and Reynolds and LAW Printing. In an effort to provide the best service to the California dealer community, AAS and Reynolds have teamed-up to ensure dealers are properly informed and well-equipped to deal with the daunting landscape of consumer litigation and governmental enforcement activity.

AAS applauds Reynolds and Reynolds for its commitment to compliance and looks forward to a strong working relationship that will surely benefit our mutual clients.

What is this "BPA Fee" Everyone is Talking About?

Senate Bill 46 (effective back in July of 2001) created a "Business Partner Automation" program (BPA) whereby "first-line" and "second-line" business partners are able to perform, among other services, direct (i.e., online) registration of new vehicles.

A first-line business partner is defined as "an industry partner that receives data directly from the [DMV] and uses it to complete registration and titling activities for that partner's own business purposes." (Vehicle Code § 1685 (b)(1)(A))

A second-line business partner is defined as "a partner that receives information from a first-line service provider." (Vehicle Code § 1685(b)(1)(C))

A first-line *service provider* is defined as "an industry partner that receives information from the [DMV] and then transmits it to another authorized industry partner." (Vehicle Code § 1685 (b)(1)(B))

Dealers who wish to participate in this program would normally do so as a second-line business partner working through a first-line service provider such as CVR or TriVIN (to name just two). In doing so, dealers would be able to issue license plates, tags, and registration documents directly to its customers who purchase new vehicles. For this optional service, a dealer may charge the customer no more than $25. (13 CCR § 225.45) This charge should be separately itemized (see "New 552/3 Retail Contracts" article below).

To become a business partner a dealer must file an application, pay the application fee, and post a surety bond. The amount of the bond depends upon the type of business partner a dealer wants to become. A first-line partner must post a surety bond in the amount of $650,000 whereas a second-line partner must post a bond in the

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AAS Auto Advisory Services SM

14771 Plaza Drive, Suite A
Tustin, California 92780
Voice: 714.838-1233
Fax: 714.838-2205

What is this "BPA Fee" Everyone is Talking About? (Cont.)

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amount of $100,000. (13 CCR 225.09)

Note: It is unlikely that a dealer would want to incur the expense associated with becoming a first-line partner. Nevertheless, if a dealer did go in that direction, they would not have to go through a service provider (e.g., CVR or TriVIN) in order to perform direct registration. Not using a service provider means that you are not subject to the service provider's "middleman" fees.

"You may only charge the customer if you are set up to perform direct vehicle registration and are actually providing your customers with plates, tags, and registrations"

The most important things to know about the BPA fee are:

1. You may only charge the customer if you are setup to perform direct vehicle registrations and are actually providing your customers with plates, tags, and registrations;

2. This fee is optional. A customer may elect not to pay the $25 and instead wait for their plates, tags and registration to arrive by mail;

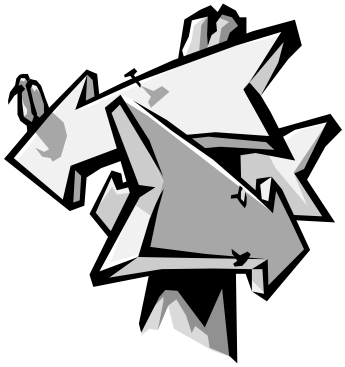
3. Each transaction for which the BPA fee is charged requires a form (REG 4020 or LAW-BPAD) be signed by the customer and a copy submitted to the DMV; and,

4. The BPA Program only accommodates registration of new vehicles at this time.

Note: The Board of Equalization has issued a written opinion that the BPA fee is nontaxable. Be sure to inform your F&I system programmer of this fact.

New 552/3 Retail Contracts

Reynolds and Reynolds' Law Printing has released a new version of their Retail Installment Sale Contract (i.e., LAW 552/3-CA Rev 01/03). The new version has three new line items, two line item deletions and a more prominent location for payoff language.



The line item additions are as follows:

1. Line 1.E. "(Optional) BPA New Vehicle Report of Sale or Renewal Transaction Fee."

As discussed in the above article "What is this 'BPA Fee' Everyone is Talking About?" a dealer may only use this line item if it is setup as either a first or second-line business partner with the DMV and is doing direct vehicle registration. A dealer may charge a maximum of $25 per new vehicle registration transaction. (See above "BPA" article for an explanation of first versus second-line business partner status).

Note: As the line item itself states, this fee is optional. A customer has the option of either paying the BPA fee and receiving plates, tags, and registration immediately, or not paying the fee and waiting to receive those items in the mail.

2. Line 1.H.. "(Optional) Gap Contract (to whom paid)"

This line item addition merely frees up the "Other" line item (formerly 1.H.) that is typically used when a gap contract is sold.

3. Line 2.C. "California Tire Fee"

This line item addition eliminates the need to have your system type-in the description of the mandatory tire fee. You may notice

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New 552/3 Retail Contracts (Cont.)

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that this addition also adds an asterisk which refers to the disclaimer "Seller may keep part of these amounts." This is important in that a dealer is entitled to keep a whopping 3% of the tire fee (15 cents for most new vehicle transactions) as "reimbursement for any costs associated with the collection of the fee." (Public Resources Code § 42885(b)(3))

The line item deletions are as follows:

1. Former Line 1.F. "Luxury Tax."

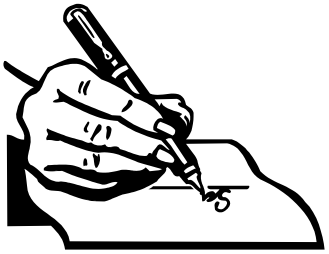
Since luxury tax has been eliminated as of January 1, 2003, this line item has been deleted.

2. Former Line 2.C. "Smog Impact Fee."

As we know, this fee was deemed unconstitutional in 1999 and is no longer imposed.

Addition of Front "Representations of Buyer" Box

In addition to the above line item additions/deletion, the new 552/3 contracts have payoff language prominently displayed on the front of the contract with its own signature lines. In all transactions where there is a trade involved, you should be sure to get the buyer(s) signature(s) in this new "Representations of Buyer" box. This box need not be signed for transactions not involving a trade.



Note: It is still a good idea to get this box signed even in cases where there is no apparent payoff. In the event it is later discovered there is a payoff, the dealer can point to this language to obtain relief from the customer.

Dealers Settle Civil Action with Santa Clara County D.A.

Earlier last year, the Santa Clara District Attorney's Office filed civil complaints against several new vehicle dealers for a permanent injunction and civil penalties for violation of Business and Professions Code section 17200. The suits alleged that the dealers, among other issues, advertised that financing could be arranged for everyone (offers of guaranteed approval); sold used vehicles to Spanish speaking buyers and failed to inform those buyers of the terms and conditions of the Buyers Guide (in the Spanish language); failed to identify all advertised credit term (i.e., "triggered") disclosures; failed to disclose on a contract the existence and amount of a deferred down payment; and the dealer's failure to provide the borrower a copy of his or her credit application.

Our sources report the dealers involved in these actions have since entered into a stipulated final judgment for an amount of $35,000 in civil penalties and $10,000 for the cost of investigations.

DMV Issues New Titles

The DMV began issuing new California Certificates of Title and Salvage Certificates in December 2002. The new version (REV. 10/02) intends to simplify document recognition and contains various security features designed to prevent fraudulent duplication and alteration.

The front of the new title is pink with a blue border and a white opaque state seal. The back of the new title is blue. "VOID" appears on the Certificate of Title, if photocopied.

The front of the Salvage Certificate is yellow with a red border and a green state seal. The back of the new Salvage Certificate is green. The word "SALVAGE" in large outline letters is displayed across the bottom of the certificate.

Both new certificates will have a vehicle history (i.e. "brand") notification prominently displayed within a red box in the upper right corner of the certificates. (DMV Vehicle Industry News Bulletin VIN 2002-16).

Dealers Conspiring to Not Advertise Prices?

"Dealers are reminded that many agreements between competitors (not just price-related agreements) can have severe federal and state antitrust implications."

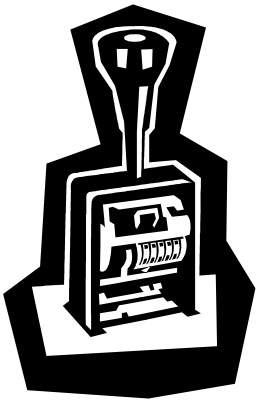
The Sacramento Bee reported in December that the Attorney General's office and the Sacramento County District Attorney's office filed suit against four Toyota dealerships alleging the dealers "agreed either explicitly or implicitly to not advertise prices of new Toyota vehicles" in violation of state antitrust laws.

The Bee reported that officials had been working on the case for approximately two years following a tip from the DMV.

The suit reportedly also contained a separate false advertising charge alleging a dealership implied it had the lowest prices of Toyotas in the area and further alleged "when in fact the average profit per new Toyota vehicle [at the dealership in question] is larger than at any other Toyota dealer in the Sacramento market area."

Dealers are reminded that many agreements between competitors (not just price-related agreements) can have severe federal and state antitrust implications. For a good refresher course on dealer antitrust issues, please refer to Auto Advisory Services', YOU "AUTO" KNOW LEGAL ARTICLE, July 1997, *Agreements Between Competitors, Basic Antitrust Principles.*

Backdating Contracts May be in Violation of Federal Law



When you are unable to get financing for a customer under the terms they were rolled on and call them back to the dealership to do a rewrite, do you backdate the contract? If so, you may be interested in a recent court decision.

The U.S. District Court for the Eastern District of Virginia recently ruled that the practice of backdating a second contract, after rescinding the first one, violates the Truth in Lending Act (Regulation Z).

The facts should be familiar to many dealers. A customer purchases a vehicle and takes immediately delivery. The dealer was unable to obtain financing under the terms of the agreement on which the customer took delivery, however, a lender provided the dealer with terms under which they would provide financing. After bringing the customer back, the dealer rewrote the contract to reflect new (and less favorable) terms and backdated the rewritten contract to the date of the original sale/delivery. The customer then took delivery under the terms of the new contract.

The court explained that under Regulation Z, consummation is defined as "the time that a consumer becomes contractually obligated on a credit transaction." Under that definition, the court reasoned that once the first contract is canceled (i.e., rescinded) for failure to obtain financing, the subsequent contract represents the ultimate obligation between the parties and therefore constitutes the consummation of the transaction. Since a dealer is required to provide an accurate APR disclosure prior to consummation (under Regulation Z), the court held that in backdating the contract, the APR is

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Backdating Contracts (Cont.)

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misrepresented insofar as it is calculated based upon a date that is earlier than the date of actual consummation. The court ultimately held that the APR was understated by .4%.

Although this was a Virginia case and not controlling authority for California courts, it is persuasive and could result in similar suits being brought against dealers here. AAS recommends against the practice of backdating and understands that lenders oftentimes require it. Dealers are encouraged, however, to discuss the issue of backdating contracts with competent counsel. (Reference: *Rucker v. Sheehy Alexandria, Inc.* (2002))

Justice After All?

The State Bar has confirmed it is investigating the Trevor Law Group and its affiliated attorneys for alleged "extortion tactics." Many of our dealer clients may recognize the name of this firm as being one of the several law firms that have been suing dealers for alleged "unfair business practices" including alleged advertising and service department violations. The Trevor Law Group ordinarily sues on behalf of a company called "Consumer Enforcement Watch." As with several other firms, the Trevor firm generally files suit and seeks a quick settlement under the "it's cheaper to settle than fight it" theory.

Chief Trial Counsel Mike Nisperos of the State Bar in talking about the recent suits, is quoted as saying, "The State Bar will investigate the practices of the attorneys affiliated with the Trevor Law Group and either dismiss the complaints as unfounded, take appropriate disciplinary action, or refer the case to the proper authority for criminal investigation."

Alleged Aggressive Sales Practices Result in $2.6 Million Settlement

The Los Angeles Daily Journal (daily newspaper for attorneys) recently reported a settlement of three consolidated class actions brought against one vehicle dealership. These actions were brought on behalf of customers who had purchased or leased a vehicle from this dealership between April 1, 1999 and May 2, 2000.

The suits alleged that customers were subject to a pattern and practice of excessively overcharging customers on their written contract for automotive parts and accessories not selected by the customers; excessively charging customers under written contracts for extended warranties and/or other service plans not requested by customers; not permitting customers to read their written contracts; drafting contracts which contained options, terms and/or conditions not requested by customers; and other alleged fraudulent sales practices.

Despite the defendant's denial of wrongdoing, the case was evidently settled through a mediation process. It is reported that the settlement value was $2,666,540. Of this amount, evidently the class members were to receive a total of $344,400 along with oil change certificates. What was not reported was what happened to the other $2.3 million. One might assume it went for payment of attorneys fees and/or costs.

Legal Article: "Prop. 65" Pre-Suit Notices (What Is This All About?)

Charles "Mike" Michaelis, Esq.

Introduction

Welcome to the party – the Prop. 65 litigation party that is! Vehicle dealers and auto manufacturers may soon find themselves involved in "Prop. 65" litigation. This litigation is like an unchained gorilla running loose in the city – a picture of King Kong should come to mind.

The purpose of this article is to acquaint vehicle dealers with Proposition 65 and its litigation attributes. Hopefully dealers might better understand why they have received "pre-suit" notices threatening to sue them. Even more so, dealers should be in a better position to understand why they may be receiving a summons and complaint in the near future.

This article has more negative aspects than positive. For example, no attempt is made to discuss whether gasoline and/or oil found in vehicles could expose persons to a risk of cancer. The experts will ultimately decide this.

This article also makes no attempt to instruct dealers on how to achieve compliance. As will be seen, since the specific concerns of plaintiff's counsel are yet unknown, it is too early to predict with any certainty the precise steps a dealer might have to take to guard against liability.

The real purpose of the article is to place the pre-suit notices (and the predicted future lawsuits) in a perspective such that you might better understand what is occurring. It is believed that by providing some background information concerning these types of claims, and how the Attorney General interprets the law, that you will have a much clearer understanding.

Background

Proposition 65 was a referendum passed a number of years ago by the California public. One of its main attributes was a public expression that businesses dealing in products that might contain chemicals known to cause cancer (or other serious birth defects) should have systems in place whereby both employees and the public is notified of the risk. Yearly, a state agency publishes a list of chemicals that are known to cause cancer. If any of these chemicals are known to appear in products, in minimum measurable amounts such that it could create a risk of cancer or serious birth defects, then there are regulations requiring notification and/or warnings about such chemicals.

In December of 2001, vehicle dealers received notice that vehicles they were selling contained gasoline and oil which, under certain circumstances, could emit fumes such as to expose persons to cancer or other serious birth defects.

Due to procedural requirements of the law, these written "pre-suit" notices had to be sent out at least 60 days before a suit could be filed. A copy of the notice was sent to the California Attorney General's office. This is also procedural requirement.

The Attorney General, upon receiving the notices, made inquiries of the Plaintiff's counsel as to the seriousness of the threat – expressing serious doubts that the attorneys had done their homework concerning the perceived risk and/or failure to comply with the law's requirement by vehicle dealers. It warned Plaintiff's counsel not to pursue litigation until certain concerns were addressed.

During the year 2002 Plaintiff's counsel evidently presented the voluminous material to the Attorney General's office demonstrating there were a couple of areas where perhaps there was validity to their concern. One area deals with gasoline fumes in areas where vehicles are being repaired. Another deals with gasoline fumes that could exist in and around private residences that have attached garages.

The Attorney General, after reviewing the documentation, ultimately found itself having to observe that perhaps Plaintiff's counsel had standing to file a case and resolve issues on behalf of the public. As a result the Attorney General has, in essence, "green-lighted" a case to proceed against the industry.

As a result of this "green-light," notices were once again sent out in the latter part of 2002 setting up the right to bring litigation after a new 60-day period had elapsed. One reason why the notices were resent is because the Attorney General had found fault that notices were not properly addressed to persons shown on California's state records.

What Should We Do if Suits Are Served on Us?

Relax! Do not take the suit personally. You should find a great deal of comfort in realizing you are just one of many dealers and/or auto manufacturers being sued. There should also be a level of comfort knowing you are just another business finding yourself in this litigation nightmare. Examples of other businesses facing similar type of litigation are chocolate manufacturers, dentists, Christmas tree light manufacturers, hotel chains, etc. [If you find this subject matter interesting,

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Legal Article: "Prop 65" Pre-Suit Notices (Cont.)

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there are two excellent sources that you should review on the internet. The first is the California Attorney General's own website devoted to Prop. 65 litigation. This can be accessed at www.caag.state.ca.us \prop65\. Another interesting site is maintained by a law firm apparently devoted to defense of these matters. The website is: www.CalProp65.com.]

You should also realize this type of litigation will, of necessity, be resolved on a group level. It would be silly to think an individual dealer would, or could, go out and fight this matter on its own. Also, if you think you would like to enter into a quick settlement by paying a few hundred dollars, then you can cease such wishful thinking. Under the law, Prop. 65 litigation matters can only be settled with court approval. In addition, before a court can approve a settlement, the terms must be reviewed by the Attorney General's office so they may comment upon the terms of the settlement and make recommendations to the court.

Various dealer associations are already taking steps to protect your interest. For example, the California Motor Car Dealer's Association has retained a recognized law firm to advise its association as to compliance issues and to determine whether there is legal exposure. Additionally, local associations, such as the Orange County, Southland, and San Diego dealer groups, are having discussions about developing a group defense.

We Are Not in Compliance?

A number of dealers we have spoken with think they are in compliance with the law's requirements. Many relay that their environmental consultants have advised they are properly posting signs or providing written notices to their employees. As previously mentioned, this author expresses no opinion whether your signs are, in fact, in compliance. This author believes that before a precise answer can be provided, there needs to be agreement that there is in fact an exposure that necessitates compliance with Prop. 65. Thus, a preliminary fact whether gasoline or engine oil creates an exposure needs to be resolved.

Assuming, for the purposes of this article, that gasoline vapors and/engine oils do create a risk of exposure, such as to require the posting of signs, it is interesting to appreciate what type of signage might be required in the future. It is highly likely that many dealers currently have signs posted that contain generic warnings such as:

> "This facility contains chemicals known to the State of California to cause cancer and birth defects and other reproductive harm."
>
> "Warning: chemicals known to the State of California to cause cancer and/or birth defects or other reproductive harm may be present in products sold here."

The above two warnings are known as "Generic" warnings by the industry and the Attorney General's office. "Generic" warnings achieve compliance with the law's requirement for warnings employees (referred to as "occupational warnings"). However, the Attorney General's office has noted there is a difference in the type of sign that might be required for the "general public" (referred to as "environmental warnings"). Possible different requirements for "occupational" warnings versus "environmental" warnings is perhaps best explained by quoting an Attorney General's position expressed in a recent letter dealing with the subject:

> "The use of the single 'generic" environmental warning sign, 'WARNING: This Facility Contains Chemicals Known To The State Of California To Cause Cancer And Birth Defects Or Other Reproductive Harm' is troubling because of the extent to which it is being used to provide warnings for a variety of possible exposures. Regulations do permit the use of this type of a sign, *but only if certain criteria are met.* These regulations provide that environmental and occupational exposure warnings may be given by posting a sign stating 'this area contains a chemical known to the State of California to cause cancer' (or birth defects or other reproductive harm). For environmental warnings, any warning whether signs, media, or delivered notices, must be provided 'in a conspicuous manner and under such conditions to make it likely to be read, seen or heard, and understood by an ordinary individual in the course of normal daily activity and *reasonably associated with the source and location of the exposure.*' Depending on the size, appearance, and exact location of the sign, it may meet the 'likely to be seen' test but, as applied to many of the exposures, it is not reasonably associated with the source and location of the exposure.'

What the above teaches is that it is highly likely, that if there is a problem involving gasoline vapors and/or engine oil, then a more specific sign may be required. It is also likely the sign would need to be posted in areas where the problem would be more apparent. For example, the industry

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Legal Article: "Prop 65" Pre-Suit Notices (Cont.)

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might end up with signs advising the public there are gasoline vapors or engine oils in areas where vehicles are present.

There is yet a second method through which notification may be achieved. Assuming gasoline vapors and engine oil does create an exposure, then it is possible the product itself could contain necessary warnings. An example is cigarette packages or cartons containing a Prop. 65 warning. Stores that sell cigarettes do not necessarily have to post warning signs, since the product itself contains the warning.

One might speculate that if vehicles do require a warning, the vehicle itself could be marked. For example, manufacturers might affix a Prop. 65 warning label to each new vehicle. Dealers may find themselves having to mark used vehicles on their own.

If There is a Settlement, What Will it Look Like?

As previously mentioned, settlement of these actions must be approved by a court. As a result we have examples to draw upon.

It is probable there would be a class settlement whereby dealers would agree to post and to display prescribed signs to the public. It is also likely a small amount of money would be paid in the form of "civil penalties." It is interesting to note that if civil penalties were to be collectively paid, then 75% of any such penalty has to be paid over to a state agency known as the "Department of Toxic Substances Control." The agency then disperses the funds for cleanup of contaminated sites and enforcement activities of local public health offices. The other 25% would have to be earmarked and approved for a public purpose.

Attorneys' fees are, of course, recoverable by the other side. This should come as no surprise as it is often the sole reason many attorneys get involved in these cases. Fortunately, the amount of attorneys' fees are closely monitored by the courts and the Attorney General's office. The Attorney General's office has an announced desire to be conservative when reviewing claims for attorneys' fees. The office appears devoted to a concept that an attorney fee "windfall" should not be allowed.

Summary

Although this article provided little answers, it hopefully achieved its purpose. You should be better informed as to what these Prop. 65 claims are all about.

In closing, you are offered a reminder that if and when you are served with an actual summons and complaint, then make sure you contact your attorney. Secondly, and perhaps more importantly, you should tender the matter to your insurance company. Whether they will provide coverage remains to be seen.

Finally, keep your eyes and ears open to see if there is a defense team being set up by your dealer associations.

Auto Advisory Services has made reasonable efforts to ensure the accuracy of the subject matter reported. AAS makes no express or implied warranty respecting the information presented and assumes no responsibility for errors or omissions. This legal article should not be used as a substitute for proper professional or legal advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

AAS Reminder!

As of January 1, 2003, luxury tax has been eliminated. Be sure to have your systems reprogrammed accordingly.