MLG
AUTOMOTIVE LAW

Super Lawyers

DEALER'S VOICE

VOLUME 1 :: ISSUE 1

IN THIS ISSUE:

The Dark Side of Social Media

Whether we like it or not, social media is a part of all of our lives. As a dealer, social media can have a tremendous benefit: having consumers follow you on Facebook or Google-Plus is the new biggest thing. Social media eliminates postage costs and lag-time associated with traditional advertising. But there is a dark side.

As a dealer, you undoubtedly have scores of employees who are connected to social media, and therein lies the danger. The way a dealership interacts with its employees on topics of social media is regulated by Title VII of the Civil Rights Act of 1964, and policed by the United States Equal Employment Opportunity Commission (EEOC) and the National Relations Labor Board (NRLB). Thus, just as a dealer needs to be careful to not discriminate in the workforce, it also needs to be careful of how it deals with employees and their social media behavior.

You may be surprised to learn that the EEOC and the NRLB have found the following acts unlawful:

- Disciplining an employee for the content of their social media posts.
- Disciplining an employee for creating posts that have a negative impact on the company, regardless of when or where the post was made.
- Prohibiting an employee from disclosing confidential or proprietary information about the company.
- Requesting that an employee confine social media activities to topics unrelated to the business.
- Requesting that an employee provide you access to their social media sites.
- Prohibiting an employee from posting photographs or videos taken in the workplace.
- Requiring an employee to contact management prior to making a media post about the company.

Given the pervasiveness of social media among employees, dealers need to be careful about limiting the activities of their employees. Labor law violations typically have statutory attorneys' fees clauses with them, and a claim by a former (or current) employee could end up being very expensive.

To avoid a costly misstep, take a moment to familiarize yourself with the EEOC and NLRB guidelines regarding social media. The EEOC guidelines can be found at http://www.eeoc.gov/employers, and the NLRB guidelines can be found at http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media.

By Kristen Rodriguez
krodriguez@mlgautomotivelaw.com

The Trade-In Dilemma

Closing a sale that involves a trade is one of the cornerstones of the car business. And taking a trade may not only be necessary, but it can also greatly enhance the financial aspect of the deal. Many consumers are willing to give away their old vehicles to get in something fresh and new. And when a trade is taken in far below market value, a significant margin can be made on resale, whether it is at retail or at auction.

California's Retail Installment Sales Contracts give the dealer the right to cancel the contract if the dealer is unable to sell the paper within 10 days of the contract. If the consumer is able to be financed, all parties are happy. But what happens when the dealer cannot find financing, and the consumer wants their trade returned? Real issues arise when the trade is no longer available because it has already been sold.

California Civil Code § 2982.7 states that when a trade has been sold, the dealer is required to give the consumer the greater of what the dealer sold the car for, or its fair market value. This could result in a substantial financial hit for the dealer, particularly if the trade was wholesaled for less than fair market value. If the dealer fails to tender payment to the consumer within five days of rescinding the deal, the consumer can bring a civil claim against the dealer, which can include a claim for attorneys' fees incurred in bringing the claim. And this is where the tail wags the dog.

Many a dealer have discovered the hard way that refusing to refund the consumer top dollar for their trade can end up costing tens of thousands of dollars in attorneys' fees in litigated claims. And there are countless predatory law firms in California that make their living off of suing dealers for nominal claims, only to recover the statutory attorneys' fees.

To make matters worse, even when the value of the car is tendered to the consumer, the dealership could still have a problem on its hands. When a deal is rescinded, two facts usually prevail: 1) the consumer is now without a car to drive, and 2) they have been found to be un-bankable. So, if they cannot get financing, and are now without a car, what is the consumer to do?

This dilemma could lead some consumers to feel they were misled when they entered into the transaction, which could lead to a claim for violation of the Consumer Legal Remedies Act. The CLRA can be a dealer's biggest nightmare – it not only calls for payment of the consumer's attorneys' fees, but it also has elements that touch upon class action claims. Thus, a seemingly innocuous claim by a consumer could lead to a consumer rights law firm climbing through your deal-jackets looking for any violation of consumer lending laws.

As with many things in life, an ounce of prevention is worth more than a pound of cure. If you find yourself with an un-bankable consumer and their trade has been sold, consider every option to keep them from coming unglued. This could include financing the transaction yourself, or taking the excess capital you would have had to pay the consumer for the fair market value of their trade, and using that to put them in a deal that works.

While no one likes to lose money on a transaction, the cost of a disgruntled consumer can be staggering if not handled properly. Be smart and try to avoid being on the receiving end of that stick.

By M. Todd Ratay
tratay@mlgautomotivelaw.com

"Nothing great in the world has been accomplished without passion."
— Georg Wilhelm Friedrich Hegel

Uber's Worst Nightmare

Reprinted from the July 8, 2015 edition of the Los Angeles Daily Journal

It's hard to imagine that things could have gotten worse. Earlier this year, ride-share giant Uber Technologies was hit with a bevy of class actions over claims that the company was fraudulently advertising its cars as the "safest rides on the road." Citing to a string of rapes and assaults by Uber drivers, the lawsuits allege that the company's drivers have virtually no training, are not fingerprinted and checked against the Department of Justice criminal database, and are put through a minimal screening process.

Now, Uber has been dealt an even more significant blow — and one that goes to the core of its business model. Last month, the California labor commissioner issued a ruling that an Uber driver should have been classified as an Uber "employee," not an independent contractor.

The case was never intended to be significant. In September 2014, Barbara Berwick filed a claim with the labor commissioner's office, seeking reimbursement of expenses for the two months she had worked as a San Francisco Uber driver. Berwick didn't have an attorney, and no one was expecting much from the claim.

All of that changed, however, when hearing officer Stephanie Barrett issued a 12-page opinion, citing substantive case law and Labor Code statutes, and concluded that under California law Uber drivers should be classified as employees, not independent contractors. The labor commissioner then found that Uber owed Berwick $4,152.20 in expenses, mileage reimbursements, toll charges, and interest for her two months of employment.

A blanket classification of "employee" for its drivers would be the death knell for Uber. Not only would the company be required to pay substantial payroll taxes, which it would not have to pay for independent contractors, but the expense reimbursement could be unfathomable. Consider that Berwick was awarded slightly over $4,000 in unpaid expenses for just two months of work. Now consider that Uber has 22,000 in San Francisco alone, and another 140,000 throughout the rest of the U.S.

As a relevant comparison, and a hint at what could be in store for Uber, last month Fed Ex paid $228 million to settle a lawsuit regarding the misclassification of 2,300 Fed Ex Ground drivers. With 160,000 U.S. drivers at issue, the financial impact could be catastrophic — even for a company with billions in cash.

But the direct financial impact is just the beginning. Classification as employees would also give drivers substantive legal rights that they so far have not been able to enjoy, such as workman's compensation insurance, unemployment insurance, overtime benefits, and health care benefits. It would also expose the company to an array of claims for wrongful termination, unlawful discrimination, failure to make reasonable accommodations, and unsafe work environment.

* * *

To continue reading, go to mlgautomotivelaw.com/uber.pdf

By Jonathan Michaels
jmichaels@mlgautomotivelaw.com

DEALER SPOTLIGHT

Beginning in September, we will be featuring a different dealer each quarter in our "Dealer Spotlight." If you would like to share your story and have it read by thousands, send your submission to jmichaels@mlgautomotivelaw.com.

Each dealer featured in our Dealer Spotlight will receive a bottle of Opus One, compliments of MLG!

California's Free Mediation Program

Did you know that the New Motor Vehicle Board offers a free and informal consumer dispute resolution program for new car dealers? The Consumer Mediation Services Program provides mediation services for disputes consumers have with new car dealers, manufacturers and distributors licensed in California. The program assists parties who have not yet retained an attorney, filed a lawsuit or been to arbitration.

The program provides a neutral mediator who works with the parties to achieve a resolution that is agreeable to all involved. The mediator has no authority to force a party to resolve the dispute in a manner they do not agree with; therefore, the dealer is never forced to provide the consumer with what they are demanding. If a resolution is not reached, the parties are left in the same position that they were in prior to the mediation.

Below is a list of some of the types of issues that can be mediated in the Consumer Mediation Services Program:

- Warranty / repair disputes
- Contract disputes
- Used vehicles which are still under the original warranty
- Used vehicles sold by a new dealer
- Consumer complaints regarding a recreational vehicle's chassis, chassis cab, and drive train (although these are initially referred to the Department of Consumer Affairs)

Not all types of disputes or complaints fall under the Consumer Mediation Services Program's jurisdiction. Below is a list of some of the types of cases which the Program does not have authority to mediate:

- Lemon Law
- Vehicles sold "as is"
- Odometer fraud
- Sales or transactions by private parties
- Used vehicles purchased from an exclusively used car dealership, which have no remaining original warranty

The Consumer Mediation Services Program is extremely successful in resolving disputes, boasting a 70% success rate in achieving resolution. Not only does a successful mediation allow you to avoid the high costs of litigation, it may also result in maintaining a positive relationship with the customer. If you would like to take part in the Consumer Mediation Services Program, you may call (916) 445-1888, or fill out a mediation request form, which can be found at https://www.nmvb.ca.gov/apps/consumer_program/sendmediationform_2010.aspx.

By Kianna Parviz
kparviz@mlgautomotivelaw.com