May/June 2019

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INSIDE THIS ISSUE

Chief Editor Phyllis Sartin

I have been visiting with dealers, legislators and automotive product providers across the state and the one commonality shared amongst everyone was how rapidly this industry is changing. We also had the opportunity to attend the Internet Sales 20 Group Training Session in Nashville. This event was an exciting three full days of remarkable content that was extremely informative and very timely while further validating how quickly the communication and technology landscape is changing this industry. Our goal is to keep you informed of the changes that will directly affect your business now and in the future. When it comes to your success, we are here for you. As always, please contact us with any comments, questions or concerns.

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Have you had your chance to catch your breath from that crazy tax season yet?

There is no rest for the weary!

Time to ramp up for graduation season and those Summer car purchases.

Floorplan Xpress is not just here for you in the hectic tax season, we are here with you all year long. We are fast approaching graduation season. Every high school senior is awaiting their used car to drive to college or start their careers. If you buy today using our 90-day terms, you can make it through graduation season with fresh vehicles to fit their needs and wants.

What about the summer buyers that want the convertibles, jeeps, or sports cars? Again, buy today using a *Floorplan Xpress* account and be ahead of the competition. Summer is here and so are we – to help you build your inventory!
Our process is quick, easy and painless. It starts with contacting us at (615) 444-5535 or going online and applying at FPXUS.com

THE TWO MOST FREQUENTLY STATED NON-VALID STATEMENTS

When I conduct dealership used vehicle management training seminars or when I'm doing an in-house dealership consulting service I am frequently told; "you know if I could find more inventory I could sell more vehicles" or "if we had more floor traffic we'd sell more used cars. Traffic has been slow this month". While I am sensitive to both inventory issues and floor traffic, often times the solutions to either of these statements can be found within the dealership.

When faced with these two perceived realities I must search out the root causes to the lack of available inventory and to the lack of floor traffic. I can't assist in fixing a problem unless I understand the root cause in order to validate the perceived problem. The first place I look for inventory is in the floor log or within the dealership CRM or other floor traffic control system. I'm well aware of the sales a dealer makes as reflected by the financial statement. What I'm looking for are possible missed opportunities. A reasonable appraisal system can tell me the dealership management team appraised 86 vehicles during the month and actually won or took in on trade only 23 of those trades (27% look-to-book). What does this tell me? It suggests to me there might be an opportunity to re-evaluate the current appraisal process to determine why the "win" percentage is not closer to 55%? I am under the firm belief there are many more vehicles to be acquired if dealerships would simply pay more attention to their appraisals. The general manager/dealer needs to be asking; "why aren't we winning more trades? Do we need to be using other tools or team appraising?"

When it comes to, "we really need more floor traffic in this store" I have to ask the question, "well how many potential buyers walk through your door each and every day?" I'm amazed at how many times I can't get a reliable opportunity count. Dealers all too often accept the belief "you know how salespeople are, you can't get them to record floor traffic all the time". Well, why not? Whose dealership is it anyway? How do you know if you truly need more floor traffic when you're not measuring how many opportunities you have each day and most importantly, how effective the dealership is working with each of those opportunities? While I previously mentioned a fair and expected look-to-book appraisal rate should be around 55%, I also expect an opportunity to appraisal rate to be close to 50%.

Before assuming you need to purchase more vehicles, try trading for more. Before you assume you need more floor traffic, take a closer look at your existing opportunities and evaluate how effective you currently are. Continuing to do a mediocre job with more traffic will only compound your challenges.

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Today's Car Dealer and Social Networking: Do I CLICK LIKE?

Your plate is full; is Social Networking really that big a deal? As a car Dealer, I have Ad Budgets for TV, Radio, Newspaper, Direct Mail, and of course Digital because everyone else is doing it. Now I have to have someone keeping us on Facebook?

Let's put it this way, you are in one of the most competitive arenas on the planet and you need to know these statistics compared to say your Digital Program. For context, as of March 5th, 2019, 69% of U.S. adults use at least one social media site. The average American Internet user has 7.1 social media accounts. 88% of American 18- to 29-year-olds use social media.

Every day people approach your store selling you programs on Social media posting and other ways to use Social Media in the automotive industry. Why? Social Media is so big if it were a party it would have 225,768,000 attendees! And all of these people are looking for something in common. So early on the biggest thing was to generate "Likes" for your dealership, post positive information about you, the more you get the better right? Well, we have learned a lot through the years having been on board with this from the start and not just how massive Social networking can be for your store, but the best way to do it. So, if you are at this party do you think you would make money doing nothing but talking? Or do you make more money listening to people? What their needs are, what their problems are, and what they are looking for? The great thing about Social media is that if you were at a party with 226 million people you could only listen to one person at a time. In social media using all of the robust features available you can actually search all the conversations going on for keywords: people who are talking about their car breaking down, possibly buying a new car, maybe they are moving to your area and will be purchasing a new car and when they do there is a myriad of information you can provide to solve their need.

When you use Social Media the correct way, you have the ability to run an ad about your store saying how great you are, or one where your customers are raving about you. Which one do you think is most effective?

When someone sees your customer talking great about you, and thousands of people see this on a regular basis, you are priming them for that moment when they are buying a car. In today's world, Social Media is the most powerful tool there is; but know how to use it. Example: You have several 5-star reviews you are very proud of, and you have spent a lot of money getting them, so who sees them? Only someone who had Googled you or found you in a huge group of other dealers who want the same customer.

With Social Media, you can separate yourself and gain huge success by not being the one out there telling everyone how great they are. You want to be the one who has your customers saying how great you are. That is who people buy their car from, and I am going to share the latest and greatest way to be the Social Media Giant.

Use your customer testimonials on Social Media as the trigger to find and target people who are actually looking for a car. It is easy, and the testimonials, when turned into videos and trickled out to the people looking for a car result in an increase of numbers walking in your door exponentially and each of those people, will, in turn, be asked to also give a testimonial and all of these constantly being fed through social networking.

So, as a Dealer today Do you Click "Like" With Social Networking?

Ask yourself one question: Which of my marketing tools can reach-

Two hundred twenty-five Million seven hundred and sixty-eight people?

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Inject Capital into Your Business with a Bulk Purchase Program

If your tax season was as successful as you planned, you most likely sold a large portion of your inventory and grew your finance receivables portfolio. Now is the time to start thinking about aging your new loan originations and turning them into cash in the next 90 days or so. Selling a portion of your finance receivables allows you to raise cash quickly for operating expenses and helps alleviate the stress that comes with servicing a growing portfolio.

Bulk Purchase Programs provide you with capital flexibility. Many dealerships use the cash to pay down debt, build inventory or even keep it on-hand to prepare for future growth. The purchaser assumes servicing of the loans, reducing your overhead costs and risk. There are many options when it comes to finding a partner to provide financing solution for your dealership. However, finding the right partner who will work alongside you to ensure a smooth transition, regardless of your dealership needs, will ensure you do not lose customers and can continue to operate your business effectively.

At Spartan Financial Partners, we do it the right way from the beginning, providing you a quick close and great customer service. We don't believe in hidden fees and offer no hassle, up-front pricing. Each dealership's capital needs are unique, which is why our team will work one-on-one with you to custom-tailor a solution to fit your business. For over a decade, we have been fully dedicated to providing capital solutions to dealerships across the country.

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For more information, visit their website at Spartan-Partners.com.

TIME TO BUTTON UP THE PROCESS FOR FURNISHING OF CREDIT INFORMATION AND DISPUTE HANDLING

It was recently announced that lawsuits against creditors arising from credit reporting issues has bypassed Telephone Consumer Protection Act cases and is now the leading legal action brought against creditors. Now seems like a great opportunity to remind everyone to examine their policies and procedures and get their house in order to avoid being the next target.

These types of lawsuits can be divided into those involving the furnishing of credit history information or, secondly, the handling of consumer disputes regarding the reporting of such information. In my experience, many creditors/dealers make the mistake of simply delegating the task of furnishing of credit history information to a third party and assume it's going to be handled correctly. As the CFPB pointed out in the First Investor's Consent Decree and other high profile matters, the creditor is the true provider of the information and has the ultimate responsibility to provide correct information, even if it outsources the actual task. A dealer doesn't "outsource" its liability simply by having a contract with another party to provide the service.

Beginning with the conducting due diligence on a third party provider, entering into a contract, and continuing throughout the relationship, the course of dealings between the parties should emphasize training, policies and audit. Simply put, this means that the provider should be training its personnel (and making sure its provider does the same) on how to handle reporting, there should be policies in place at both the creditor and provider to ensure this happens systematically and accurately, and there should be an audit mechanism to "spot check" for accuracy. For a dealer with a few thousand accounts, we're only talking about pulling a small sample size every month, but that should be sufficient to identify errors. Contact me if you'd like information on how to perform such an audit.

Turning attention to the handling of disputes, the keys are again training, policies and audit. Have your personnel been given adequate training on the types of disputes being received? Getting a few hours of training in-house usually isn't enough, but luckily there are lots of alternatives available, if you want more information just go to our website, IgniteCP.com, and email me for more information. Is there a company policy that sets forth a systematic routine to intake and respond, and is someone checking the work after the fact to make sure it is being done correctly? All credit dispute letters are not created equal, some can be very detailed and tricky, so it is important to perform each of these steps to protect the business.

This exercise is all about protecting your business. The wolves are stalking their prey and the weak will be attacked. Take the time necessary to examine your practices in these areas and make sure things are being handled the right way. These cases are expensive to defend and will ruin your day. An "ounce of prevention" now is worth your effort.

Steve Levine is Chief Legal and Compliance Officer of Ignite Consulting Partners, where he provides guidance to car dealers, finance companies and other industry participants about compliance, best practices, and issues affecting the car sales and finance industry. Follow him on Twitter @LawyerLevine for his commentary on industry compliance developments.

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www.musiccityaa.com

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Does your Credit Application Need a Tune-Up?

When a customer sits down at the finance desk in your dealership, the first step is to take some basic information about them. But, the credit application isn't just about obtaining identifying information. Federal law requires certain disclosures to appear in a credit application. And there are still other disclosures that, while not required, are recommended. A credit application should include the following disclosures:

Alimony, Child Support, and Separate Maintenance: If your credit application asks whether an applicant is receiving alimony, child support, or separate maintenance payments, your application must also state that the applicant isn't required to reveal such income, unless the applicant wants to rely on that income in the determination of creditworthiness. That is, the credit application must explain that, unless the applicant wants to use alimony, child support, or separate maintenance to qualify for credit, the applicant doesn't have to list those amounts.

Credit Report: The Fair Credit Reporting Act allows persons to pull credit reports for "permissible purposes," including allowing creditors to obtain a credit report on applicants applying for credit. The submission of an application (even if the creditor doesn't tell the customer his credit is being pulled) or a separate express written authorization allows a creditor to pull a credit report. Even though the application itself allows the creditor to pull the applicant's credit, including a statement in the application authorizing a credit report puts the applicant on notice that you will be checking their credit and may help avoid misunderstandings.

Telephone and Text Message Authorization: Providing a cell phone number on a credit application constitutes consent to receive calls and text messages for account-related messages. These include servicing and collection calls. Even though it's not required, it's a good idea to include a disclosure explaining that by providing a cell phone number in connection with the application, the customer consents to receive account-related communications. If the creditor will engage in any marketing whatsoever by placing calls or sending text messages to a cell phone (e.g., calling the customer to sell an extended warranty), the Telephone Consumer Protection Act requires that a creditor must first obtain the customer's prior express written consent. This can be done by including a specific disclosure in the application, along with a place for the customer to initial or sign, indicating they want to receive marketing calls and texts. However, the customer is not required to agree to receive marketing calls and must able to apply for credit without signing such consent.

References: Consider revising your application to include a statement explaining when references will be contacted. The CFPB has cited companies for failing to inform customers that their references will be contacted for collections purposes, even though the Fair Debt Collection Practices Act allows creditors to contact references for the purposes of obtaining location information about a customer.

The credit application is the first document you put in front of your customer. You don't want the transaction to be a lemon – that is, faulty from the start. Give your credit application a multi-point inspection today, and make sure it includes these important federal disclosures.

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Disclaiming Warranties? Do it Right!

by Thomas B. Hudson

The law in some states permits dealers to sell vehicles "as is," provided they do so in a certain way. I predict that, in a couple of decades, dealers in all states will be prohibited from doing "as-is" sales. Until that happens, dealers who engage in "as-is" sales should listen up. Here's why.

Reinhard Smith bought a used car from Key & V Auto Sales Corporation. The car did not have a Buyers Guide affixed to it. Smith was told that the car had no problems but that if he experienced any issues, the car had a 90-day warranty.

Smith signed a retail installment contract and a sale agreement. The sale agreement provided that the dealership could repossess the car if the account became delinquent. The sale agreement also provided that the sale was "as is." Similar "as-is" language was included multiple times on a Non Warranty Notice that Smith also signed.

A week after the purchase, Smith struck a parked van when his car's steering column became stuck. Key & V Auto refused to help with the repairs and ended up repossessing the car when Smith defaulted.

Smith sued Key & V Auto and various employees, asserting claims under the Magnuson-Moss Warranty Act (failure to affix a Buyers Guide and breach of warranty), the Fair Debt Collection Practices Act, and various Pennsylvania laws. The defendants moved to dismiss the complaint, and the federal trial court judge granted the motion but noted that the "troubling allegations surrounding the transaction [and lack of a] legal remedy … underscore why some states, unlike Pennsylvania, forbid the sale of a used car without at least some warranty."

Plaintiffs can't bring just any old claim in federal court. In order to avoid having those courts swamped by an ocean of small claims, plaintiffs have to allege a serious dollar amount of damages in certain cases. Those damages are called the "amount in controversy." The court noted that Smith did not plead sufficient facts to meet the $50,000 amount-in-controversy requirement for jurisdiction over MMWA claims in federal court.

Next, even if Smith had alleged sufficient damages, the court found that the Buyers Guide and breach of warranty claims would still fail. The court noted that Smith could not allege that Key & V Auto's failure to affix a Buyers Guide to his car caused him any damage because there was sufficient evidence that Key & V Auto gave him explicit notice in both the sale agreement and the Non Warranty Notice that the vehicle was being sold without any warranty.

For the same reason, the court found that Smith's claim for breach of express and implied warranties failed. The law in many states permits a seller to disclaim warranties provided that it does so clearly and conspicuously. The court noted that Key & V Auto's written disclaimers were clear and conspicuous and could not be modified by the alleged verbal offer of a 90-day warranty. The court also found no support for Smith's FDCPA claim where the documents he signed gave Key & V Auto the right to repossess the car for nonpayment.

(Continued on page 20)

It's 10 P.M. Do You Know What Your Repossession Agents Are Doing?

Do you truly know what the repossession agents you've assigned to repossess one or more of your customers' cars are doing? I'm hearing more and more about a very disturbing practice in the repossession services industry that, if true, could get repossession agents (and you, by extension) in trouble with the authorities and possibly sued. I understand that some repossession agents are placing global positioning system trackers on vehicles out for repossession, without the knowledge or consent of the car's owner.

Here's how it typically works: A repossession agent uses license plate recognition technology to locate a vehicle out for repossession, but the tow truck is not immediately available to "pop" the car. So, the repossession agent places a GPS unit on the car so that he/she can track it. Later, the tow truck driver uses the GPS tracker to locate the car and repossesses it.

Let's take a look at how one state law may impact the use of a GPS device. Texas law permits an electronic tracking device to be installed on a vehicle subject to the prior consent of the buyer or lessee of the vehicle. Under the Texas Penal Code, a person commits a Class A misdemeanor by knowingly installing an electronic or mechanical tracking device on a motor vehicle owned or leased by another person. However, a person installing the electronic tracking device is not subject to criminal penalties if the person obtained the effective consent of the owner or lessee of the motor vehicle before the electronic or mechanical tracking device was installed.

If the repossession agent or employee doesn't get the owner's or lessee's consent before the GPS device is installed on the vehicle, then the agent would be at risk of violating the law and being charged with a misdemeanor.

What if the state has an "anti-stalker" statute that provides that the installation of a tracking device on a car without the owner's or driver's consent would be considered the offense of stalking? How'd you like your repo agent to be accused (and possibly found guilty) of stalking?

The repossession company also may be in violation of its agreement with you, the secured party/creditor (e.g., in which it represented and warranted that it will comply with federal and state law when providing its repossession services).

Finally, let me turn to the "dark side" and put my consumer plaintiff's hat on for a minute. If my client had her car repossessed and I learned that the repossession agent placed a GPS device on her car without her knowledge or consent, you can bet I'm suing the repossession company, the repossession agent, and you - the secured party/creditor - for violating my client's privacy by installing the device on her car without her knowledge or permission.

Maybe I decide I want to file my suit as a class action on behalf of all other similarly situated persons for violating their privacy or committing acts or practices that were unfair, deceptive, or violative of public policy. With many state statutes providing statutory damages, attorneys' fees and costs, and the possibility of treble damages, why wouldn't I want to file this action as a class action?

It's 10 p.m. Are you sure that your repossession agents aren't installing GPS devices on targeted cars without the buyers' or lessees' knowledge or consent?

*Eric L. Johnson is a partner in the Oklahoma office of Hudson Cook, LLP. He can be reached at 405.602.3812 or by email at ejohnson@hudco.com.

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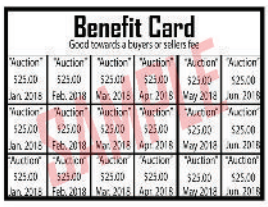

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Magazine

Disclaiming Warranties? Do it Right!

(Continued from page 16)

After all these claims had been disposed of, the plaintiff was left with only state law claims. In those circumstances, federal trial courts, which may but are not required to entertain state law claims, often dismiss the plaintiff's lawsuit (no sense working when you don't have to), and that's what the court did here, declining to exercise jurisdiction over Smith's state law claims.

Note the "clear and conspicuous" requirement. About eight years ago, I bought a car from a local dealer. When I did so, I actually read through the buyer's order - both sides, no less. That document contained a warranty disclaimer, but it was part of a longer paragraph, not set apart in any way and in the same color, size, and font as the surrounding text. Remembering my Boy Scout training, and trying to be helpful, I suggested to the GM that a court wouldn't enforce his disclaimer because it wasn't clear and conspicuous.

A couple of months ago, I bought another car from that same dealer. As I signed on the dotted line, I thought, "This looks familiar. It can't be the same version of the buyer's order I signed years ago, with the same ineffective disclaimer language, can it?

You guessed it. Free advice from a lawyer, and the dealership hadn't taken it.

Smith v. Kershentsef, 2019 U.S. Dist. LEXIS 22388 (E.D. Pa. February 12, 2019).

Thomas B. Hudson
Of Counsel

**Thomas B. Hudson was a founding partner of Hudson Cook, LLP, and is now of counsel in the firm's Maryland office. He is the CEO of CounselorLibrary.com, LLC, and is a frequent speaker and writer on a variety of consumer credit topics. Tom can be reached at 410.865.5411 or by email at thudson@hudco.com.*

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Auctioneer Spotlight

Justin Ochs moved to Middle Tennessee in 2005 to complete a Master's Degree at Middle Tennessee State University. It was then he became involved in the real estate and auction business. In fact, Ochs' first auto auction job was working the ring at Manheim Nashville.

Since that time Justin has traveled the country working for some of the largest auction companies of their kind, including Barrett-Jackson, Mecum Collector Cars, and Ritchie Bros. among others. Each week Justin can be found at several auto auctions including Music City Auto Auction, Manheim Nashville, ADESA Nashville and also selling motorcycles and ATV's for National Powersport Auctions. Ochs loves the art of bringing buyers and sellers together to make a deal that is profitable for both parties.

Justin is a past Tennessee State Champion Auctioneer and the 2012 International Champion Auctioneer as designated by the National Auctioneer's Association. When not working an auto auction, Justin runs his own real estate business specializing in assisting in the disposition of Government owned assets. He has exceeded $40 Million in sales for clients like the United States Marshals Service, FDIC and the State of Tennessee.

Justin and his wife Kelly make their home in Hendersonville on a family farm with children Weston, Ava & Lawson.

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CLOSED NISSAN FACTORY SALE EVERY THIRD THURSDAY AT 9:00 AM CT

For personal assistance about these and other sales, call us at (615) 773-3800. See you at the sale!

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