



Class Actions: What They Are and What You Should Do About Them

All dealers watch for trends in the auto business. From time to time you are sure to hear about the fearsome threat of class actions.

Unless you have been involved as a defendant in a class action, it is hard to really assess the danger. Make no mistake, a class action can be very dangerous. But there are things that can be done to protect your dealership.

What is a Class Action?

Law.com defines a class action as: “a lawsuit filed by one or more people on behalf of themselves and a larger group of people who are similarly situated.” In essence, it is lawsuit by a person or by a group of people who seek to act as representatives for hundreds or thousands allegedly aggrieved by some wrongful practice of the defendant. Under the rules applicable in federal courts and under state court rules where class actions are allowed, a representative may sue on

behalf of a class (1) so numerous that individual actions are impractical; (2) where there are questions of law or fact applicable to the class; (3) where the claims of the representative are typical; and (4) where the representative will fairly and adequately protect the interests of the class.

Dealers sued in class action lawsuits are right to be concerned. They can be quite expensive to defend. Insurance coverage may be limited. Unlike many lawsuits, however, the dealer’s success may depend heavily on actions taken early in the litigation process. A sound defense of a class action suit requires a strong challenge immediately to the sufficiency of the complaint, followed by an immediate challenge to the plaintiff’s attempt to certify a class. Once a class is certified based on a solid complaint, the defendant is looking at a very expensive ride, win or lose. And a loss can be devastating because of the substantial verdict that can result from hundreds or thousands of claims being tried at one time.

So what do you do?

The first line of defense to a class action lawsuit is to avoid a lawsuit. The best way to do that is to have a compliance program. Yes, you say, but there are hundreds of federal and state laws that apply to how you do business. That may be true, but there are generally certain things that lead to class actions.

Listen to your state trade association. Seek advice from your attorney. Learn the exposures that can lead to class action claims in your area. In states that allow class action practice, class actions often arise from problems that can lead to claims under the state unfair and deceptive practices act. Class actions can be brought in all federal courts, but because of federal jurisdictional requirements, however, those cases would have to be brought under some federal statute such as the Truth in Lending Act.

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Know where your exposures lie, and establish a compliance program.

Compliance Implementation

It is not enough just to have a compliance program. It must be implemented, people must be trained, you must review their performance, and you must take action to enforce compliance if your program is not being followed. Without having that process in place, you will not have an effective compliance program.

Establish a Complete Complaint Handling System

Although there are exceptions when lawyers themselves set out to build class action cases, many class action cases arise from a disappointed customer who goes to a lawyer. What is the lesson? Solve each customer's problem before he or she visits a lawyer. There has never been a dealer defendant in a class action case arising from a single complaint that didn't wish they had solved the complaint early on.

So what is a complete complaint handling system?

☀️**It starts with the complaint intake.** Treat every complaint seriously. Make sure it is logged in for follow up.

☀️**Contact every customer who complains as soon as you receive the complaint.** Assure the customer that you are looking into the problem. Develop the facts with the customer. Find out what the customer is looking for.

☀️**Investigate.** Find out the true facts. Understand the complainant's position and understand the position of dealer staff.

☀️**Develop a Response.** Can you meet and is it appropriate to meet the customer's demands? If not, should you offer a substitute remedy?

☀️**Follow up with the customer and bring the matter to closure.** The circle is only closed when the customer is contacted and the complaint is brought to a close.

Only with a complete complaint handling system designed to resolve every complaint will the dealership have some confidence that it can head off problems.

Arbitration

For several years, dealers have used pre-dispute mandatory arbitration provisions that require disputes between customers and dealers to be resolved by binding arbitration. Often, those arbitration agreements contain waivers of class action consideration, meaning that a dispute between a customer and a dealer has to be considered on an individual basis, not as part of a class action. Unfortunately, class action waivers in arbitration have been controversial. Some courts, like the Supreme Court of California, have ruled that arbitration agreements containing a class action waiver are unconscionable and unenforceable.

On April 27, 2011 the United States Supreme Court in a case known as AT&T Mobility v. Concepcion settled the issue. The court issued a ruling that rejected California's position that class action waivers in arbitration agreements are unconscionable. The Supreme Court of the United States held that California's rule was subject to federal preemption because of the Federal Arbitration Act, and that arbitration waivers in class action agreements are enforceable.

The Federal Arbitration Act was originally enacted in 1925 as a means of providing a framework for the quick and simple resolutions of disputes. Federal courts have repeatedly ruled that the FAA may not be preempted or limited by state actions. In the Concepcion decision, the Supreme Court found that a state policy requiring class action arbitration by banning class action waivers "interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." In other words, the court found that any state requirements that would impose the cumbersome class action rules and processes on arbitration would create the very complexity and burden that the Federal Arbitration Act was enacted to prevent.

Any dealer who reasonably is concerned about class actions should carefully review whether a pre-dispute

arbitration provision with class action waiver language is a practical option. In considering this, a dealer should consult with its attorney.

The only real danger area is dealer overreaching. Some courts that have considered the fairness of arbitration agreements have held that agreements that overreach and create an unnecessary burden on a consumer to exercise his or her rights may be stricken as unfair. The AT&T agreement on which the Supreme Court ruled favorably had some very substantial and specific provisions to ensure fairness that the Supreme Court described in the opinion:

☀️There is a simple one page notice of dispute form on the company's website.

☀️If the dispute is not resolved within 30 days, the customer can invoke arbitration using a separate demand also available on AT&T's website.

☀️AT&T pays all arbitration costs for non-frivolous claims.

☀️Arbitration must take place in the county where the customer is billed.

☀️For claims of \$10,000 or less, a customer may choose to proceed in person, by telephone, or only on written submissions.

☀️Either party may bring a claim in small claims court.

☀️The arbitrator may award any form of individual relief including injunctions and even punitive damages.

☀️AT & T may not seek reimbursement of its attorney's fees.

☀️In the event a customer receives an arbitration award greater than AT&T's last written settlement offer, AT&T must pay a minimum \$7,500 recovery and twice the amount of the claimant's attorney's fees.

While we are not suggesting that every one of these must be followed to the letter, there may be elements of state law or local practice that will make some version of these appropriate for your agreement. Only your attorney can help you in that regard.

Information Safeguards Sometimes Overlooked

Your salespeople probably listen regularly to your customers' concerns about protection of their private information. You've put in place safeguards to protect that information as required by federal law, and you notify customers of your policy through a privacy notice. You've locked file rooms, locked F&I offices, and put in any number of physical and electronic protections against information breaches. But here are some things you may have overlooked.



Equipment with a memory.

Hopefully, when you dispose of a computer you take steps to reformat the hard drive to wipe out all information. However, today's copiers, faxes, printers, and scanners keep an electronic copy of any documents you are processing through them in an internal memory. Unless you wipe out that memory, when you trade in your equipment, send it to the dump, or give it to the local school, pages and pages of material containing confidential information will still be

in the machine. Before disposing of electronic equipment with a memory, make sure you wipe the equipment clear of any stored information. Discuss this with the vendor selling you the replacement equipment to make sure that you get it right.

Portable Devices.

You have safeguards on your computer system. You protect against external and internal intrusions. You have adopted a password protocol, and you make sure that employees only have access to customer files for the purposes of doing their jobs. However, to what types of devices can employees with access download the information? If they can download it to portable PCs, workpads, and smartphones, you may

wind up with some substantial confidential information on these personal devices. What happens if an employee leaves your employ with this information? What happens if an employee loses his or her PC, workpad, or smartphone? Make sure you control the ability to download to personal devices.

Invoices and Deal Documents.

You want your salespeople to follow up with customers to whom they sell vehicles. So you give them "invoices" or other deal documents to keep track. Is the employee keeping those documents under lock and key to protect them? And what happens to them when the employee leaves? The company's deal documents belong to the company. Make sure that deal documents are safeguarded by the company's system and that they are not in the personal files of salespeople.

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U.S. Department of Labor Changes Position on Service Advisors?

Over the next few weeks, you will probably see stories in industry publications that the U.S. Department of Labor has reversed its position and that service writers are no longer exempt from overtime requirements. More importantly, your service advisors may see the coverage. Here is the real story and what you can do about it.

In 1978, the Wage and Hour Division of the DOL issued an opinion letter that service advisors are exempt from premium overtime under the exemption for dealer salespeople, “partsmen”, and mechanics since they “can be properly regarded as engaged in selling activities.”

Three U.S. appellate courts, including the United States Court of Appeals for the Fourth Circuit which governs Maryland and

Virginia, agreed in cases they decided.

Nearly three years ago, the DOL proposed to change its wage and hour rules to bring them into line with this opinion letter and the court decisions. On April 5 the DOL published its decision that it would not amend its rules to make it clear that service advisors are exempt because they are engaged in selling activities.

This announcement apparently reflects the position of the DOL that the dealership exemption for salespeople, “partsmen”, and mechanics must be strictly construed. According to the April 5 DOL notice, “selling” activities are limited to selling vehicles and mechanic activities are limited to turning wrenches. Since service advisors do neither, they will not be considered exempt.

While this is an edgy position for the DOL since it has not withdrawn its 1978 opinion letter and the rule is contrary to three federal courts of appeals decisions on the wage and hour statute,



dealers will still have to be concerned in the event of a DOL audit. Fortunately, there is another provision of the wage and hour law, known as the 7(i) exemption,

for employees paid commissions by retail establishments that can provide an exemption for service advisors. There are three conditions that must be met for an employee to fit under the 7(i) exemption. These are:

1. the employee must be employed by a retail or service establishment, and

2. the employee’s regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and

3. more than half the employee’s total earnings in a representative period must consist of commissions.

The Department of Labor has noted that unless all three conditions are met, workers must earn overtime premium pay for all hours worked over 40 in a workweek.

While the new DOL position is subject to potential challenge in the event of an audit, dealers who wish to continue considering service advisors as exempt and to avoid DOL scrutiny and potential private wage and hour lawsuits should consider reviewing service advisor pay plans to ensure that they fall within the 7(i) exemption.