

CHARAPP & WEISS, LLP

DRIVING YOUR SUCCESS

THE FTC: THE BEAST IS STIRRING!



In This Issue...

THE FTC: THE BEAST IS STIRRING!
page 1

Are You Inspecting Your Used Cars?
page 1

The Importance of Keeping Your Insurance Policies
page 4

The FTC has new power under the Dodd Frank financial reform law to regulate car dealers. It is about to host its third, and final, workshop this month in an attempt to determine whether it wishes to propose greater regulation of the industry. However, it has also announced that it is not going to wait to ramp up its efforts to take enforcement action involving deceptive dealer advertising, especially on the internet. And it is probably most interested in dealer advertising of financing and leasing under the Truth in Lending Act.

The FTC has for some time had certain objectives for its advertising compliance efforts. These are: (1) the advertising must be truthful and not misleading; (2) advertisers must have evidence to substantiate (i.e., back up) their claims; and (3) advertisements may not be unfair. Under Regulation Z (which governs

consumer credit sales) and Regulation M (which governs consumer leases) of the Truth in Lending Act (“TILA”), dealers’ advertisements must provide additional mandated disclosures for vehicle financing and leasing that contain “trigger terms”. Advertising on the internet is treated no differently than ads in print, radio, or television media.

“TRIGGER TERMS” FOR SALES AND LEASES

In vehicle sale advertisements, a Regulation Z “trigger term” is:

* The amount or percentage of a downpayment, (i.e., “10% down”, “\$1,000 down”, “90% financing”, “trade-in with \$1,000 appraised value required”); OR

[see the Beast, Continued on page 2](#)

ARE YOU INSPECTING YOUR USED CARS?

Used car managers like the cars they buy. Too often, they like them so much that they can’t wait to get them onto the front line, and that means no dealership employee takes the time to thoroughly inspect them. If that’s happening in your dealership, it’s a problem.

Most used car managers will argue that they review the vehicle history report or maybe even the title history for the vehicle. Since those show no problems, they see

no reason to inspect a vehicle they wish to retail. However, that disregards the problems with vehicle history reports and title histories.

Vehicle history reports are unreliable. There are lots of reasons why a problem with a vehicle doesn’t show up on a vehicle history report. Perhaps the issue with the vehicle – damage or flooding for example –

[see Are you Inspecting, Continued on page 3](#)

the Beast, Continued from page 1

* The number of payments or the period of repayment, (i.e., “up to four years to pay”, “48 months to pay”); OR

* The amount of any payment, (i.e., “Monthly payments less than \$250 on all our loan plans”, “Pay \$23.44 per \$1,000 amount borrowed”, “\$210.95 per month”); OR

* The amount of any finance charge, (i.e., “financing costs less than \$300 per year”; “Less than \$1,200 interest”).

If any Regulation Z “trigger term” is in a vehicle sales advertisement, then the following disclosures must appear “clearly and conspicuously” and in proximity to the trigger term in the advertisement.

1. The amount or percentage of the down-payment; AND

2. The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment; AND

3. The “annual percentage rate,” which may be abbreviated as “APR”. Dealers also must disclose if an APR can be increased after the credit transaction is complete.

In vehicle lease advertisements, a Regulation M “trigger term” is:

* A statement of any capitalized cost reduction or other payment (or that no payment is required) prior to or at consummation or by delivery, if delivery occurs after consummation; OR

* The amount of any payment.

If any of the above Regulation M trigger terms appear in a vehicle lease advertisement, then the following disclosures must appear “clearly and conspicuously” and in proximity to the trigger term in the advertisement.

1. A statement that the transaction advertised is a lease; AND

2. The total amount of any payment (such as security deposit or capitalized cost reduction) required before or at the consummation of the lease, or by delivery if delivery takes place after consummation, or a statement that no such payment is required; AND

3. The number, amounts, and due dates or periods of scheduled payments under the lease; AND

4. A statement of whether or not a security deposit is required; AND

5. A statement that an extra charge may be imposed at the end of the lease term where the lessee's liability (if any) is based on the difference between the residual value of the leased property and its realized value at the end of the lease term.

“CLEAR AND CONSPICUOUS” DISCLOSURES

In traditional media, disclosures must be placed near the trigger term. Technological advancements provide options for placement of disclosures that are unique to internet advertising. Whether disclosures in vehicle advertisements meet the standard of “clear and conspicuous” depends on whether consumers actually perceive and understand the disclosure in the overall context of the vehicle advertisement.

What is Clear and Conspicuous?

With no set formula prescribed to determine whether a disclosure is clear and conspicuous, the FTC recommends that the following be considered:

- ➔ The placement of the disclosure in an advertisement and its proximity to the “trigger” term.
- ➔ The prominence of the disclosure.
- ➔ Whether there are items that distract and draw attention away from the disclosure in other parts of the advertisement.
- ➔ Whether disclosures in audio messages are presented in an adequate volume and cadence.
- ➔ Whether visual disclosures in televised messages appear for a sufficient duration.
- ➔ If the disclosure is understandable to the intended audience.

Proximity And Placement Of Disclosures

Although disclosures in traditional media must be placed in close proximity to the trigger term, internet advertising provides options that are not available in print media such as hyperlinks and scrolling (pop-ups and banners are additional options).

Hyperlinks

A hyperlink that leads to the disclosure when the cursor is placed on the trigger term is useful if the disclosure is lengthy or is repeated because multiple
see the Beast, Continued on the bottom of page 3

Are you Inspecting, Continued from page 1

was not reported to an insurance company and was repaired by the owner at its own cost. Or perhaps the damage or flooding reported to the vehicle history report company is delayed in making it to the report. For many reasons, a clean vehicle history report does not mean that a vehicle has not had problems.

Title histories may also be misleading. The fact that a vehicle has never been titled in the name of an insurance company doesn't mean that the car was never declared a total loss. Insurance companies have been known to simply "skip title" by arranging a purchase from the owner of a seriously damaged vehicle directly to a subsequent owner (it if has been fixed) or to someone who will fix it for resale (if it has not been repaired). An insurance company's name sometimes never shows up on the title history of a totaled vehicle.

There are a number of reasons you must carefully inspect the used cars you sell at retail.

* **Floods.** With the recent torrential rains and floods in various parts of the United States, there are many cars that have suffered flood damage. The fact that its flooding hasn't yet appeared on a vehicle history report doesn't mean the car you are buying isn't a flood car. There are lots of organizations who can give you tips on what to look for in an inspection to determine whether you are buying a flood vehicle. However, you won't see those if you don't carefully inspect the vehicle.

* **Serious damage.** Plaintiffs' lawyers love to sue dealers over used vehicles that have suffered serious previous damage without disclosure of that to the buyer. Once again, you cannot depend on the vehicle history report or the title history. You can best protect yourself from a claim that a used vehicle suffered severe damage by inspecting it carefully, including putting it up on a lift to look at the undercarriage.

* **Odometer discrepancy.** Generally, liability for an odometer discrepancy requires a sale of a vehicle and a knowing nondisclosure of mileage discrepancy. However, taking a car in with a clean mileage statement is not always the foolproof protection you think it is. Dealers have been sued when the apparent use on the vehicle does not match up with the odometer disclosure. A plaintiff's lawyer will contend that a dealer who sold a car with a disclosure that it has 30,000 miles should have known that it was making a false representation when the wear patterns on pedals, seats and parts indicate the car has 90,000 miles.

In short, there are many reasons why you must inspect used vehicles before you put them on the lot at retail. Of course, it is important to know what is in the vehicle report and the title history so you should review each for every car that you retail. But it is just as important to inspect the car to make sure that there is no condition that should put you on notice of a serious problem.

the Beast, Continued from page 2

vehicles use the same disclosures. If hyperlinks are used to display disclosures within an advertisement, consider the following:

The hyperlink's label should make it not only obvious to consumers to click on it for more information, but it should also show the consumer that the hyperlinked information relates to the vehicle being advertised.

Since different web sites use different signals for hyperlinks, dealers should use similar text, graphics, format and color throughout a single web page for easier identification of hyperlinks by consumers.

If you use a click-through page, it should display the complete disclosure prominently. It should not provide distracting visuals or extraneous information.

Any "close" or "click-away" opportunities should be displayed discreetly and not blocking the disclosure information.

Remember to test any hyperlinks to be sure that they work properly.

Scrolling

If a consumer has to scroll to view a disclosure in its entirety, use text and visual design cues to indicate that scrolling is required. Text prompts such as explicit instructions should be used to alert the consumer that more information is available. Avoid placing disclosures at the bottom of the screen with blank space between the disclosure and the product because consumers may not continue reading or may not scroll to the bottom.

THE IMPORTANCE OF KEEPING YOUR INSURANCE POLICIES

You should keep all former garage policies with your liability, property, comprehensive and other coverages. Plaintiffs' attorneys are increasingly utilizing the legal doctrine of equitable tolling to circumvent statutes of limitations that might otherwise bar legal actions against dealers. This doctrine can be used by a court to allow the presentation of a stale claim if the wrongdoing of the defendant or other extraordinary circumstances prevented a plaintiff from knowing about the claim earlier. This "discovery rule" has been legislatively enacted by many states with respect to claims for fraud by providing that the statute of limitations does not commence until the plaintiff discovered or should have discovered that he or she has a claim.

The possibility of becoming a defendant in a case involving a transaction that is many years old is the main reason for keeping all former insurance policies. Using equitable tolling, a plaintiff may allege that the statute of limitations did not begin to accrue on a claim that is well beyond the statute of limitations until he or she learned of the dealership's wrongdoing. If the court rules that equitable tolling applies, the statute of limitations will not bar the case. The dealer

will be forced to defend the case that arose years before. And this can become very serious when it is a class action that may include thousands of customer claims for five, ten or even more years.

Under most garage policies, the insurance company owes the dealer a duty to defend and perhaps indemnify against a covered claim that arose during its coverage period. Even though the claim is asserted years later, the dealer can request coverage for defense and indemnification. That request, if made expeditiously after knowledge of the existence of the new complaint, will probably implicate the coverage of the old policy. And if it is a class action for claims that span a number of years, each policy during each year during could be involved.

A dealer may have the opportunity to seek separate defense coverage and indemnification for each policy year. That is important where there are strict limits under each policy of the amount that will be paid out for defense coverage and indemnification. In essence, the dealer can "stack" the coverage to take advantage of each year's coverage limit for defense and/or indemnification in a class action lawsuit.

You are not likely to be in a position to put in a claim for coverage if you don't recall who your insurer was when you sold the car and you don't have the policy. As an initial matter, you must know who the insurance company was during a period covered by the lawsuit and your policy information so that you can make a claim. If the claim is denied because the insurance company claims it is stale or for some other reason, then you will need your policy so that you can consult with your attorney to determine whether the insurance

company is acting properly within its scope of duties.

So what does this mean to you as a dealer?

- * Get a complete insurance policy every time. When you sign up for a new policy, or when you renew, you generally won't receive the full, new policy for months. Make sure that you follow-up and get your policy.

- * Keep your insurance policies. Have a digital copy of each policy made and save the hard copy and the digital copy where you keep your important organic documents.

- * When you receive a claim, decide what insurance may apply. Don't just assume if you get a claim today that your present insurance carrier is the one to put on notice. If the claim arose from actions several years ago, the insurance carrier at that time is probably the one whose policy is implicated. When you get a claim, make sure you put the appropriate carrier on notice.

- * Err on the side of caution. If you make a claim improperly, the insurance company will just deny it so there is no downside to submitting a claim to a former carrier who may not be liable for coverage. But if you fail to make a claim that you should have made, you may face the defense by the insurance company that it was prejudiced by your failure to promptly report a claim, possibly justifying a refusal to provide coverage. Therefore, if you are unsure who should be put on notice of a claim, put all potentially liable prior insurance carriers on notice for all coverage periods alleged in the lawsuit. That is especially the case in a class action where the class period may extend for a substantial duration.

CHARAPP & WEISS, LLP

8300 Greensboro Dr. Suite 200

McLean, VA 22102

Tel: 703.564.0220

Fax: 703.564.0221

www.cwattorneys.com

Contents©2011 Charapp & Weiss, LLP.
Articles are for information only and
do not constitute legal advice.