

Lawsuits Against Manufacturers and Used Vehicle Sales

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On February 5, 2016, New Jersey acting attorney general John J. Hoffman filed suit against VW and its subsidiaries Audi and Porsche for carrying out alleged fraud against consumers by using software in millions of diesel vehicles to circumvent federal emission tests, allowing it to increase sales by improperly touting environmentally friendly cars. The suit seeks maximum penalties against Volkswagen for alleged violations of the New Jersey Air Pollution Control Act and Consumer Fraud Act, which allows for treble damages, attorney's fees and direct restitution to consumers who have been materially harmed by the company's misconduct.

The suit alleges approximately 17,400 Volkswagen vehicles equipped with the defective equipment are registered in this state. New Jersey is the second state in the country, following New Mexico, suing Volkswagen over the same alleged emissions fraud.

Volkswagen submitted recall plans initially rejected by the federal government as not adequately addressing overall impact on vehicle performance, emissions and safety. Discussions are ongoing between Volkswagen and the federal government.

Dealer Obligations

In the midst of these well-publicized emissions testing problems and lawsuits filed by different states, countries and consumers against the manufacturers, dealers increasingly have obligations when selling any used motor vehicle with an open recall and/or when a recall has not yet been issued but is widely expected. The following New Jersey and federal proposed and existing laws and regulations should be considered.

- Federal law prohibits the sale of new vehicles with open recalls but neither federal nor New Jersey law specifically bar the sale of used vehicles with

open recalls.

- New Jersey's Consumer Fraud Act and the Federal Trade Commission Act indirectly address the sale of used vehicles with open recalls.

- According to some estimates, one in six vehicles has an open recall, and only about 70 percent of vehicle recalls are ever closed or fixed.

- Not all recalls involve safety concerns. Some recalls are non-safety related. For example, non-functioning air conditioners and radios or ordinary wear of equipment that has to be inspected, maintained and replaced periodically. Such equipment includes shock absorbers, batteries, brake pads and shoes, and exhaust systems.

- In some cases, especially for non-safety related recalls, the parts may be back ordered or hard to obtain for weeks or months. A blanket rule that would bar sales of any vehicles with an open recall would negatively, and perhaps unfairly, impact a dealer's costs and inventory, yet may not make the public any safer in many instances.

- The Federal Trade Commission has brought recent enforcement actions against an American manufacturer and two dealer groups concerning open recalls: The manufacturer and the dealer groups advertised many of the vehicles had undergone a comprehensive inspection process, often as part of a certified pre-owned program. The FTC alleged in separate complaints the manufacturer and the dealer groups violated the Federal Trade Commission Act by touting those inspection processes but not informing consumers about the existence of unrepaired safety recalls.

The companies denied wrong doing and were not assessed fines but are now prohibited from claiming their vehicles have undergone a rigorous inspection unless they are free of unrepaired safety recalls. If

a safety recall is not repaired, those companies against whom the actions were brought must disclose the existence of any safety related recalls in close proximity to any statement about the inspection process.

- **A recall bill was reintroduced in the New Jersey State Legislature in January 2016 for the second consecutive legislative session that would require dealerships to check the National Highway Traffic Safety Administration's website and inform a potential buyer of any outstanding recalls:** Under the bill, dealers would not be liable for any errors contained on the NHTSA website. The bill makes clear that: (1) there is an "irrebuttable presumption" that the dealer had no knowledge of a recall if the information was not on the NHTSA website at the time of the sale; and (2) dealers would not be required to fix open recalls prior to selling a vehicle (which often would not be practical).

The bill would not apply to wholesale transactions or sales between owners and operators of junk businesses or motor vehicle junkyards or any person involved in dismantling, destroying or recycling motor vehicles. Failure to disclose an outstanding recall under the bill would constitute a violation of the New Jersey Consumer Fraud Act subjecting dealers to actions brought by the attorney general's office for fines, attorney's fees and costs of collection as well as cease and desist orders or civil suits by retail consumers for treble damages (three times compensatory damages) and attorney's fees.

- New Jersey's existing Consumer Fraud Act requires dealers to refrain from affirmative misstatements or omissions regardless of intent on selling a motor vehicle. For example, not mentioning the vehicle is one of the affected diesel models involved in the Volkswagen emission scandal or stating a vehicle's airbag doesn't need to be replaced could create legal exposure if it were found to be untrue.

- The New Jersey advertising regulations that correspond



to the Consumer Fraud Act also require dealers to disclose substantial body or repair work performed on a motor vehicle they knew or should have known about that cost \$1,000. Depending upon the nature of the recall, the cost could exceed the \$1,000 limit. Failure to make necessary disclosures under the Act could subject dealers to compensatory damages, treble damages and attorney's fees.

Best Practices

Dealers should disclose, for example, if a used Volkswagen diesel vehicle they are offering for sale is one of the impacted models even if a recall has not yet been issued for the vehicle. In terms of existing recalls for other vehicles that are not the subject of the attorney general's suit, dealers should make full disclosure about known recalls especially if representing that the vehicle has undergone a comprehensive inspection process prior to sale.

Even if there is no representation the vehicle underwent a comprehensive inspection, best practices are to make the disclosures. The transparency is what consumers expect and it can potentially mitigate liability for dealers.

From a practical standpoint, dealers should simply check the NHTSA website. They should inform customers if a recall exists, if it is being fixed and have their customers sign a copy of a printout from the website acknowledging they have been provided the information. 🚗

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