



**Anthony Bush** is a Member in Eckert Seamans' Princeton Office with over two decades of experience with automotive issues. He counsels a wide spectrum of clients including automobile dealerships, operators of wholesale motor vehicle auctions, auto parts distributors, finance companies, and auto body repair facilities.

# DEALER BEST PRACTICES: CLASS ACTIONS INVOLVING NEW JERSEY'S OBSCURE WARRANTY NOTICE ACT

By Tony Bush, Esq., Eckert Seamans Cherin & Mellott, LLC

Despite being nearly 40 years old, New Jersey's Truth in Consumer Contract Warranty and Notice Act ("TCCWNA") has only recently been used as a basis for numerous class action lawsuits against national retailers and car dealers.

## WHAT IS THE TCCWNA

Unlike New Jersey's Consumer Fraud Act, under the TCCWNA, consumers do not need to show: any actual damages; that they bought anything from sellers; or that there is any unconscionable commercial practice to prevail on TCCWNA claims.

Alleged violations of the Act generally fall into two categories. First, the TCCWNA prohibits the inclusion of unenforceable terms on websites or in contracts that pertain to the retail sale of goods and services. For example, websites or contracts that contain provisions that virtually bar all contract or negligence claims may subject your business to a TCCWNA claim. Second, the TCCWNA provides that it is permissible to include phrases such as, "exclusions may not apply in some jurisdictions"; however consumer contracts, notices or signs must state which provisions are unenforceable or inapplicable within the State of New Jersey. Failure to do so is a violation of the Act.

Successful litigants under the TCCWNA are able to recover \$100.00 for each violation plus attorneys' fees. Since individual claims only have nuisance value, TCCWNA claims really only have value if brought as part of a class action lawsuit.

## RECENT CASES INVOLVING ONLINE NATIONAL RETAILERS

In the last several months, Advance Auto Parts, Walmart, Johnson & Murphy, J. Crew, Vitamix and others have been sued in Federal Court in New Jersey in class actions alleging their websites' terms and conditions improperly attempt to absolve them of responsibility over the products they sell. The suits typically allege that New Jersey law prohibits these types of exculpatory clauses (because they undermine the purpose of the laws to protect consumers). They seek to recover hundreds of thousands to millions of dollars often without any proof that a single person suffered damages.

## CASES INVOLVING CAR DEALERS AND THE TCCWNA

There a number of substantially similar lawsuits currently on appeal concerning the same contractual provision set forth in a Retail Buyer's Order Form used by many new and used car dealers in this state. The Buyers Order form contains the following provision concerning the payment of sales and use tax:

The price of the motor vehicle as specified on the face of this Order includes reimbursement for certain Federal Excise taxes, but does not include sales taxes and use taxes (Federal, State or Local) or other taxes unless expressly stated. A customer assumes and agrees to pay, unless prohibited by law, any such sales, use or occupational taxes imposed on or applicable to the transaction covered by this order, regardless of which party may have primary tax liability.

Plaintiffs alleged that the language violated the TCCWNA provision on the grounds that it suggests that the payment of taxes are or may be void, unenforceable, or inapplicable but failed to explain the applicable law in New Jersey. The trial courts have found that the challenged provision accurately and unambiguously informs New Jersey consumers of their obligations to pay taxes under current New Jersey tax structure. Furthermore that the inclusion of the flexible language of "unless prohibited by law" does not violate the TCCWNA. These cases are currently under appeal. The businesses community is anxious for any appellate court ruling that restricts interpretation of the TCCWNA and possibly slows the stream of future litigation involving the TCCWNA.

## DEALER BEST PRACTICES

Whether it is your online advertising or your physical documents used at your on-site locations, there are pre-emptive steps that dealers can take to avoid becoming the target of a TCCWNA class action lawsuit.

It is important to have a well drafted arbitration clause in the terms and conditions on your

CONTINUED ON PAGE 18

## AN INTERVIEW WITH BETH & NOAH MELAMED CONTINUED FROM PAGE 6

### Q. How is technology helping your operations?

**A. Noah Melamed:** Technology has changed the way we operate. With our security system, we can keep an eye on the dealership from our smart phones, regardless of where we are. If there are issues with a vehicle, our technicians can just plug the vehicle into a computer and we can quickly get an idea of what's wrong and how to fix it. Our customers can now go online to make their payments. Sure, you lose some of the relationship with the customer, you lose some of the human aspect, but customers love the convenience.

### Q. Legal and Regulatory compliance continues to challenge automotive retailers. What steps have you taken to be compliant in all aspects of your business?

**A. Beth Melamed:** The current regulatory environment has been a challenge, but we have always strived to follow the government guidelines and comply with regulations. Being a BHPH dealership, our team closely follows the Consumer Finance Protection Bureau guidelines as well as regulations from the Federal Trade Commission. We work to stay on top of things by being involved with NIADA Twenty Groups.

**Noah Melamed:** I am currently involved in training given by the National Automotive Finance Association to become certified in consumer lending compliance through their extensive courses. Our goal when it comes to compliance is to stay ahead of the curve. Recalls have been a challenge. We want to make sure we check every vehicle before we sell it to make sure there are no open recalls. We don't like having dead metal on the lot, but we'd rather hold the vehicle a few extra weeks. We never want to put a customer in a position where there is a safety issue.

### Q. What are the challenges and opportunities facing today's independent automotive retailer from the perspective of your dealership?

**A. Beth Melamed:** The growing cost of wholesale vehicles is a big challenge. Currently the climate in the banking industry is very aggressive, making it easier for people with a poor credit history to get into new cars. This has taken a percentage of what was typically a used car buyer and cut into the BHPH and subprime used car markets. At the NIADA Convention in

Las Vegas many of the experts in market trends felt that the banks are over-approving customers and putting them into loans that they cannot sustain. If that is the case, the banks may pull back and the cycle will bring those consumers back to the used car and BHPH market.

### Q. How long have you been a member of your IADA? How did you get involved in IADA leadership?

**A. Beth Melamed:** I went to the MARIADA meeting in Atlantic City about five years ago and was very impressed with the work that the organization was doing. At that meeting I was invited to be on the board and I've been involved ever since. I currently hold an executive position as a vice president. Noah became a director two years ago. The work that the IADA is doing in advocating for the industry is very important. With ever changing regulations and laws it is essential that our industry have a voice and that we are united in making our state representatives aware of who we are and how legislation affects our businesses.

### Q. There is tremendous opportunity for growth among the regional IADA membership. How would you convince a non-member to join their state IADA?

**A. Noah Melamed:** We have found membership to be very valuable in many ways. It keeps us abreast of what is happening in state politics that can affect our business. The IADA is a lobbying organization, plus it is a dealer resource. The association is the place to go for titling questions, insurance bonds, state forms, compliance questions, advocacy with the departments of transportation in our states, banking resources, vendor recommendations and the list goes on. They are an all-in-one shop for dealer supplies so members can focus on running and growing their business rather than the minutia of paperwork and compliance.

### Q. What goal would you like to see for the NIADA association, locally and nationally?

**A. Beth Melamed:** As an organization our power is in numbers and unity. By growing the membership we will have greater influence to reach our state and national objectives.

I'd like to see more involvement from members in contacting their local representatives to make them aware of issues that affect all of us. 🚗

## DEALER BEST PRACTICES

CONTINUED FROM PAGE 14

business' website and in your contracts or Retail Buyers' Orders. These provisions are valid, binding and enforceable and provide protection, provided that: (1) they clearly state the consumer gives up their right to a jury trial; and (2) the arbitration clause states unambiguously that the consumer may not serve as a class member or a class action representative. (If the consumer can't participate in a class or serve as a class representative, the claim has nuisance value only). These clauses have generally been held enforceable; however, they are under attack in recent New Jersey cases and on a national level from the Consumer Financial Protection Bureau which seeks to propose new regulations limiting

their use in consumer contracts. The New Jersey Supreme Court has held arbitration provisions must state clearly that all claims are subject to arbitration, and that the consumer gives up their right to file a lawsuit. Courts have also held that if such provisions are "buried" in a consumer contract, they may not be enforceable.

Another easy step to protect a retailer is to review any provisions that contain a disclaimer of liability that is unenforceable in New Jersey. If it is important for a retailer to maintain the provision on their website or contracts, the retailer should expressly state that the disclaimer does not apply in New Jersey. Finally, best practices are to have your entire website disclaimer language and existing contracts undergo a thorough review for compliance with all existing Federal and State obligations. 🚗