



NJ AUTO INDUSTRY ALERT

November 24, 2014

NEW JERSEY AUTOMOBILE INDUSTRY TRENDS AND TOPICS: RECALLS, AND LEGISLATION THAT CAN IMPACT YOUR DEALERSHIP

Eckert Seamans Cherin & Mellott, LLC is pleased to partner with the [New Jersey Independent Auto Dealers Association](#) to provide an update on a number of important and trending issues affecting New Jersey automobile retailers. Eckert Seamans is a national law firm with over 350 attorneys located in offices throughout the eastern United States. The needs of our clients involve us in virtually every area of the law and most industries. The NJIADA is an organization designed to give independent dealers a unified voice and to provide them with information about how to operate successfully in New Jersey.

AIRBAGS AND OTHER RECALLS: DEALERS' OBLIGATIONS IN NEW JERSEY

In light of the well-publicized recent recalls of airbags, many dealers and consumers are wondering: what are a dealer's obligations when selling a motor vehicle with an open recall?

- According to some sources, one in six cars has an open recall and as many as 37 million airbags have been recalled.
- Only 60-65% of vehicle recalls are ever closed or fixed.
- Not all recalls involve serious safety concerns. Some recalls are non-safety related. For example, nonfunctioning air conditioners and radios, and 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 etc.
- Federal law prohibits the sale of new vehicles with open recalls but does not address the sale of used vehicles with open recalls.-
- *New Jersey law does not specifically address the sale of used vehicles with open recalls.* 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 used vehicles with an open recall would, among other things, impact dealers' costs and inventory levels and in many instances potentially not make the public any safer.
- New Jersey's Consumer Fraud Act requires dealers to refrain from affirmative misstatements or omissions regardless of intent when selling a motor vehicle (i.e. a representation that a vehicle's airbag doesn't need to be replaced could result in legal exposure if untrue when made even if there was no intent to deceive a consumer).
- **When in doubt, dealers should disclose that air bags have been replaced and/or that they need to be replaced and are subject to a recall if known by them.** The NJ Consumer Fraud Act also requires dealers to disclose substantial repair or body work



performed on a motor vehicle that they know of or should have known about. Airbag replacement costs between \$1,000-\$1,500 per airbag. Failure to make necessary disclosures under the New Jersey Consumer Fraud Act can subject a dealer to compensatory damages, treble damages and attorneys' fees.

LEGISLATION

Legislation Would Eliminate Attorneys' Fees and Other Costs for Technical Violations of the Consumer Fraud Act

The Assembly Consumer Affairs Committee recently approved A207, which would eliminate the award of attorneys' fees, filing fees and costs of suit for technical violations of the Consumer Fraud Act. Under the current CFA, companies must pay such attorney's fees even if they prevail in a lawsuit. This change would impact dealers as the law is currently often used in suits against them.

The business-friendly measure would no longer allow for the award of attorneys' fees, filing fees, and costs of suit for a technical violation of the CFA, which the bill defines as one in which the business made a good faith effort to comply with the Act and the resulting violation did not impact the quality of the product or service provided or result in an ascertainable loss to the consumer. In addition, a second or subsequent violation of the same or similar nature also constitutes a technical violation, provided the person has been notified of the first violation and has had a reasonable time and chance to rectify the additional violations. However, the bill explicitly clarifies that it does not prevent specified fees and reasonable costs of suit from being awarded in suits brought by the Attorney General, even if they are for technical violations. The bill also does not address awards of attorneys' fees, treble damages (three times compensatory damages), and other fees where there are alleged violations of the CFA for omissions or intentional representations regardless of intent.

The bill, sponsored by Assemblyman Reed Gusciora (D-Trenton), is ready for a vote in the Assembly. Senator Shirley Turner (D-Lawrence) introduced the bill's Senate counterpart, S1127, in January. The bill was referred to the Senate Commerce Committee but has not been scheduled for consideration.

Paid Sick Leave Could Be Coming to New Jersey

On October 27, 2014, the Assembly Labor Committee voted to release A2354, which would require employers to provide paid sick leave to both full and part-time employees. The bill was released along partisan lines, with six Democrats voting in favor and three Republicans voting in opposition.

The bill would mandate that all NJ businesses provide employees with one hour of earned sick leave for every 30 hours worked. However, employers with more than 10 employees in New Jersey are not required to allow more than 72 hours of earned sick leave to accrue at any one time



or to carry forward to the next year. For employers with less than 10 employees in the state, that number drops to 40 hours of earned sick leave to be accrued or carried-forward .

The bill provides that employees may use earned sick leave for themselves or to care for a family member. Employees could also use the time for absence to attend to the circumstances resulting from domestic violence, against the employee or a family member. Business groups have been critical of the bill as harmful to small business.

Sick leave has already been mandated in six cities: Jersey City, Paterson, Newark, Passaic, Irvington and East Orange. Trenton and Montclair voters approved referendums on November 4 and ordinances in those cities will be effective in 2015.

The bill, sponsored by Assemblywoman Pam Lampitt (D-Voorhees), now heads to the full Assembly for a vote. The Assembly Speaker has identified this bill as a top priority. Senate Majority Leader Loretta Weinberg (D-Teaneck) has sponsored the Senate companion bill, S785; however, the bill has not yet been considered by the Senate Labor Committee.

Bill Would Ban The Rental Or Sale Of Rental Cars With Safety Recalls

A bill known as the “Safe Motor Vehicle Rental Act” would make it unlawful for rental companies to rent, sell or lease vehicles that are subject to a safety recall without repairing the problem. This bill was recently released by the Assembly Consumer Affairs Committee and is ready for a final Assembly vote. It has not been introduced in the Senate.

Under the bill, if the rental company becomes aware of a safety recall during the term of a rental/lease it would be required to immediately contact the renter/leasee, inform them of the recall and offer to provide a comparable replacement at no charge. Under the bill, failure to comply would make it a violation of the New Jersey Consumer Fraud Act, subjecting the rental company to awards of treble damages, attorney’s fees and other costs. *The bill would not apply to the sale of a vehicle to dealer or any other party engaged in the business of selling vehicles. It only would apply to retail transactions.* As noted in our March 2014 NJ Auto Industry Alert, there is a bill in the Assembly (A2193) that would prohibit the sale of a motor vehicle with an outstanding recall. The Assembly bill has not advanced and a Senate counterpart of the bill has also not been introduced.

By: Anthony Bush and Grace S. Power of Eckert Seamans Cherin & Mellott, LLC

Anthony Bush is a Member in Eckert Seamans' Trenton 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. Tony and Eckert Seamans have expertise representing dealers in consumer and corporate litigation, land use matters, business counseling, employment matters,



franchise disputes, before the New Jersey Motor Vehicle Commission and New Jersey Department of Law and Public Safety, Division of Consumer Affairs, and in legislative and regulatory issues affecting the automotive industry. Grace Strom Power is an Associate in the Trenton Office and has over 10 years of government affairs experience in both the public and private sectors, advising and representing clients before the New Jersey State Legislature, Office of the Governor, state and local agencies, commissions and regulatory authorities.

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