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NJ AUTO INDUSTRY ALERT

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Bill Allows Dealers To Offer Vehicle Subscription Services Along With Selling And Leasing; Compliance Tips For Including And Enforcing Arbitration Provisions In Sales Documents; And New Case Law Holds That Dealers And Lenders Do Not Need To Automatically Return Repossessed Vehicles To Consumers That File For Bankruptcy Protection

Bill Would Allow Dealers To Offer Subscription Services

Assembly bill A-5461 would allow licensed new and used car dealers to offer motor vehicle subscription services to consumers in addition to selling and leasing vehicles. Under the bill, a customer would pay a fee for the right to use one or more vehicles for up to 120 days with the option of including insurance and maintenance as part of the cost. Under current law, licensed dealers are not explicitly authorized to offer subscription services independent of any such service offered by a manufacturer or other entity. The bill would create a new category of license plates that could only be used by dealers on subscription vehicles. The New Jersey Assembly Transportation and Independent Authorities Committee favorably reported on the bill but it is not yet scheduled for a vote in the General Assembly.

Compliance Tip: Retail Sales Documents Should Include Arbitration Provisions And When Appropriate Dealers Should Timely Seek To Arbitrate Not Litigate Disputes in Court

It is important to have a well drafted arbitration clause in your dealership's retail orders or retail installment sales contracts. These provisions can bar class action lawsuits, trials by jury, and greatly reduce legal exposure provided that they clearly state: (1) the consumer knowingly gives up the right to a jury trial; and (2), the consumer may not serve as a class action member or representative. A recent New Jersey case highlights that a dealer can unfortunately waive its right to arbitration (and be subject to a class action lawsuit) even if an agreement has an otherwise enforceable arbitration clause.

In a recent New Jersey federal case, a judge denied a new car dealer's efforts to dismiss a class action lawsuit and compel arbitration where it was alleged that the dealership violated consumer protection statutes by charging unnecessary and unadvertised fees and by requiring consumers to purchase extended warranties. The dealer's retail order contained an arbitration provision requiring all disputes to be arbitrated through the American Arbitration Association ("AAA") and to waive any class action claims. The Arbitration provision also stated that the dealership would pay both parties' filing, service, administration, arbitrator, hearing, and other fees. The dealer claimed that it never received the consumer's arbitration demand or the AAA's four additional communications requesting payment of the fees either because they were not sent to the correct address or because of an internal clerical error by the mail intake employee at the dealership. There was evidence that at least one or more of the letters had been received. Eventually, the

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AAA declined to arbitrate the case due to the failure of dealer to pay the required arbitration fees. The court found arbitration was properly demanded, rejected the dealer's argument about a clerical mix-up and held that by failing to pay the required fee the right to arbitrate was waived.

The takeaway from this case is that dealers should establish procedures to make sure that they follow the requirements contained in their agreements in order to not waive the right to arbitration and face either a jury trial or class action litigation not to mention much greater legal exposure.

New Case Law Holds that Dealers And Lenders Do Not Need To Return Repossessed Vehicles To Consumers That File For Bankruptcy Protection

On October 28, 2019, the United States Court of Appeals for the Third Circuit (covering New Jersey, Pennsylvania, and Delaware) held that the filing of a bankruptcy petition by a consumer debtor did not require a dealer or lender (that took the assignment of a retail installment sales contract) to immediately return a vehicle that was repossessed prior to a bankruptcy filing. In most of the country, excluding areas covered by two other circuit courts of appeal, a lender or dealer in possession of a repossessed vehicle would be required to return the vehicle to the debtor even though the repossession was lawful. Bankruptcy law generally bars a creditor from exercising control over the property of a debtor without court permission once the bankruptcy is filed. Generally, a repossessed vehicle is still considered property of the debtor until the repossessing party sells the vehicle. The third circuit held that the failure to return the vehicle was not an act to exercise control over the debtor's property and held that the statute was not intended to prohibit passive retention of property seized prior to the filing of a bankruptcy.

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Anthony Bush is a Member in Eckert Seamans' Princeton Office and has extensive commercial litigation and regulatory experience with an emphasis on issues impacting the automotive industry. His clients include operators of wholesale motor vehicle auctions, auto dealerships, wholesale auto parts distributors, finance companies, lessors, and auto body repair facilities. Tony and Eckert represent clients in corporate and consumer litigation including class actions, 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. For more information about the NJIADA, contact Paula Frendel at njiada.pfrendel@gmail.com. For more information about any of the issues above, or any other legal issues impacting your business, contact Tony Bush at (609) 989-5056 or abush@eckertseamans.com.