

TRANSMISSION

Helping make compliance automatic

Inside this issue:

Top Dealer Attorneys Rob Cohen and Mike Charapp Write Comprehensive Legal Guide	1
What's Hot on the Hotline: Smogging Used Vehicles Before Delivery	2
Arbitration Update: The Continuing Battle Over Class Action Waivers	8
Sales Tax and County Fee Changes	8
FTC Consumer Alert: Auto Warranties, Routine Maintenance and Repairs: Is Using the Dealer a Must?	11

Top Dealer Attorneys Rob Cohen and Mike Charapp Write Comprehensive Legal Guide

Auto Advisory Services, Inc. is proud to announce the release of *Auto Dealer Law, The Definitive Legal Guide to the Purchase, Sale, and Operation of Vehicle Dealerships*. This comprehensive guide and subscription service provides vehicle dealers and their advisors with access to legal information that, until now, was simply not available from any one source. Written by nationally recognized auto industry legal experts, Mike Charapp and Rob Cohen, the fully indexed reference book is authoritative and easy to read. The subscription service includes quarterly updates and special notifications on pressing industry developments.

Unlike *Transmission*, *Auto Dealer Law* (www.autodealerlaw.com) is not California-specific and is not limited to sales, finance, advertising and DMV compliance issues. ADL is a legal management guide that addresses a broad spectrum of legal issues dealers face. Whether you are a dealer principal, GM, controller, finance director, or otherwise involved with the operation or advising of dealers, this book and subscription service will give you the tools you need to spot (and in some cases solve) legal issues before they become legal problems.

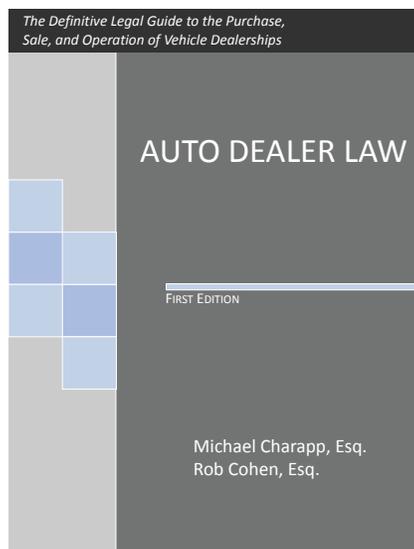
Organization of Book

Auto Dealer Law is divided into three parts:

- Part I: Buying and Selling the Dealership
- Part II: Running the Dealership
- Part III: Compliance

Part I discusses the many aspects of dealership buy/sells and includes both buyer and seller perspectives, standard and essential contract terms, and factory approval issues. In addition, this part addresses issues related to bankruptcy and the closing of dealerships.

Part II focuses on the myriad of legal issues involved with running dealerships. These issues include public, employee, vendor, factory, and lender relations. This part also discusses litigation management, insurance, parts and service, antitrust concerns, record retention, and emergency preparedness.



Order now at www.autodealerlaw.com.
AAS clients save \$100! Use promo code
AAS1110 at checkout.

(Continued on page 2)



14771 Plaza Drive, Suite A
Tustin, California 92780
Voice: 800.785.2880
Fax: 714.838.2205
www.autoadvisory.com

Auto Advisory Services has made reasonable efforts to ensure the accuracy of the subject matter reported. AAS makes no express or implied warranty respecting the information presented and assumes no responsibility for errors or omissions. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Auto Dealer Law (Cont.)

(Continued from page 1)

Part III of the book is devoted entirely to legal compliance. Dealers continue to struggle with an ever-expanding array of laws and regulations relating to sales, finance, advertising, and vehicle titling. These compliance issues are as complex as they are numerous. This part sets forth federal compliance requirements in easy to understand terms and, for you over-achievers, provides citations to specific laws, regulations and court decisions for further analysis. This part also provides some best-practices in the sales and finance arenas, while mentioning some state law compliance issues to look out for.

The table of contents is available for download at www.autodealerlaw.com/contents.

Subscription to Newsletter and Update Service

The purchase of Auto Dealer Law (ADL) includes a one-year subscription to the ADL newsletter and update service. Our quarterly updates will keep you abreast of law changes and other significant industry events. ADL updates will provide you with the tools you need to stay on top of legal developments impacting dealership operations. Along with legal updates, we will also include sample policies and forms from time to time, making a subscription to ADL extremely valuable to dealers and their advisers.

What's Hot on the Hotline: Smogging Used Vehicles Before Sale By Scott Jakust, Esq.

There's no doubt about it. Something's definitely going on with the recent attention being directed toward dealers by the DMV concerning the smog certification of used vehicles. Incident #1 was OLIN (Occupational Licensing Industry News) 2009-05 entitled "Dealer Smog Requirements" issued in April 2009. Incident #2 was OLIN 2011-02, also titled "Dealer Smog Requirements," issued in February 2011. Incident #3 was a "Dealer Written Warning" issued in July of this year to a dealer for ostensibly smogging a used vehicle after sale. I am reminded of the humorous line offered by the late author of speculative fiction, Arthur C. Clarke: "Once is an accident; twice is a coincidence; three times ... a conspiracy." The purpose of this article is to review both the DMV's recent enforcement activities in this area and the obligations of a dealer to smog certify vehicles prior to sale. Here's a brief chronology.

DMV OLIN 2009-05 was issued in April of 2009, and begins, "Car dealers must ensure the smog inspection requirements are satisfied prior to delivering a vehicle to a customer." It describes vehicles that require smogging and those that are

Authors

Leading dealer attorneys, Mike Charapp and Rob Cohen, pour decades of dealership operation and representation experience into ADL. Michael G. Charapp, a partner in the law firm of Charapp & Weiss, LLP, has spent his life in and around the automobile business. Mr. Charapp advises and represents hundreds of dealers, several dealer associations, and is widely regarded as one of the top dealer attorneys in the country. Rob Cohen is president of Auto Advisory Services. Rob developed a strong background inside dealerships by working as a car salesman and doing F&I during law school. Rob is a nationally recognized and leading expert in the field of auto dealer legal compliance. With unparalleled skill, Mike and Rob will guide you through the confusing maze of legal issues associated with dealership acquisitions, operations, and divestitures.

Availability and Ordering Information

Auto Dealer Law, First Ed., will be available for shipping on September 1. However, you can order your copy today by visiting www.autodealerlaw.com. The cost for the book (which includes a one-year subscription to the ADL newsletter and update service) is \$395. However, AAS clients can save \$100 by using promo code **AAS1110** at checkout. Or, just call us at (800) 785-2880 to place your order and we'll bill you when the book ships.

exempt. It warns that dealers who sell vehicles prior to satisfying the smog requirements are subject to an administrative action to suspend or revoke their dealer license and substantial fines. (Erroneous citations to statutory authority were corrected in the 2011 Memo.) By way of background, the Memo states, "It has come to the [DMV's] attention that some vehicle dealers are selling vehicles prior to satisfying the smog inspection requirements. Dealers who sell vehicles that have not satisfied the smog certification requirement cause the consumer undue hardship and subject the dealership to enforcement action."

DMV OLIN 2011-02, issued in February of 2011, begins, "Car dealers must provide a smog certificate prior to delivering a vehicle to the customer." Smog-mandatory and smog-exempt vehicles are again described and noncompliance penalties are again outlined, with authority cited. This time the background statement includes this: "Dealers who sell vehicles that have not satisfied the smog certification requirement

(Continued on page 4)

In case you were wondering about ...

warranty claims, Broker sales, Buy/Sells, Buyers Guides, CAN-SPAM Act, Cash management accounts, Cash Reporting, Certified used vehicles inspection standards, Class Action Fairness Act, Clean Air Act, Clean Water Act, Clear and conspicuous standard advertising, Closing the dealership, Code of Ethics, Complaint handling process, Compliance, Consumer Leasing Act, Consumer Satisfaction Index (CSI), Corporation and LLC documents, Corporation structure for dealership, Cosigner policy, Craigslist, Credit Applications, Credit discrimination, Credit Reports, Criminal background check, Crisis involving the dealership, CSI, Customer pay and warranty rates, Damaged vehicles, Dealer add-ons, Dealer groups, Dealer tags/plates, Dealership Management System, Deceptive Mail Prevention and Enforcement Act, Deferred downpayments, Demonstrators, Deposit terms, Desking practices, Direct mail pieces, Disaster plan, Discount and savings claims advertising, Discovery, Discrimination, Disparate impact, Disparate treatment, Disposal Rule, Dispute Resolution Rule, Do-Not-Call, Do-Not-Email, Do-Not-Fax, DOT, Dress code, Driving record, Drug and alcohol policy, Due diligence, eBay, ECOA, Electronic message boards advertising, Email, Emergency preparedness, Employee handbook, Employee Relations, Employment at will, Environment Protection Agency (EPA), EPA Fuel Economy Guides, Equal Credit Opportunity Act, Exported vehicles, Facebook, Factory Approval, Factory audits, Factory Relations, Act, Fair Credit Reporting Act, Fair Labor Medical Leave Act, Federal Deposit Insurer-Vehicle Safety Standards, Federal Odometer-Finance Source Relations, Flammable Foreign language advertising, Former Franchise demands, Franchisor accounts, military alerts, Free offers in advertising, FTC Red Flags Rule, FTC Safeguards automobiles, Fuel Economy Guides dealership, Gimmicky promotional investigations, Government look-alikes Group advertising, Harassment, Hartrial handling, Hidden finance charges, Identity theft affidavit, Independent con-Internal reviews (audits), Internet, Interlines, Interview questions, Interviewing, FinCEN Form, Job evaluations, Joint user suppliers, Law enforcement, Lawsuits Legal structure of the dealership, Lemon Limited liability company structure for dealership, Litigation, Load Carrying ments with finance companies, Loss con-houses, Managing Litigation, Manufacturer Mediation, Military Family Leave, Mini-driving, Money laundering prevention, and Cost Savings Act, National Defense equity, New Vehicle Modifications, Nonpublic personal information, NPI, stration (OSHA), Odometer issues, Of-trust status, Over-allowances on trade-in Service, Parts content label, Parts depart-Permissible purposes for obtaining a Pickup payments, PMA, Pre-sale Availabil-ies, Price comparisons with other deal-sory notes, Promotional concepts, Protection of dealership assets, Public Relations, Reader boards advertising, Real estate buy/sell considerations, Recalls, Record retention, Records disposal, Recruiting, Red Flags Rule, Reference checks, Registration and titling, Regulation B, Regulation M, Regula-tion Z, Replacement keys, Replevin action, Repossessions, Reservation of rights letter, Resource Conservation and Recovery Act, Retail delivery report, Right of first refusal, Risk Based Pricing Notice, Safe Drinking Water Act, Safeguards Rule, Sales and Finance Practices, Sales and Service Agree-ments, SDN list, Service department fees, Service Providers, Showroom window paint advertising, Site control, Social media, Software policy, Speaking publicly on behalf of your dealership, Specially Designated Nationals (SDN) list, Sprinklered premises, Subpoenas, Substantiation, Succession plan, Superfund, Supplemental stickers, Supplier contracting policy, Suspicious transactions/money laundering, Sweepstakes advertising, Technology use policy, Telemarketing and Consumer Fraud and Abuse Prevention Act, Telemarketing Sales Rule, Telephone Consumer Protection Act, Telephone credit applications, Temporary tags, Termination of franchise, Test drives, Third parties payments to disclosure requirements, TILA, Tire Placards, Tool reimbursement plans, Toyota sudden acceleration recall, Trade association activities, Trade-in over-allowances, Truth in Lending Act, Truthful-ness advertising, U.S. Department of Transportation (DOT), Unauthorized advertising, Unions, USA PATRIOT Act, Used Car Rule, Vehicle history disclosures, Vehicle Labeling, Vehicles and premises security, Vendor rela-tions, Vertical price restraints, Walking surfaces and customer areas, WARN, Warranty Disclosure Rule, Welding and cutting, Wholesaler policy, Worker Adjustment and Retraining Notification Act (WARN Act), Workers compen-sation, Workplace violence, Wrongful repossession, Yield-spread attacks.

15-passenger vans, Adverse action notices, Ad-vertising assistance, Advertising associations, Advertising Compliance, Affiliate Marketing Rule, Affiliate Sharing Rule, Age Discrimination in Employment Act, Airbag deactivation request, Alternative dispute resolution, American Auto-mobile Labeling Act, Antitrust Concerns, Arbitration, Audits, Bankruptcy, Banner advertising, Billboard advertising, Boycotts, Breach of war-

ranty claims, Broker sales, Buy/Sells, Buyers Guides, CAN-SPAM Act, Cash management accounts, Cash Reporting, Certified used vehicles inspection standards, Class Action Fairness Act, Clean Air Act, Clean Water Act, Clear and conspicuous standard advertising, Closing the dealership, Code of Ethics, Complaint handling process, Compliance, Consumer Leasing Act, Consumer Satisfaction Index (CSI), Corporation and LLC documents, Corporation structure for dealership, Cosigner policy, Craigslist, Credit Applications, Credit discrimination, Credit Reports, Criminal background check, Crisis involving the dealership, CSI, Customer pay and warranty rates, Damaged vehicles, Dealer add-ons, Dealer groups, Dealer tags/plates, Dealership Management System, Deceptive Mail Prevention and Enforcement Act, Deferred downpayments, Demonstrators, Deposit terms, Desking practices, Direct mail pieces, Disaster plan, Discount and savings claims advertising, Discovery, Discrimination, Disparate impact, Disparate treatment, Disposal Rule, Dispute Resolution Rule, Do-Not-Call, Do-Not-Email, Do-Not-Fax, DOT, Dress code, Driving record, Drug and alcohol policy, Due diligence, eBay, ECOA, Electronic message boards advertising, Email, Emergency preparedness, Employee handbook, Employee Relations, Employment at will, Environment Protection Agency (EPA), EPA Fuel Economy Guides, Equal Credit Opportunity Act, Exported vehicles, Facebook, Factory Approval, Factory audits, Factory Relations, Act, Fair Credit Reporting Act, Fair Labor Medical Leave Act, Federal Deposit Insurer-Vehicle Safety Standards, Federal Odometer-Finance Source Relations, Flammable Foreign language advertising, Former Franchise demands, Franchisor accounts, military alerts, Free offers in advertising, FTC Red Flags Rule, FTC Safeguards automobiles, Fuel Economy Guides dealership, Gimmicky promotional investigations, Government look-alikes Group advertising, Harassment, Hartrial handling, Hidden finance charges, Identity theft affidavit, Independent con-Internal reviews (audits), Internet, Interlines, Interview questions, Interviewing, FinCEN Form, Job evaluations, Joint user suppliers, Law enforcement, Lawsuits Legal structure of the dealership, Lemon Limited liability company structure for dealership, Litigation, Load Carrying ments with finance companies, Loss con-houses, Managing Litigation, Manufacturer Mediation, Military Family Leave, Mini-driving, Money laundering prevention, and Cost Savings Act, National Defense equity, New Vehicle Modifications, Nonpublic personal information, NPI, stration (OSHA), Odometer issues, Of-trust status, Over-allowances on trade-in Service, Parts content label, Parts depart-Permissible purposes for obtaining a Pickup payments, PMA, Pre-sale Availabil-ies, Price comparisons with other deal-sory notes, Promotional concepts, Protection of dealership assets, Public Relations, Reader boards advertising, Real estate buy/sell considerations, Recalls, Record retention, Records disposal, Recruiting, Red Flags Rule, Reference checks, Registration and titling, Regulation B, Regulation M, Regula-tion Z, Replacement keys, Replevin action, Repossessions, Reservation of rights letter, Resource Conservation and Recovery Act, Retail delivery report, Right of first refusal, Risk Based Pricing Notice, Safe Drinking Water Act, Safeguards Rule, Sales and Finance Practices, Sales and Service Agree-ments, SDN list, Service department fees, Service Providers, Showroom window paint advertising, Site control, Social media, Software policy, Speaking publicly on behalf of your dealership, Specially Designated Nationals (SDN) list, Sprinklered premises, Subpoenas, Substantiation, Succession plan, Superfund, Supplemental stickers, Supplier contracting policy, Suspicious transactions/money laundering, Sweepstakes advertising, Technology use policy, Telemarketing and Consumer Fraud and Abuse Prevention Act, Telemarketing Sales Rule, Telephone Consumer Protection Act, Telephone credit applications, Temporary tags, Termination of franchise, Test drives, Third parties payments to disclosure requirements, TILA, Tire Placards, Tool reimbursement plans, Toyota sudden acceleration recall, Trade association activities, Trade-in over-allowances, Truth in Lending Act, Truthful-ness advertising, U.S. Department of Transportation (DOT), Unauthorized advertising, Unions, USA PATRIOT Act, Used Car Rule, Vehicle history disclosures, Vehicle Labeling, Vehicles and premises security, Vendor rela-tions, Vertical price restraints, Walking surfaces and customer areas, WARN, Warranty Disclosure Rule, Welding and cutting, Wholesaler policy, Worker Adjustment and Retraining Notification Act (WARN Act), Workers compen-sation, Workplace violence, Wrongful repossession, Yield-spread attacks.

The Definitive Legal Guide to the Purchase, Sale, and Operation of Vehicle Dealerships

AUTO DEALER LAW

FIRST EDITION

Michael Charapp, Esq.
Rob Cohen, Esq.

www.autodealerlaw.com
Use promo code **AAS1110**
and save **\$100.**

... everything.

Smogging Used Vehicles (Cont.)

(Continued from page 2)

cause the consumer undue hardship and subject the dealership to administrative action.”

Dealer Written Warning

The AAS Hotline was recently provided with a copy of a “Dealer Written Warning” issued by the DMV to the owner of a Southern California dealership in early July, 2011. The triggering event for the letter was the smogging after sale of a used vehicle sold by the dealership. The specifically-identified used vehicle that was the subject of the warning was smogged almost six weeks after sale. Here is the operative part of the Warning.

The Department of Motor Vehicles (DMV) received notice that you sold a vehicle without it being SMOG certified. This is a criminal violation of the California Vehicle Code (CVC) that you must abide by as a car dealer. Below you will find the vehicle and violation specifics.... This letter serves as a warning. The violation found will be made a part of your dealer record in the DMV database. Failure to comply with the law may result in a criminal and/or administrative action. This letter does not supersede any other action against your dealership for additional violations.

The misconduct of the dealership is described as a violation of CVC 11713(i), and the violation degree is noted as “Misdemeanor.”

What are the smog requirements? Which vehicles must be smogged and which are exempt?

Upon initial registration and upon transfer of ownership and registration, the DMV requires a valid certificate of compliance or a certificate of non-compliance, issued in accordance with the requirements of the Health and Safety Code (H&SC). As a general rule, smog certification is required on original or transfer transactions for: (1) gasoline-powered, 1976 and newer year-model vehicles; and (2) diesel-powered, 1998 and newer year-model vehicles, with a gross vehicle weight rating of 14,000 pounds or less. A critical exception: Gasoline-powered, California-registered vehicles four model-years old or newer are exempt from transfer smog requirements. [CVC 4000.1(d)(7)] All non-resident (out-of-state-registered) vehicles must be smogged. [CVC 4000.1, 4000.2, 4000.3]

What are a dealer’s smog requirements and when do they arise?

The obligation of a dealer to perform a smog inspection is stated in Health and Safety Code (H&SC) section 44015(f): “a licensed motor vehicle dealer shall be responsible for having a smog check inspection performed on, and a certificate of compliance or noncompliance issued for, every motor vehicle offered for retail sale.” Note that the statute is written to indicate that the smog must be performed on every vehicle “offered for sale,” and not simply every vehicle sold. This strongly implies the smog inspection must have been performed not only prior to sale, but prior to “offering” the vehicle in any way to the public. Clearly this means it would be improper for a dealer to show an unsmogged vehicle to an individual consumer “in person” at the dealership, or to the public at large in mass media advertising or by posting the vehicle on the dealer’s website.

Additional proof that the pre-sale smog-timing issue is critical may be found in a careful reading of CVC 24007(b)(1): “no person shall sell, or offer or deliver for sale ... a new or used motor vehicle which is not in compliance with ... the rules and regulations of the State Air Resources Board...” Again note that the vehicle must be smog compliant at the time the vehicle is offered for sale. On the obligations of dealers, specifically, section 24007(a)(1) provides a dealer must not sell a new or used vehicle that is not in compliance with the Vehicle Code, unless the vehicle is sold to another dealer or to be legally wrecked.

What about the violation noted in the Written Warning, CVC 11713(i)?

That section provides it is illegal for a dealer to deliver, following sale, a vehicle for operation on the highways, if the vehicle does not meet all of the equipment requirements of Division 12 of the Vehicle Code. Among the lengthy list of equipment required under Division 12, CVC 27156(b) provides that required air pollution control devices must be “correctly installed and in operating condition.” Unlike other statutes in this area, Section 11713(i) does not prohibit the offering of unsmogged vehicles. It prohibits delivering a vehicle with smog equipment that is not operating properly. In other words, it seems to me that a violation of section 11713(i) could only be found if a dealer delivered a used vehicle in a condition in which it could not pass smog. If the vehicle was smogged after sale (and passed) there would be no violation of section 11713(i).

(Continued on page 5)

Smogging Used Vehicles (Cont.)

(Continued from page 4)

May I “piggy-back” on another dealer’s smog certificate?

If Dealer A smog certifies a used vehicle on September 1, 2011 and prior to any retail sale there are multiple wholesales, may any later retailing dealer refrain from smogging the vehicle and avail itself of Dealer A’s smog certificate until September 1, 2013, so long as there was no intervening retail sale? This is a reasonable question since H&SC 44015(f) states that, “A certificate issued to a licensed motor vehicle dealer shall be valid for a two-year period, or until the vehicle is sold and registered to a retail buyer, whichever occurs first.” Unfortunately, the answer to the question is unclear. The sentence immediately preceding this is the one quoted above which mandates, “[A] licensed motor vehicle dealer shall be responsible for having a smog check inspection performed on ... every motor vehicle offered for retail sale.” Does “responsible for” mean the retailing dealer must smog the vehicle – or have it smogged – sometime after acquiring it? Or does “responsible for” mean “accountable for” in the sense that the retailer can be charged with the statutory violation if a smog-noncompliant vehicle was sold and delivered to a consumer? Or does it mean both? Here’s what I mean.

A franchised dealer whose service department is backed up with work may elect to have safety inspections for used vehicle inventory performed by a third-party garage. But that dealer is responsible for ensuring that any used vehicle it sells meets Division 12 equipment requirements, just as if it was the one who performed the safety inspection in-house. (This is what is known as a “non-delegable duty”; it cannot be delegated to another.) If the garage performs a deficient inspection and passes a vehicle with inoperable headlights, without repairs, the selling dealer is liable for the Vehicle Code violation of delivering an “unsafe” vehicle. Now, please consider smog requirements; if it is your dealer license on the line, would you want to place it in jeopardy by blindly assuming another dealer might have competently smogged the vehicle sometime in the past? Questions would remain, even if a KSR shows a recent smog on the vehicle record, or even if an earlier smogging dealer includes a copy of the smog printout in the wholesale paperwork that follows the vehicle.

Even if you know and trust the wholesale dealer who claims the vehicle was smogged (and passed), the smog certification may not have been competently performed. A careless visual inspection might have failed to detect that an illegal modification effectively defeated the proper operation on the emissions system. What if something was done to the emission control system – even innocently – after a proper smogging that disabled the system? And negligence is not the only con-

cern. What if a fraudulent smog certification was performed? The vehicle may have been “clean-piped.” Clean piping is the illegal practice of using the emission results from the tailpipe of a “clean,” passing vehicle as a substitute for, and in lieu of, the actual “dirty” vehicle being tested. Again, you are effectively certifying to the compliance of a noncompliant vehicle. The impact on your dealer license can be as devastating as if you personally had performed a careless or fraudulent smog inspection. The National Rifle Association says that the only unloaded gun is the gun you unloaded yourself. Perhaps the only smog-compliant vehicle should be the vehicle you smogged yourself.

What are the penalties for a noncompliant dealer?

When discussing compliance issues on the Hotline, callers in management positions frequently tell me that one of the best ways they’ve found to motivate their people to be compliant is to lay out for them the price of noncompliance. Requests for citations to statutory and regulatory authority are common, as are requests for copies of the authority referenced. For those

(Continued on page 6)

“Imitation is the sincerest form of flattery.”

— Charles Caleb Colton



The award-winning DMVdesk® has been built over the last four years on the feedback of over 500 registration clerks, office managers and controllers.

Don't accept an imitation.

Call today for more information and to schedule a demonstration.



DMVdesk
LOGBOOK • PLATE/FREE FILING • BUNDLE MANAGER • DASHBOARD

1-877-DMVDESK (368-3375)

www.dmvdesk.com

Smogging Used Vehicles (Cont.)

(Continued from page 5)

“inside baseball” types, I’m going to expand on the information relating to “Noncompliance Penalties” outlined by the DMV in their OLIN Memos. Those sources tell us simply that dealers who are noncompliant with the dealer smog certification requirements and sell vehicles prior to satisfying the smog inspection requirements are subject to a suspension or revocation of the dealer occupational license, and the payment of fines, ranging from \$15 to \$750 per violation.

Pursuant to CVC 11705(a)(8), a dealer license may be suspended or revoked for violation of any provision of Division 3, commencing with Section 4000. (The smog certification requirements are laid out in Sections 4000.1 and 4000.2.) Such action against a dealer license may also be based on Section 11705(a)(10), for any violation of Article 1, commencing with Section 11700. (Section 11713(i) prohibits delivery of a vehicle not in compliance with the equipment requirements of Division 12.)

A schedule of potential monetary penalties which may be required of dealers is provided in Title 13, California Code of Regulations Section 314.00. (You may want to refer to the paragraph immediately above.) Under 13 CCR 314(a)(1), fines ranging from \$15 to \$300 may be assessed for each violation of CVC 11705(a)(8). And under 13 CCR 314.00(a)(2), fines ranging from \$50 to \$750 may be assessed for each violation of CVC 11705(a)(10) and 11713(i).

Finally, adding insult to injury, the OLIN Memos warn that pursuant to H&SC Section 39674, persons found to be in violation of Air Resources Board (ARB) requirements may be subject to additional fines for each day of noncompliance. If you are curious, as I was, you should note that Section 39674(b)(1) provides that any person who violates any rule or regulation, emission limitation, permit condition or “duty to...carry out inspection ... activities” is liable for a civil penalty not exceeding \$10,000 for each day in which the violation occurs.

So, what’s the answer?

Cries of “Wise guy!” or worse would ensue if I were to state the obvious: Don’t sell used vehicles until needed smog certifications have been performed. An equally obvious, though less inflammatory suggestion would be to establish a checklist procedure to control for smogging vehicles. I hesitate to relate the procedure followed by some dealers decades ago. Different colored sticky-dots were placed on the left or right headlight of the vehicle when the vehicle was smogged and safetied. Salespersons knew not to sell a vehicle not displaying the proper sticky-dots, because that meant the vehicle had not been smogged or safetied. Since checklists have gone the

way of stock cards and rotary phones, perhaps a computer program could be created which prevents the Sales and Finance Departments from printing paperwork – especially a sale contract – using the stock number of a vehicle that has not been smog certified. Another possibility would be to physically segregate unchecked vehicles from “saleable” inventory such that the vehicles could not even be shown to customers until they had been smogged.

The four model-year exemption for gasoline-powered vehicles has been a mixed blessing for dealers. Way back when, every used vehicle had to be smogged and you didn’t have to remember to count model years. Now dealers have to do a little math calculation when the calendar is about to turn over to a new year, and smog certify a particular group of vehicles in inventory which were already on the line but had not been smogged. Here’s what I mean, and again, we are only talking about gasoline-powered and California-registered vehicles. (Recall that all diesels must be smogged.) In this year of 2011, smog-exempt vehicles are those of model years 2011, 2010, 2009 and 2008. So, 2008 year model used vehicles in inventory right now may not have been smogged. But on January 1, 2012, the exempt model years advance to 2012, 2011, 2010 and 2009, and a smog is needed for those 2008 year model vehicles which did not need smogs last year. This borderline group of vehicles may slip through the cracks and be sold unsmogged next year. The delay of the transfer – until the required smog can be performed – will, in the words of the DMV, “cause the consumer undue hardship.”

Every year, at year’s end, dealers must remember to check inventory – that’s existing inventory – and smog any unsmogged vehicles which may have “turned over” and lost their smog-exempt status. If this shift-forward concept has proven difficult for your dealership, one Draconian measure that could be instituted (inflicted?) would be to simply smog every used vehicle when acquired, irrespective of year model, to ensure none are missed. (Just remember that you cannot charge the customer for the smog unless it was required for the transfer.) It should be noted that this procedure will also catch any nonresident (out-of-state) vehicles – all of which must be smogged – which otherwise might have gone unsmogged by virtue of their year model.

Grow Your Bottom Line, Not Your Overhead:

AUTOMATE: Key Compliance and
HR Processes

ADD: Revenue Producers,
Not Expenses

ACQUIRE: Protection from Claims,
Fines & Litigation

Choose Compli

For information on Compli, a product demonstration, or the latest Compli news,
visit www.compli.com/aasnews, call 1.866.294.5545 or email info@complí.com.

Arbitration Update: The Continuing Battle Over Class Action Waivers By Christian Scali, Esq.

So you thought dealers won the arbitration battle? Well, fasten your seatbelts, because the ride may not be over. In addition to possible future action from the CFPB or FTC restricting the use of mandatory arbitration agreements, or passage of Senate Bill 987 to amend the Federal Arbitration Act to exclude civil rights, consumer and employment disputes from federal arbitration, some California courts may seek to restrict the holding of *AT&T Mobility*, trying to create exceptions to the enforcement of valid class action waivers in consumer arbitration provisions.

In *AT&T Mobility*, the U.S. Supreme Court held that state laws that create defenses to the enforcement of arbitration agreements that are not generally available to all contracts, or that are applied in such a manner as to disfavor arbitration, are preempted by the Federal Arbitration Act (FAA) and that class action waivers should be enforced notwithstanding such laws. Dealers facing class claims, particularly those filed under the Consumers Legal Remedies Act (CLRA) can obtain enforcement of the class action waiver contained in the LAW[®] 553-CA-ARB form contract if they employ the proper strategy.

Dealers and their counsel should establish the broad reach of *AT&T Mobility*. Specifically, counsel should demonstrate that the line of cases hostile to the enforcement of class action waivers does not apply in the consumer arbitration context and are preempted by federal law. The holdings of those cases relied on *Discover Bank*, which has been expressly overruled by the U.S. Supreme Court. Finally, counsel should show that federal courts interpreting *AT&T Mobility* have uniformly rejected California's judicially created exceptions to enforcement of arbitration agreements and have, both before and after *AT&T Mobility*, expressly held that the CLRA's anti-waiver provision is preempted by the FAA.

However, last month, a California court of appeal decided *Brown v. Ralphs Grocery Co.*, a case under the Private Attorney General Act ("PAGA") alleging violations of the Labor Code by the defendant against a class of employees. In *Brown*, the trial court invalidated the class action waiver in the employment contract. The court of appeal reversed, holding that the plaintiff failed to demonstrate that enforcement of the class

action waiver would result in the waiver of unwaivable rights under *Gentry v. Superior Court*, a pre-*AT&T Mobility* California Supreme Court case. But the court specifically refused to determine whether the rule of *Gentry* is pre-empted by the FAA under *AT&T Mobility*. We understand that Ralphs Grocery may petition the California Supreme Court for review, and may have done so by the time this article is published. But the ruling in *Brown* nonetheless leaves uncertainty whether California courts will apply *AT&T Mobility* as they should in the context of consumer arbitration contracts containing class action waivers. We have received reports that California trial courts are divided on the reach of *AT&T Mobility* and that several appeals are pending concerning the enforcement of the class action waiver contained in the LAW[®] 553-CA-ARB form. It remains to be seen whether any of these appeals will result in a published decision and we will be alert for any new developments in this ever-changing legal landscape. At the same time, however, there is some discussion that the CFPB or FTC may, under their rulemaking authority, create some restriction on mandatory arbitration in consumer contracts.

Meanwhile, on May 12 of this year, in direct response to Justice Scalia's opinion in *AT&T Mobility*, Senator Franken introduced Senate Bill 987 in the U.S. Senate, intended to exempt civil rights, consumer and employment disputes from arbitration under the FAA.

As it currently stands, dealers have a lot of arguments in their litigation quiver should they be faced with a challenge to the enforcement of their class action waiver in the LAW[®] 553-CA-ARB form contract and they should seek advice from litigation counsel as soon as they are served with a pre-litigation demand letter under the CLRA that purports to be sent on behalf of a class of individuals to have the best opportunity to avail themselves of all of their legal rights and be best positioned to defend against those claims.

Christian Scali is a partner with Arent Fox, LLP in the firm's automotive industry group. His practice focuses on business and consumer litigation at both the trial and appellate level, with a significant emphasis in class actions, franchise law, and commercial law. Chris has been advising and representing dealerships in various capacities for over 12 years. He can be reached at scali.christian@arentfox.com or (213) 443-7621.

Sales Tax and County Fee Changes

Effective **September 10, 2011**, fees for the following counties will go up \$12: Fresno, Kern,* Kings, Madera, Merced, San Joaquin, Stanislaus, and Tulare. Note that the change takes place on the **10th** of September not the 1st.

*Not all ZIP codes in Kern county are affected by this increase. Please see the revised AAS/DMVdesk chart on the following page for details.

In addition, there is a sales tax rate increase for one city in Siskiyou county that takes effect **October 1, 2011**. Mt. Shasta will go from 7.25% to 7.50%. The rest of Siskiyou county will remain at 7.25%. Please see the revised AAS/DMVdesk sales tax chart on page 10.



2011

COUNTY FEE ADD-ON CHART Effective September 10, 2011



<p>WHEN TO COLLECT</p> <ul style="list-style-type: none"> Original registration applications Annual registration renewal applications 	Alameda	\$20	Orange	\$10
	Alpine	\$1	Placer	\$8
	Amador	\$5	Plumas	\$8
	Butte	\$6	Riverside (general)	\$11
	Calaveras	\$1	Riverside (limited) <small>(ZIP Codes: 92225, 92226, 92272)</small>	\$8
	Colusa	\$8	Sacramento	\$10
	Contra Costa	\$10	San Benito	\$10
	Del Norte	\$9	San Bernardino <small>(See sub-chart to the left for \$10 ZIP Codes)</small>	\$10
	El Dorado	\$10	San Bernardino <small>(All other ZIP Codes)</small>	\$7
	Fresno	\$22	San Diego	\$8
Glenn	\$7	San Francisco	\$20	
Humboldt	\$10	San Joaquin	\$23	
Imperial	\$9	San Luis Obispo	\$9	
Inyo	\$1	San Mateo	\$24	
Kern <small>(See sub-chart to the left for \$22 ZIP Codes)</small>	\$22	Santa Barbara	\$9	
Kern <small>(All other ZIP Codes)</small>	\$9	Santa Clara	\$20	
Kings	\$22	Santa Cruz	\$10	
Lake	\$3	Shasta	\$6	
Lassen	\$6	Sierra	\$2	
Los Angeles (general)	\$10	Siskiyou	\$2	
Los Angeles (limited) <small>(ZIP Codes: 93532, 93534, 93535, 93536, 93539, 93543, 93544, 93550, 93551, 93552, 93553, 93563, 93584, 93586, 93590, 93591, 93599)</small>	\$9	Solano	\$10	
Madera	\$22	Sonoma	\$10	
Marin	\$20	Stanislaus	\$22	
Mariposa	\$0	Sutter	\$7	
Mendocino	\$10	Tehama	\$7	
Merced	\$23	Trinity	\$9	
Modoc	\$0	Tulare	\$22	
Mono	\$2	Tuolumne	\$7	
Monterey	\$10	Ventura	\$9	
Napa	\$10	Yolo	\$9	
Nevada	\$6	Yuba	\$9	
Changes in Red take effect September 10, 2011				

WHEN TO COLLECT

- Original registration applications
- Annual registration renewal applications

INSTRUCTIONS

Locate the county where the vehicle is to be registered on the list and add this amount to the appropriate AAS Vehicle License Fee Chart amount.

KERN COUNTY

\$22 ZIP Codes: 93203, 93206, 93215-16, 93220, 93222, 93224-26, 93241, 93243, 93249-52, 93263, 93268, 93276, 93280, 93287, 93301-09, 93311-14, 93380-90

SAN BERNARDINO COUNTY

\$10 ZIP Codes: 90708-10, 91701, 91708-10, 91729-30, 91737, 91739, 91743, 91758-59, 91761-64, 91784-86, 91798, 92305, 92313-18, 92321-22, 92324-26, 92333-37, 92339, 92341, 92346, 92350, 92352, 92354, 92357-59, 92369, 92373-78, 92382, 92385-86, 92391, 92399, 92401-18, 92420, 92423-24, 92427



2011

SALES/USE TAX CHART

Effective October 1, 2011



COUNTY	SALES/USE TAX	COUNTY	SALES/USE TAX
ALAMEDA ¹	8.750%	ORANGE ¹⁷	7.750%
ALPINE	7.250%	PLACER	7.250%
AMADOR	7.750%	PLUMAS	7.250%
BUTTE	7.250%	RIVERSIDE ¹⁸	7.750%
CALAVERAS	7.250%	SACRAMENTO ¹⁹	7.750%
COLUSA ²	7.250%	SAN BENITO ²⁰	7.250%
CONTRA COSTA ³	8.250%	SAN BERNARDINO ²¹	7.750%
DEL NORTE	7.250%	SAN DIEGO ²²	7.750%
EL DORADO ⁴	7.250%	SAN FRANCISCO	8.500%
FRESNO ⁵	7.975%	SAN JOAQUIN ²³	7.750%
GLENN	7.250%	SAN LUIS OBISPO ²⁴	7.250%
HUMBOLDT ⁶	7.250%	SAN MATEO ²⁵	8.250%
IMPERIAL ⁷	7.750%	SANTA BARBARA	7.750%
INYO	7.750%	SANTA CLARA ²⁶	8.250%
KERN ⁸	7.250%	SANTA CRUZ ²⁷	8.000%
KINGS	7.250%	SHASTA	7.250%
LAKE ⁹	7.250%	SIERRA	7.250%
LASSEN	7.250%	SISKIYOU²⁸	7.250%
LOS ANGELES ¹⁰	8.750%	SOLANO	7.375%
MADERA	7.750%	SONOMA ²⁹	8.000%
MARIN ¹¹	8.000%	STANISLAUS ³⁰	7.375%
MARIPOSA	7.750%	SUTTER	7.250%
MENDOCINO ¹²	7.250%	TEHAMA	7.250%
MERCED ¹³	7.250%	TRINITY	7.250%
MODOC	7.250%	TULARE ³¹	7.750%
MONO ¹⁴	7.250%	TUOLUMNE ³²	7.250%
MONTEREY ¹⁵	7.250%	VENTURA ³³	7.250%
NAPA	7.750%	YOLO ³⁴	7.250%
NEVADA ¹⁶	7.375%	YUBA ³⁵	7.250%

CITY EXCEPTIONS

- San Leandro (zip: 94577-79) — 9.00%;
• Union City (zip: 94587) — 9.25%
- Williams (zip: 95987) — 7.75%
- Richmond (zip: 94801-08, 94820, 94850); Pinole (zip: 94564); Concord (zip: 94518-24, 94527) — 8.75%;
• El Cerrito (zip: 94530) — 9.25%
- Placerville (zip: 95667) — 7.75%;
• South Lake Tahoe (zip: 96150-52, 96154-58) — 7.75%
- Selma (zip: 93662); Reedley (zip: 93654) — 8.475%;
• Sanger (zip: 93657) — 8.725%
- Eureka (zip: 95501-03, 95534) — 8.00%;
• Arcata (zip: 95521); Trinidad (zip: 95570) — 8.00%
- Calexico (zip: 92231-32) — 8.25%
- Arvin (zip: 93203); Delano (zip: 93215-16) — 8.25%

- Clearlake (zip: 95422); Lakeport (zip: 95453) — 7.75%
- Avalon (zip: 90704); El Monte (zip: 91731-33, 91735);
Inglewood (zip: 90301-05); Santa Monica (zip: 90401-11);
South El Monte (zip: 91733) — 9.25%;
• Pico Rivera (zip: 90601, 90660); South Gate (zip: 90280) — 9.75%
- San Rafael (zip: 94901, 94903); Novato (zip: 94945, 94947-49) — 8.50%
- Fort Bragg (zip: 95437); Point Arena (zip: 95468); Ukiah (zip: 95482); Willits (zip: 95429, 95490) — 7.75%
- Los Banos (zip: 93635); Merced (zip: 95340, 95348);
Gustine (zip: 95322) — 7.75%
- Mammoth Lakes (zip: 93546) — 7.75%
- Salinas (zip: 93901, 93905-8); Sand City (zip: 93955) — 7.75%;
• Del Rey Oaks (zip: 93940); Pacific Grove (zip: 93950);
Seaside (zip: 93955); Marina (zip: 93933) — 8.25%
- Truckee (zip: 96160-62); Nevada City (zip: 95959) — 7.875%
- La Habra (zip: 90631) — 8.25%
- Cathedral City (zip: 92234-35) — 8.75%
- Galt (zip: 95632) — 8.25%
- Hollister (zip: 95023-24) — 8.25%;
• San Juan Bautista (zip: 95045) — 8.00%
- Montclair (zip: 91763); San Bernardino (92401, 92404-05, 92407-08, 92410-11) — 8.00%
- El Cajon (zip: 92022); Vista (zip: 92081, 92083-85) — 8.25%;
• La Mesa (zip: 91941-42) — 8.50%;
• El Cajon (zip: 92019-21, 92090); National City (zip: 91950-51) — 8.75%
- Stockton (zip: 95201-13, 95215, 95219, 95267, 95269, 95296-97) — 8.00%;
• Manteca (zip: 95336-37); Tracy (zip: 95304, 95376-78, 95385, 95391) — 8.25%
- Arroyo Grande (zip: 93420-21); Grover Beach (zip: 93433); Morro Bay (zip: 93442-43); Pismo Beach (zip: 93449); San Luis Obispo (zip: 93401, 93405) — 7.75%;
- San Mateo (zip: 94401-04) — 8.50%
- Campbell (zip: 95008) — 8.50%
- Capitola (zip: 95010); Santa Cruz (zip: 95061, 95063, 95066-67); Watsonville (zip: 95076-77) — 8.25%;
• Santa Cruz (zip: 95060, 95062, 95064-65) — 8.50%
- 28. Mt. Shasta (zip: 96067) — 7.50%**
- Santa Rosa (zip: 95408); Sebastopol (zip: 95472-73) — 8.25%;
• Cotati (zip: 94927-28, 94931); Rohnert Park (zip: 94927-28); Santa Rosa (zip: 95401-07, 95409) — 8.50%
- Ceres (zip: 95307) — 7.875%
- Visalia (zip: 93277-79, 93290-92) — 8.00%;
• Farmersville (zip: 93223); Porterville (zip: 93257);
Tulare (zip: 93274) — 8.25%;
• Dinuba (zip: 93618) — 8.50%
- Sonora (zip: 95370, 95373) — 7.75%
- Oxnard (zip: 93030, 93033, 93035-36); Port Hueneme (zip: 93041-43) — 7.75%
- Davis (zip: 95616-18); West Sacramento (zip: 95605, 95691) — 7.75%;
• Woodland (zip: 95695, 95776) — 8.00%
- Wheatland (zip: 95692) — 7.75%

Rates and ZIP codes as reported by the DMV on 7/5/11. Rates subject to change. AAS assumes no responsibility for erroneously reported and/or changed rates.

Copyright © 2011 Auto Advisory Services, Inc. All rights reserved.

FTC Consumer Alert

Federal Trade Commission ■ Bureau of Consumer Protection ■ Division of Consumer & Business Education

Auto Warranties, Routine Maintenance, and Repairs: Is Using the Dealer a Must?

If you own a car, you know how important it is to keep up with routine maintenance and repairs. But can a dealer refuse to honor the warranty that came with your new car if someone else does the routine maintenance or repairs?

The Federal Trade Commission (FTC), the nation's consumer protection agency, says no. In fact, it's illegal for a dealer to deny your warranty coverage simply because you had routine maintenance or repairs performed by someone else. Routine maintenance often includes oil changes, tire rotations, belt replacement, fluid checks and flushes, new brake pads, and inspections. Maintenance schedules vary by vehicle make, model and year; the best source of information about routine scheduled maintenance is your owner's manual.

What is a warranty?

A warranty is a promise, often made by a manufacturer, to stand behind its product or to fix certain defects or malfunctions over a period of time. The warranty pays for any covered repairs or part replacements during the warranty period.

Do I have to use the dealer for repairs and maintenance to keep my warranty in effect?

No. An independent mechanic, a retail chain shop, or even you yourself can do routine maintenance and repairs on your vehicle. In fact, the Magnuson-Moss Warranty Act, which is enforced by the FTC, makes it illegal for manufacturers or dealers to claim that your warranty is void or to deny coverage under your warranty simply because someone other than the dealer did the work. That said, there may be certain situations where a repair may not be covered. For example, if you or your mechanic replaced a belt improperly and your engine is damaged as a result, your manufacturer or dealer may deny responsibility for fixing the engine under the warranty. However, according to the FTC, the manufacturer or dealer must be able to demonstrate that it was the improper belt replacement — rather than some other defect — that caused the damage to your engine. The warranty would still be in effect for other parts of your car.

Will using 'aftermarket' or recycled parts void my warranty?

No. An 'aftermarket' part is a part made by a company other than the vehicle manufacturer or the original equipment manufacturer. A 'recycled' part is a part that was made for and installed in a new vehicle by the manufacturer or the original equipment manufacturer, and later removed from the

vehicle and made available for resale or reuse. Simply using an aftermarket or recycled part does not void your warranty. The Magnuson-Moss Warranty Act makes it illegal for companies to void your warranty or deny coverage under the warranty simply because you used an aftermarket or recycled part. Still, if it turns out that the aftermarket or recycled part was itself defective or wasn't installed correctly, and it causes damage to another part that is covered under the warranty, the manufacturer or dealer has the right to deny coverage for that part and charge you for any repairs. The FTC says the manufacturer or dealer must show that the aftermarket or recycled part caused the need for repairs before denying warranty coverage.

Tips To Avoid Warranty Issues

Here's how to get the most out of your vehicle's warranty:

- **Read your warranty.** Often bundled with your owner's manual, the warranty gives a general description and specific details about your coverage. If you have misplaced your owner's manual, look for it online. Check the "Owners" section of your manufacturer's website.
- **Be aware of your warranty period.** If problems arise that are covered under the warranty, get them checked out before the warranty expires.
- **Service your car at regular intervals.** This is a good idea in any case. But for the sake of keeping your warranty intact, follow the manufacturer's recommended service schedule. Details are in your owner's manual.
- **Keep all service records and receipts, regardless of who performs the service.** This includes oil changes, tire rotations, belt replacement, new brake pads, and inspections. Create a file to keep track of repairs; it will come in handy if you have to use your warranty. If you ever have a warranty claim and it appears that you did not maintain your vehicle, your claim could be denied.
- **Complain.** If you think a dealer's service advisor denied your warranty claim unfairly, ask to speak with a supervisor. If you still aren't satisfied, contact the manufacturer or go to another dealer. You also may wish to file a complaint with your state Attorney General, local consumer protection office, local Better Business Bureau, or the FTC.

For More Information

Visit ftc.gov for free information on buying, financing, leasing, renting and maintaining vehicles.

The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace and to provide information to help consumers spot, stop and avoid them. To file a complaint or get free information on consumer issues, visit ftc.gov or call toll-free, **1-877-FTC-HELP** (1-877-382-4357); TTY: 1-866-653-4261. Watch a new video, *How to File a Complaint*, at ftc.gov/video to learn more. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.