

# READING AND RESPONSE

## MARCH 2006

### Storm-damaged Cars Expected To Arrive In Region

Vehicles damaged by floods when hurricanes struck the Gulf Region this year haven't yet been reported in Oregon, but there's no doubt they will, said Jan Magosian, a spokeswoman for the Oregon Attorney General's Office. "It always happens," Margosian said. "Since the flooding occurred clear across the U.S., people will fix (damaged cars) and run them through several states until their titles are washed and they no longer show up as salvage units."

As many as 500,000 vehicles were submerged during hurricanes Katrina and Rita. Here are a few of the actions various organizations are taking to address the issue of what happens to those vehicles:

- The National Insurance Crime Bureau (NICB) has made public a special online database of motor vehicles and boats affected by the hurricanes. Anyone can log on to the NICB website ([www.nicb.org](http://www.nicb.org)) to check a suspected VIN free of charge.
- Experian Automotive also offers free storm damage vehicle information through a new website feature ([www.auto-check.com/storm](http://www.auto-check.com/storm)). Enter a VIN at the website to determine if the vehicle was reported titled or registered within the last 12 months in Louisiana, Mississippi, Alabama or Texas; was reported as storm-damaged in a state affected by the hurricanes.
- The National Auto Dealers Association (NADA) has posted to its website ([www.nada.org/floodtips](http://www.nada.org/floodtips)) a list of 10 ways to spot whether a vehicle has been damaged by flood waters.
- The Automotive Recyclers Association is asking recyclers seeing such vehicles at auctions to notify the association's Ray Tarnowski ([ray@a-r-a.org](mailto:ray@a-r-a.org)). Although the ARA may not be able to stop the sale of that particular vehicle, the association says the information could help ARA in its effort to "pass national VIN condemnation legislation that could put an end to dangerous and illegal activities like this."
- Louisiana lawmakers have passed a bill that would require all vehicles determined to be "total losses" as a result of flooding to be dismantled or crushed. Insurers have opposed the bill, saying vehicles contaminated by salt water or biohazard materials should be taken off the roads, but that the legislation would result in the destruction of thousands of other storm-damaged vehicles that could be salvaged.

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DEALERS: Access DMV driver and vehicle information files via touch-tone phone 24 hours a day, seven days a week.

**How? Open A Record Inquiry Account.**

Those entities who qualify to receive personal information under [ORS 802.175-802.191](#) may be eligible for a Record Inquiry Account. To obtain a record inquiry account, you must:

1. Complete a [Record Inquiry Account Application](#).
2. Submit any documents necessary to prove you qualify for personal information.
3. Submit a \$70, non-refundable, application fee.

If approved for an account, you are then pre-qualified to receive record information. Account holders are billed monthly for records requested, and have access to DMV's Interactive Voice Response System (IVR). IVR is an automated record inquiry system available only to record inquiry account holders. Advantages for IVR users include 24-hour access to certain driver and vehicle record information, and overnight turnaround time for prints ordered through the system. Through IVR, you have the following six menu choices:

1. Listen to driver license name and address, description and status.
2. Listen to vehicle description and ownership.
3. Order a three-year non-employment driving record.
4. Order a complete or certified court print driving record.
5. Order a three-year employment driving record.
6. Order a vehicle record print.

A Record Inquiry Account Holder can also order driver and vehicle records online by using the Web forms designed for [Driver Records](#) or [Vehicle Records](#) (for more information on the online Web forms call (503) 947-4031). Records that are submitted online through these forms and received by 3 PM Monday through Friday will be sent by mail the next business day.

***For More Information:***

Record Inquiry Accounts: (503) 945-7950

Interactive Voice Response System (IVR): (503) 945-5312

Oregon DMV  
Attn: Record Services Unit  
1905 Lana Avenue NE  
Salem, OR 97314



**January 2006**

**By: Whann & Associates, LLC.**

**- Federal Legislative Developments**

During the past year, House and Senate Leaders succeeded in accomplishing their goal of moving key and, in some cases, long-stalled Legislation carried over from the 108th Congress. By June, both Legislation to Curb Class Action Lawsuits and the Bankruptcy Reform Act had been signed into law. During the next few months, the Administration focused on enacting the REAL ID Act, the Junk Fax Prevention Act of 2005, a Comprehensive Energy Bill and the Highway Transportation Funding Bill. As we enter 2006, Members of Congress and the Administration are looking to clear key legislation, while also making a fresh start with a new list of priorities. Looking forward to this session's activities, completing the 2006 Budget Resolution, Legislation to renew the expiring provisions in the Patriot Act, and the Tax Overhaul Measure will likely take immediate precedence. The midterm elections coming up in November will no doubt have a large impact on the other priorities that make Lawmakers' agendas. Debates on social policy issues such as repeal of the estate tax, immigration reform, and a Constitutional ban on gay marriage may be on the horizon. At the same time, Legislators will continue dealing with topics of national security, removal of troops from Iraq, and revitalizing the Gulf Coast. Overall, 2006 is sizing up to be an interesting year.

**Expiring Patriot Act Provisions Extended for Five Weeks**

Despite their persistent efforts and the urging of President Bush, Congressional Leaders could not agree on a plan to reauthorize all of the 16 expiring provisions of the 2001 Patriot Act before the end of 2005. The Senate passed a Bill (S. 2167) in July that proposed four-year sunsets for two of the most contentious expiring provisions, one that would grant the FBI power to seek "roving wiretaps" and another to seize various business records and search warrants, as well as a provision that allows law enforcement to seek warrants against "lone wolf" terrorists. The House Measure (H.R. 3199) included 10-year sunsets on

the first two provisions and would have given law enforcement more latitude in seeking records and warrants. Because the House waited until mid-November to appoint Conferees, however, there was little time to reach a final deal. A draft agreement released on November 16th would have made 14 of the provisions permanent, and placed seven-year sunsets on the roving wiretap and warrant provisions, and a 2012 sunset on the lone-wolf provision. Three Republican Senators, joined by three Democrats, threatened to filibuster the deal and it was put on hold until after the Thanksgiving Recess. A new deal reached in December proposed four-year expiration dates for three of the provisions. The House adopted the Conference Report on the Bill, but final action was blocked in the Senate. Although both the President and Senate Majority Leader insisted they would not support an extension of the expiring provisions of the Patriot Act, the House and Senate agreed to just that before the Christmas break. The Senate originally passed a six-month extension of the Law, but it was reduced to five weeks by the House and the Senate concurred. Lawmakers are expected to pick up negotiations as soon as they return from the winter break.

### **Spyware Remains a Priority for Lawmakers**

As public concern grew over "spyware," or computer programs that are unknowingly downloaded onto an individual's hard drive to collect personal data for third parties, Congress decided it had to take a serious look at anti-spyware proposals. The House passed two Bills in May of 2005 addressing the issue, while a separate Measure won Committee approval in the Senate. The primary obstacles to passage of Spyware Legislation have been industry concerns over including specific technology requirements and the types of penalties that should be assessed if a violation occurs. Given the amount of public attention spyware has received, and the continued focus on protecting individual's private information and on preventing identity theft, it is likely that Members of Congress will vigorously pursue reaching an agreement on Spyware Legislation.

### **- Federal Regulatory Activities**

#### **FCC Releases Proposed Rules for Junk Fax Prevention Act**

The Junk Fax Prevention Act of 2005 was signed into law on July 9, 2005. The Act codifies and defines an established business relationship exemption to the prohibition on unsolicited facsimile advertisements; requires a sender to provide a specified notice and contact information on a fax advertisement that allows the recipient to opt-out of any future transmissions from the sender; and specifies the circumstances under which a request to opt-out complies with the Act. The Act also authorizes the Federal Communications Commission (FCC) to consider limits on the duration of an established business relationship and to exempt small businesses and trade associations from certain requirements. The FTC is currently seeking comments on how best to implement these requirements and update its Rules to address these issues. On December 18th, the FCC released its amended proposed Rules implementing the Act as mandated by Congress. It also delayed mandatory compliance with prior written permission requirements from January 9, 2006 until April 5, 2006, which happens to be the FCC's deadline to issue regulations to implement the Act's provisions. We have filed comments on behalf of NIADA

to protect the interests of NIADA, its State Affiliates and their members.

### **- Activity of Interest**

#### **Insurers Predict Increase in GAP Costs in 2006**

The insurance industry is predicting steep depreciation in the value of used motor vehicles and the aftermath of Hurricanes Rita and Katrina may cause the dealer cost of guaranteed asset protection (GAP) products to increase by as much as 30% during the upcoming year. They explain that the widespread discounting of new vehicles to "employee prices" combined with high gasoline prices will result in consumers purchasing fewer used vehicles, especially those that are less fuel efficient like sport utility vehicles and that used vehicle values will depreciate more quickly thereby creating larger "gaps" for insurers to cover. If the number and amount of claims increase, there may also be fewer providers in the market. Despite the increases, GAP products should remain a viable profit center for dealerships.

### **- Case of the Month**

#### **Washington Dealership Sued For Passing Charge on to Consumers Despite Making Disclosures**

Dealerships often charge documentary fees and look for other ways to pass costs through to consumers. Sometimes a dealer's and a court's interpretation of whether a statute allows them to do so can be in conflict as illustrated in *Nelson v. Appleway Chevrolet Inc.* The issue in this case was whether a motor vehicle dealership violated State law by passing on a charge for the State business and occupation tax (B&O tax). In an unusual turn of events, the lawsuit arose because the Dealership disclosed that it was charging the fee, not because it failed to do so. When the consumer purchased a vehicle from the Dealership in 2002, the parties agreed on a sales price of \$16,822 and entered into an Agreement to Purchase. In addition to the sales price, the Agreement listed several fees and taxes, including a charge of \$79.23 for Washington State B&O tax. The B&O tax was also disclosed to the consumer on the reverse side of the Agreement to Purchase and in the Retail Installment Contract and Security Agreement, and the consumer initialed another paragraph acknowledging that the Dealership was passing through the B&O tax.

The consumer filed a complaint requesting that the Court find that the Dealership's collection of the B&O tax and assessment of sales tax thereon violates State law. The Dealership defended its practice by arguing that the statute provides that the B&O tax may be passed on to the customer as part of operating overhead and that it was providing full disclosure to consumers by itemizing it on the Purchase Agreement and Installment Contract. According to a three-judge panel for the Washington Court of Appeals, however, the only way to legally pass the tax on is through disclosure during negotiation of the final purchase price of the vehicle, not by itemizing it after the fact. The Court explained that the business tax is assessed as a percentage of the value of the products, the gross proceeds of sales, or the gross income of the business and, as a result, should differ from transaction to transaction based on the actual negotiated price of the vehicle and any other products sold together with the vehicle. It further explained that Washington imposes the tax on

businesses for the privilege of doing business in the State. Relying on language in the statute stating that the B&O tax should not be construed as a tax on purchasers and customers, it held that the intent is for the person engaging in business activities to pay the tax as part of the operating overhead, not that it be passed on to purchasers of the businesses' goods and services.

The decision, which is being appealed, was certified as a class action lawsuit. It has already triggered the filing of another lawsuit that seeks class-action status against all Washington dealerships that itemize the tax and pass it on to consumers. The Washington State Attorney General's Office is also getting involved in the issue and has been having discussions with both dealership and consumer attorneys to try and resolve the confusion. The decision was not based upon the Consumer Protection Act, but the State Attorney General's Office expressed concern about the confusion that can result when the tax is stated separately from the sales price.

## **IF YOU DON'T REVIEW YOUR DEALERSHIP'S FORMS, SOMEONE ELSE WILL!**

*By: Keith E. Whann*  
***Whann & Associates***

Today we live in a rapidly changing and seemingly more difficult world. It used to be that when a motor vehicle dealership made a mistake, it had an opportunity to fix it. Now, the first mistake a dealer makes can cost him the dealership. Not surprisingly, paperwork compliance is one of the biggest challenges and the area that presents the greatest legal exposure for a motor vehicle dealership. There are a whole host of State and Federal Laws that impact a motor vehicle transaction, including State Unfair and Deceptive Acts and Practices (UDAP) Statutes and Administrative Rules, State Motor Vehicle Titling and Retail Installment Sales Acts, the Uniform Commercial Code, the Magnuson Moss Warranty Act, the Fair Credit Reporting Act, the Truth in Lending and Leasing Acts, the FTC Used Car Rule and the Federal Privacy and Anti-Terrorism Laws and their implementing Regulations, to name a few. What's more, not only have many of these State and Federal Laws gone through major revisions during this past year, but numerous case decisions and regulatory interpretations addressing compliance with these Laws are rendered on an ongoing basis. Putting all of this together, achieving forms compliance for a motor vehicle dealership and keeping current with legal, regulatory and legislative developments that impact the dealership's paperwork can be extremely challenging.

One of the most important things to remember is that very few of the dealership's forms in a transaction are meant to stand on its own. Rather, they must work together and be considered in the context of the entire transaction. Just as important is to recognize that the different variables in a transaction, such as whether the dealership is selling or leasing the vehicle, whether the vehicle is being sold with or without a warranty, and the type of financing that is being obtained, will impact the content of the dealership's paperwork and the types of disclosures contained therein. While an individual form may be appropriate for the purpose for which it was designed, it may create legal exposure for the dealership when used in conjunction with other paperwork in a transaction.

The fact that dealerships often obtain their paperwork from multiple sources can further complicate the issue. For example, the Uniform Commercial Code, the Magnuson Moss Warranty Act and the FTC Used Car Rule each impose specific requirements on dealerships when offering or disclaiming warranties. Many State UDAP Statutes also require that every retail sale of a motor vehicle be preceded by a written contract that contains all of the agreements of the parties, including all material statements made prior to obtaining the customer's signature on the purchase contract. If a dealership is to be in compliance with all of these Laws, it must ensure that the Retail Purchase Agreement, FTC Buyers Guide and Limited Warranty Document contain the required disclosures and those disclosures must be consistent and properly integrated.

What's more, with all of the legal, legislative and regulatory activity that has occurred over the past 24 months, compliance is even more difficult because many of the changes have had a direct impact on the dealership's paperwork, including:

- Compliance with the Federal Privacy Act and the FTC's Privacy and Safeguards Rules that were promulgated pursuant to the Act. The FTC has already served formal investigative requests on motor vehicle dealerships asking for evidence of compliance.
- Enforcement actions alleging "payment packing" and other deceptive acts and practices against motor vehicle dealerships. In 1999, the National Association of Attorneys General issued a Resolution addressing illegal payment packing practices commonly utilized in the motor vehicle industry. Most recently, several States have filed lawsuits against dealerships seeking millions of dollars in penalties.
- The FTC's production of a revised Dealer's Guide To The Used Car Rule, which addresses disclosures that should be made if a dealer offers a "50/50 Warranty or Another Type of Split Cost Warranty" and the posting of the Buyers Guide in a vehicle, among other things.
- Proposed Rules issued by the Federal Reserve Board that would establish a more specific and uniform definition for providing "clear and conspicuous" disclosures under the Equal Credit Opportunity Act, Regulation Z under the Truth in Lending Act and Regulation M under the Truth in Leasing Act.

The difficulties motor vehicle dealerships face in making sure that their paperwork complies with the maze of overlapping State and Federal Laws has not been overlooked by consumer attorneys. They have adopted a new strategy for handling motor vehicle cases in hopes of recovering large damage awards and attorney fees. Instead of focusing on what the consumer alleges his problem is with the motor vehicle transaction, the consumer's lawyer goes for what has become known as the "quick kill." They carefully scrutinize the dealership's paperwork looking for incorrect or inappropriately completed paperwork that might provide the basis to successfully rescind the transaction, recover damages and collect attorney fees.

Dateline NBC recently ran a story warning consumers to "Read the fine print and sift through the paperwork" to avoid being "tricked" when buying a car. Another recent publication for consumer attorneys informs them that "In almost every motor vehicle transaction there is some violation in the sale of the car." It then provides this advice: "To determine if a claim exists, lawyers should review the paperwork from the entire transaction." A report issued by "Public Citizen" titled "Rip-Off Nation: Auto Dealers' Swindling of America" likewise warned consumers that "auto dealer fraud is rampant both geographically and in the number of customers affected..." and "Abusive terms

written in the fine print permit dealers to alter the terms of the contract, including the number of payments and interest rate, without the customer's further consent... .”

Dealers must also remember their obligations under lender dealer agreements and that noncompliant dealership paperwork can create a repurchase obligation on the dealership. In the vast majority of the nearly 200 lender dealer agreements we have reviewed during the past two years, the dealership is asked to warrant that it has complied with and the documents used in the transaction are in compliance with applicable State and Federal Laws, Rules, and Regulations. Dealerships should be cautious about warranting that their paperwork is in compliance without first looking at it. Such a warranty takes on even more significance in today's motor vehicle industry given the declining creditworthiness of consumers and the increasing use of subprime financing. With the likelihood of consumer defaults increasing, dealerships should take steps to ensure that their paperwork does not open the door for the equivalent of a “recourse” obligation against them.

Clearly, the motor vehicle industry is unlike any other. While it is difficult, it is not impossible to “bullet proof” forms and eliminate mistakes in their completion and use. Given the complexity of the motor vehicle industry, more and more dealerships are turning to the NIADA and its State Affiliates for assistance with these issues. They can often help dealers sort through the legal and regulatory maze and point them in the right direction when it is necessary to obtain assistance from professionals or vendors familiar with the motor vehicle industry. NIADA's “How To Sell A Car and Keep It Sold!” 2004 Regional Professional Development Conferences provide Dealers with information on both paperwork and sales and financing compliance issues. If you are looking for a fun way to approach paperwork compliance, bring your paperwork or a sample deal to the “Techniques Used By Consumer Lawyers To Break A Car Deal” Seminar I will be conducting at NIADA's Convention in Dallas this June and see how your paperwork fairs. Whether you review the paperwork yourself or seek outside assistance, taking action now to make sure your dealership's day-to-day sales activities and paperwork are in compliance will help minimize your dealership's legal exposure while increasing your overall efficiency and profitability.

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“Kelly’s Korner”  
March 2006

***The mind is like a parachute – it works best when it is open.***

- Q. I have been in F&I for 5 years. Off-site training would be a waste of my time, wouldn’t it?
- A. On the contrary, I believe it is imperative for F&I managers to get out of the dealership about every 2 years to train with their peers. And I believe it is equally important to enter an educational event with the attitude that you will learn something. (If you talk to my students, they will tell you I am fond of reminding them that their input equals output -- or in other words, they gain from training in equal measure to what they give to it: in this case an open mind.

An open mind will silence the familiar refrains of “The trainer does not know my office . . . After all, my deals are different than the other participants here . . . The trainer does not know our selling system . . . Our operation is very different.” The truth is that the similarities in our industry are more abundant than the differences.

While an F&I educator may not know the names of the managers who work with you, rest assured there are only 4 parts to every deal and only so many ways to work them. And the goal is always the same: increased production and better service to your customers. Just as you must open your mind to training, you must also find ways to open your customer’s mind to the value of F&I products and services before you talk money. When your mind is open to new ideas, you can introduce value to your customers in a way that fully rewards your investment in training and their investment in your presentation.

Those who come to training looking to have their skepticism reinforced often leave with it intact. Those who come to training seeking answers leave training with ideas that work.

**Article written by: Jan Kelly, President of Kelly Enterprises. She is a sales trainer and consultant, convention speaker, and writes frequently for industry publications. For information about training opportunities telephone 800.336.4275 or contact Kelly Enterprises at [www.JLKelly.com](http://www.JLKelly.com).**

**Kelly Enterprises Financial Center (F&I) Seminar Schedule**

<b>- Irvine, CA</b>	<b>March 13-17</b>
<b>- Portland, OR</b>	<b>April 10-14</b>
<b>- Minneapolis, MN</b>	<b>May 8-12</b>
<b>- Tampa, FL</b>	<b>June 12-16</b>
<b>- Portland, OR</b>	<b>July 10-14</b>
<b>- Irvine, CA</b>	<b>August 14-18</b>
<b>- Baltimore, MD</b>	<b>September 18-22</b>
<b>- Portland, OR</b>	<b>October 9-13</b>
<b>- Dallas, TX</b>	<b>November 13-17</b>
<b>- Vancouver, WA (USA)</b>	<b>December 11-15</b>

**READING & RESPONSE FORM**  
**OIADA CONTINUING EDUCATION PROGRAM**  
**March 2006**

<b>ARTICLE:</b>	<b>QUESTION</b>
Storm Damage	People will fix damaged cars and run them through several states until their titles are washed and they no longer show up as salvaged units. <p style="text-align:right">True _____ False _____</p>
Legal & Legislative	Spyware is a type of computer program that unknowingly downloads onto an individual's hard drive to collect personal data for third parties. <p style="text-align:right">True _____ False _____</p>
DMV	A Record Inquiry Account gives a qualified person access to a vehicle's description and ownership. <p style="text-align:right">True _____ False _____</p>
Dealership Forms	Paperwork compliance is one of the biggest challenges and the area that presents the greatest legal exposure for a motor vehicle dealership. <p style="text-align:right">True _____ False _____</p>
Kelly's Korner	It is imperative for F&I managers to get out of the dealership about every 2 years to train with their peers. <p style="text-align:right">True _____ False _____</p>
Dealership Forms	Dateline NBC recently ran a story warning consumers to "Read the fine print and sift through the paperwork" to avoid being "tricked" when buying a car. <p style="text-align:right">True _____ False _____</p>
Legal & Legislative	The insurance industry is predicting steep depreciation in the value of used vehicles in 2006. <p style="text-align:right">True _____ False _____</p>

I certify to OIADA that I have personally read these articles in: Squeaky Wheel Magazine issue **March 2006 Continuing Education Packet # 3-06**

**NOW DROP DOWN AND SEE HOW YOU DID!**

**READING & RESPONSE FORM**  
**OIADA CONTINUING EDUCATION PROGRAM**  
**March 2006**

**ARTICLE:**

**QUESTION**

- |                     |  |
|---------------------|--|
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**March 2006 Continuing Education Packet # 3-06**