

# **READING & RESPONSE**

## **September 2006**

### **LEGAL, LEGISLATIVE AND REGULATORY SUMMARY**

#### **July 2006**

**By: Whann & Associates, LLC**

While Members of Congress are working toward completing the Fiscal 2007 Spending Bills, they have also been considering some Legislation that could have a special impact on the upcoming elections, such as a Bill that would establish a deadline for withdrawing troops from Iraq and Measures that would impose constitutional bans on gay marriages and burning American flags. At the same time, both Chambers are still working toward passing Energy Legislation that will benefit consumers, satisfy the Coastal states' desire for a greater share of revenues generated from offshore leases for drilling oil and gasoline, and address environmental concerns. The House "Energy Week" gave Legislators a forum to discuss potential resolutions regarding this issue. Other topics, including taxes and privacy, are also on the Agenda. A House passed Estate Tax Bill was on its way to the Senate and a House Committee passed a Privacy Bill that would have a direct impact on Federal Agencies.

- ***Federal Legislative Developments***

"Energy Week" Brings Energy Legislation to the Forefront in the House

During the last week of June, designated "Energy Week" by House Republicans, a number of Energy Bills already approved by the House Energy and Commerce Committee were on the agenda for consideration by the full House, including: H.B. 5534, which would allocate money collected from Corporate Average Fuel Economy (CAFE) violations to a grant program that would promote an infrastructure for the use of ethanol and other alternative fuels; a Bill (H.B. 5632) that would develop a federal rating system for fuel efficiency standards and create a program to educate consumers about how tires impact the fuel efficiency of vehicles; and H.B. 5611, which would mandate that the Energy Department, motor vehicle manufacturers and oil companies join together to educate drivers on how they can conserve fuel.

The White House also announced that it would work with Congress to come up with a solution for offshore drilling projects, possibly granting a larger share of the revenues generated from offshore leases to the Coastal States. Legislation recently approved by the House Resources Committee, H.B. 4761, would redirect revenues from energy leases to these States and would remove restrictions preventing new oil and gas drilling initiatives off the Coastal States by codifying a moratorium on drilling within 50 miles of the coast. Under the Bill, Coastal States would receive 75% of royalties realized from the federal production of oil and gasoline in an area up to 14 miles offshore. This could mean \$10 billion in revenue for the State of Louisiana alone over the next 10 years.

## Passing Stricter CAFE Rules Gains Momentum in the Senate

Notably missing from the list of Bills being considered by the House during its Energy Week was Legislation related to increasing the corporate average fuel economy (CAFE) standards. It was not clear whether there was enough support for the President's proposal to reform the CAFE standards to bring it to the House floor since the House Energy Committee passed the Bill by just two votes. Another House Bill that would raise fuel economy standards to 33 miles per gallon over the next 10 years has also been gaining additional support.

In the Senate, eight Democrats and two Republicans joined together to introduce S. 3543, called the "Ten in Ten." It would require automobile manufacturers to sell vehicles with an average fuel economy of 35 miles per gallon by 2017. For the 2006 model year, all of the cars a manufacturer sells annually are expected to average 27.5 miles per gallon, while its trucks must average 21.6 miles per gallon. It would further require manufacturers to attain an average of 31.1 miles per gallon for cars and 23.6 miles per gallon for light trucks by model year 2009. In addition, S. 3543 would require the U.S. Environmental Protection Agency to update its tests for fuel economy and require vehicles built after 2013 to come with fuel economy gauges. Both the Alliance of Automobile Manufacturers and the Administration oppose the Bill arguing that it will cost the industry billions of dollars, lead to employee layoffs nationwide and result in less safe vehicles. Growing Congressional support for higher CAFE Standards, however, has delayed the President and Federal Regulators from proceeding to reform the Fuel Economy Rules for passenger cars. The National Highway Traffic Safety Administration is phasing in new Rules for trucks between 2008 and 2011 that will set mileage standards according to a vehicle's size, with standards for some smaller trucks exceeding 27.5 miles per gallon.

## Legislation to Increase Federal Minimum Wage Sees Little Movement

Both the House and Senate Spending Bills are quickly becoming vehicles for Legislators interested in increasing the federal minimum wage. During the House Appropriations Committee mark-up of the 2007 Science-State-Justice-Commerce Spending Bill (H.B. 5672), Democrats offered an amendment that would have increased the federal minimum wage from \$5.15 to \$7.25 over the next four years. The attempt was rejected by a 28-34 vote. Similar amendments were offered to the Spending Bills for the Departments of Labor, Health and Human Services, and Education. Unfortunately for proponents of the increase, the amendments were removed from the Measures when they reached the House floor because such amendments are prohibited from being attached to a Spending Bill unless the House Rules Committee elects to protect them from a point of order. Senator Kennedy, a long time advocate of increasing the federal minimum wage, also offered an amendment to the Senate's 2007 Defense Authorization Bill (S. 2766) that would have increased the minimum wage to \$7.25 in two years. That amendment was also stripped from the Bill by a 42-46 vote. The Senate vote on the Defense Authorization Bill marked the ninth time in nine years that an increase of the federal minimum wage has been blocked.

- ***Federal Regulatory Activity***

#### FTC Levies \$350,000 Fine for Violation of the Do-Not-Call Rules

The Federal Trade Commission (FTC) recently assessed a large fine against Peoples Benefit Services, Inc. in connection with violations of the Do-Not-Call provisions in the Telemarketing Sales Rule. The FTC alleged that the company could not prove an existing business relationship with some of the consumers it directed its telemarketer to call. The telemarketer called consumers who were actually customers of the company's affiliates, including thousands of consumers who had already asked to be placed on the affiliates' entity specific Do-Not-Call list. The FTC found that the company's business was so different from that of its affiliates that it could not be deemed to have an established business relationship with those customers. Peoples Benefit Services, Inc. and the telemarketer were fined a total of \$350,000 in civil penalties for these violations.

This was the first case brought by the FTC addressing the application of the existing business relationship exemption to affiliate companies. The standard articulated by the FTC is whether a consumer reasonably would expect the affiliate to be included in a company-specific Do-Not-Call request given the identification of the caller and the product being advertised; if so, the affiliate company may take advantage of the existing business relationship exemption. The greater the similarity between the nature and type of goods sold by the seller and the affiliate and the identity between the seller and the affiliate, the more likely it is for the consumer reasonably to expect the affiliate to be included.

#### Theft of Personal Information Impacts Federal Agencies and Dealers Alike

News reports about large organizations being unable to protect the personal information they collect have spurred legislative and regulatory action not only at the Federal level, but also at the State level across the Country. Most recently, the media focused its attention on an employee of the Veterans Administration who had his laptop computer stolen. It contained the names, social security numbers, and dates of birth for over 26 million veterans and active-duty soldiers. On June 21<sup>st</sup>, the FTC also announced that it was addressing its own privacy breach. Two FTC laptop computers, one of which contained personal information, were stolen from a locked vehicle. While the laptops were password protected, the FTC notified approximately 110 people that information gathered about them in law enforcement investigations, including names, addresses, social security numbers, dates of birth and, in some cases, financial account numbers, were stored on the stolen laptops.

A California used vehicle dealer has also come under scrutiny recently as a result of its privacy policies. Consumers in the Los Angeles area have filed a class action lawsuit against the dealership for allegedly providing information obtained from their credit applications to outside third parties without their knowledge. The information shared included names, social security numbers, employment information and home addresses.

- *Activity of Interest*

Dealer Marketing Firm Pays Ohio Attorney General \$200,000

Gunning & Associates, Inc. (G & A), a company in the business of contracting out marketing and sales assistance to motor vehicle dealers, recently agreed to pay \$200,000 to settle claims that its advertising practices and “sales events” violated Ohio’s Consumer Sales Practices Act. The Attorney General of Ohio asserted that G & A enticed dealers’ potential customers by misrepresenting the source of the vehicles for sale, advertising with the intent to not sell the vehicles as advertised, misrepresenting the amount of and reasons for price reductions, implying a false premise for selling vehicles, and misrepresenting the sale price of vehicles. For example, G & A used language in its advertisements such as, “Ford Marketing Headquarters-Buyback Notice” and “Bank Mandated Repo and Off Lease \$59 Down Disposal,” when, in truth, the vehicles being sold were neither buyback, repossessed or off lease vehicles nor were they obtained from the entity identified. In addition to paying \$200,000 to the State of Ohio for enforcement costs, G & A signed an agreement stating that it would change its sales and marketing promotions to comply with Ohio Consumer Protection Laws.

- *Case of the Month*

Warranty or Service Contract? Arizona Supreme Court Sheds Light on the Differences

While many compliance issues impact a motor vehicle sale, one area that continues to pose significant problems is understanding the difference between a written warranty and a service contract and how they impact a dealership’s ability to disclaim implied warranties. The Supreme Court of Arizona recently addressed both issues in Johnson v. Earnhardt's Gilbert Dodge. The customer in this case purchased a used vehicle from the Dealership. As part of the purchase transaction, the customer signed an application and paid the contract price (in addition to the purchase price of the vehicle) for a service contract that was subsequently issued to her from DaimlerChrysler. When she experienced mechanical problems with the vehicle, however, she filed her action against the Dealership alleging breach of the implied warranty of merchantability and attempting to revoke acceptance of the vehicle under the Magnuson-Moss Warranty Act.

The first issue addressed by the Court was whether the Dealership offered a service contract or a written warranty. Focusing on the definitions set forth in the Magnuson-Moss Warranty Act, the Court noted that a written warranty “becomes part of the basis of the bargain.” In other words, a “written warranty” is given to a customer by a dealership when a vehicle is sold and the customer is not required to do or pay anything other than the purchase price of the vehicle in order to benefit from the agreement. An agreement that would meet the definition of a written warranty, but for its failure to satisfy the basis-of-the-bargain test, is a service contract. Because it was clear that the Customer paid separate consideration for the agreement, the Supreme Court of Arizona found that the Court of Appeals erred in finding that the agreement was a written warranty under the Magnuson-Moss Warranty Act as opposed to a service contract.

It wasn't convinced, however, that the Dealership had not "entered into" the service contract with the Customer. The Magnuson-Moss Warranty Act contains an important caveat regarding a dealership's ability to disclaim implied warranties. If a dealership provides a limited warranty to a purchaser or "enters into" a service contract with a purchaser at the time of sale or 90 days thereafter, the term of the limited warranty or service contract will govern the duration of the implied warranties. After reviewing the language in the documents and alleged statements made by the Dealership, the Supreme Court of Arizona found that the Court of Appeals made a mistake in holding as a matter of law that the Dealership was a party to the service contract, just as the Superior Court made a mistake when it held that the Dealership was not a party to the contract.

The Court noted that the service contract contained conflicting language about who was a party to the service contract. Some language supported the conclusion that only the Customer and DaimlerChrysler were parties to the service contract. For example the terms "we, us, our" were defined as "DaimlerChrysler Corporation," "you, your" meant "the Plan purchaser," and the contract said that the "Plan is a service contract between you and us" and "we are solely responsible for fulfillment of the provisions of the plan." Other language, however, supported the position that the Dealership was also a party to the service contract, such as the service contract application that contained an express promise from the Dealership that it would "provide service to [Johnson] in accordance with the provisions of the service contract DaimlerChrysler will issue to the purchaser." The Customer also testified that when the Dealership's employee told her that she was purchasing the Dealership's extended warranty and that DaimlerChrysler was the administrator, she understood this to mean it was a joint extended warranty provided by DaimlerChrysler and the Dealership. Since the language could be read either as a promise by the Dealership solely to DaimlerChrysler to repair the vehicle, or as a conditional promise by the Dealership to the Customer to repair her vehicle, the Court found that there was a question of fact that had to be resolved.

It is important for dealership employees to know about the products they sell, as well as what the documents they use say. In the case of limited warranties and service contracts, dealers should make sure that the warranty disclaimers printed on their purchase agreements track the language from the Magnuson-Moss Warranty Act. More specifically, the disclaimers should state that the implied warranties do not apply unless the dealership provides a limited warranty to or "enters into" a service contract with the customer on its own behalf. Remember, it is also important to make sure that the sales presentation and the service contract documents themselves do not imply that the dealership is a party to the service contract

## **The Internet: Can You Afford To Be Without It?**

By Andy Friedlander

Scott Graham used to sell cars the old-fashioned way.

Then, the Internet changed everything. Now, Graham, sales manager of Martin Auto Gallery in Pittsburgh, Pa., believes there's a better way. He believes it so much that he dropped all of his print advertising and put his money into internet marketing. And he couldn't be happier with the results.

"Print hasn't adjusted," Graham said. "For what I can get from Cars.com, from Autotrader, from eBay, it's not close. For instance, on eBay, I can put on 30 pictures of a car, pictures of every part of the car. I

can put the mileage, everything about the car, a nice, long write up – as long as I want it to be – and run an online auction in front of the whole country for roughly \$80. I couldn't put an ad in the newspaper for \$80. If spent \$80 on an ad, it would be a couple of lines that said, 'Red 500SL, mileage, chrome wheels.' No picture, no anything.

"I was spending thousands of dollars a month...my total budget now is \$5,000 a month. With the Internet, I can essentially advertise my cars 24 hours a day. It's saved me money, but it's not even so much the money aspect of it. It's just a better way of advertising."

More and more dealers are realizing that every day, and more and more customers are shopping from their home computers before ever setting foot in a showroom.

Unlike print, with its limited space, or radio/television with its limited time, the Internet allows a dealer to post detailed information about a car, which allows potential to find exactly what they're looking for. And when they do come to the dealership, they are more likely to be ready to buy, because they know the dealer has what they want.

"With more than half of used car sales starting out with people looking for information online, if you don't have your inventory there, literally half of your market could miss you as an opportunity," said Alex Vetter, Vice President of Sales for Cars.com. "So if you're a dealership and within five years you aren't advertising online, chances are you're not very long for this world."

That aid, the growth rate of internet-generated sales has actually slowed in the past two years. According to J.D. Power and Associates, 53 percent of late-model used car buyers were using the internet in 2005, while the 2004 study showed that number to be 54 percent.

But J.D. Power Senior Director Dennis Galbraith said not to interpret that to mean that Internet marketing has reached its peak.

"Just over the last couple of years it doesn't seem to be growing very much right now, but it will," he said. "One of the things holding it back is better content online. Most late-model used vehicle buyers start their shopping process not knowing what make they want. And yet, most of the tools out there require the shopper to know what make and what model they want to be able to start looking at inventory."

The software is beginning to get better – AutoTrader.com and Cars.com both have new search tools - and the customers keep coming.

"I would say it's increased our business 20 percent," Graham said of his internet emphasis. "It's easier to get the people here. The Internet has made the world a little smaller. The big joke years ago was, 'You can't order a used car.' People would say, 'I want a blue one with tan interior,' and you had a red one with a black interior. You'd just try to sell them on the fact that it's used and you can't get what you want.

"But now, if they're willing to travel a little bit, people have choices. It's easier for them to get exactly what they're looking for in a used car."

The advantages of the Internet have turned a reluctant participant into an enthusiast. Dirk Byers of B&B Auto Sales in Brookings, S.D., started a Web site and at first decided it wasn't working. But a presence on AutoTrader.com and other online classifieds in addition to B&B's own site have proven to be quite profitable, to the point that Byers wouldn't have it any other way.

**"There are a lot of older dealers, especially, who aren't computer savvy, and they don't use the Internet," he said. "I just think it's going to be a thing where, in time, you're going to have to have it."**

## **GARAGE INSURANCE LIMITS – HOW MUCH**

BY: Larry Hecht, Hecht & Hecht Insurance Agency Inc.

How much is enough Garage Liability insurance? This question is asked of us so often in so many different ways; “Make sure I have all the coverage I need.” “Insurance is so expensive, I only want what is required.” “I just want the minimum.” “Just give me what you think I need.”

Having the proper amount and kind of insurance before a loss occurs is very important. Making sure that your insurance was adequate after the loss is too late. You know you never need more insurance or a different kind of insurance, until after the loss; therefore it is critical that you know what you need and the amount you need long before you ever need it.

Proper insurance is only as good as the conversation you have with a qualified insurance agent. When obtaining insurance you should first select someone qualified in the field. Not all insurance agents are equal. When you need a certain type of attorney or doctor you often ask friends, relatives or other professionals in the field whom they might suggest. Better yet you might call your association for a referral. Not every insurance agent or every insurance company has an expertise in Garage Insurance and selecting a knowledgeable person is important. In fact Garage Insurance is so unique that many insurance agents will refer clients to those agencies that specialize in this area of insurance.

After having selected an agent or agency to talk with, be prepared to spend some time with this person. Let the agency know what you think you need and what you currently have. Together you can decide what you need and what limits of insurance will most adequately take care of your situation.

Often we hear dealers and others say, “I don’t need much insurance, my business is and Limited Liability Corporation or a “C” or “S” Corporation.” This may be true and this may help shield you personally from some of the lawsuits or the amount of the lawsuit that might affect you, but you can’t shield or protect yourself from lawsuits that are directed at you personally.

Let me use an example, If one of your employees cause bodily injury or property damage to someone within the scope of their employment the resulting claim can be limited to the corporation and possibly the employee that caused the liability. You and your personal assets “may” not be involved. On the other hand if you were driving an inventory car that was involved in the fatal “at fault” accident, the claim that results may not be limited to the corporation that owned the inventory

car. The corporation could be liable because they owned the car and you as the driver could be held personally responsible for your negligent driving which would allow your personal assets to be vulnerable. It is true that the Garage Insurance Policy will pay up the limit of the insurance that was carried at the time of the accident, however if the damages exceed the limit of insurance you may be personally responsible for the balance.

It is important to accurately and adequately insure for all of your insurance needs. This is accomplished through accurate and detailed conversations with your insurance agent. In addition you should consult with your attorney and accountant for further recommendations. You and your accountant know your financial position best and your attorney can provide guidance as to the legal aspects of your business. It takes your consulting with all three professionals to determine what the best amount of insurance might be.

Sometimes it's not a matter of buying more insurance it's a matter of self-insurance. Self-insurance is "no insurance". You are agreeing, after knowing the risk, that you are willing to say, "I can bear that chance of occurrence without paying for insurance." Consciously not carrying flood or earthquake insurance is a form of self-insurance. After knowing the risk and the cost of insuring the risk you choose to say, "If that happens I'll pay that myself."

So HOW MUCH is enough insurance? The answer as determined together with your other professionals, "The most you can afford to purchase and be comfortable with." Lawsuits today, don't start at very low figures any more. They usually start in the hundreds of thousand dollars. We know for certain that the minimum Garage Liability -- financial responsibility limit -- Bodily Injury \$25,000 per person, \$50,000 per accident, Property Damage \$10,000 is totally not adequate in our current society. We also know that having "TO MUCH" is safer than having not enough.

Hecht and Hecht Insurance Agency is your Agent of Record for the Oregon Independent Agents Association. We have been consulting with and insuring dealers in the Northwest since 1989. We are here to answer all your dealer related questions. We can be reached in Portland at 503-288-6371, toll free 800-285-1773 or at [info@hechtinsur.com](mailto:info@hechtinsur.com)

# READING & RESPONSE FORM

## OIADA CONTINUING EDUCATION PROGRAM

**Complete this test or the Certificate of Completion form for Sept. 2006**

ARTICLE: \_\_\_\_\_ QUESTION

LLR The senate introduced a bill called "Ten in Ten? It would require automobile manufacturers to sell vehicles with an average fuel economy of 35 miles per gallon by 2010.

(1) True \_\_\_\_\_ False \_\_\_\_\_

The Internet More than half of used car sales start out with people looking for information online. Meaning, if you don't have your inventory their, literally half of your market could miss you.

(3) True \_\_\_\_\_ False \_\_\_\_\_

LLR When using limited warranties and service contracts, dealers should make sure that the warranty disclaimers printed on their purchase agreements track the language from the Magnuson-Moss Warranty Act.

(4) True \_\_\_\_\_ False \_\_\_\_\_

Hecht & Hecht When figuring your insurance needs it is wise to consult with your lawyer as well as your accountant.

(5) True \_\_\_\_\_ False \_\_\_\_\_

The Internet 53 percent of late-model used car buyers were using the internet in 2005.

(6) True \_\_\_\_\_ False \_\_\_\_\_

I certify to OIADA that I have personally read these articles in Squeaky Wheel Magazine issue **Sept. 2006**  
**Continuing Education Packet # 9-06**

My Name \_\_\_\_\_(printed)

Dealership Name \_\_\_\_\_ Dealership # \_\_\_\_\_

Dealer License Expiration Date:(Month)\_\_\_\_\_ Year)\_\_\_\_\_

Signed: \_\_\_\_\_ Date \_\_\_\_\_

FAX TO: 503-364-7331 or mail to OIADA, 1475 Capitol St NE, Salem, Oregon 97301

Answers: (1) F, (2) T, (3) T, (4) T, (5) T

