YOU AUTO KNOW©

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DAMAGE DISCLOSURE

Recently, there have been questions about damage disclosure, so we will revisit the issue.

As you know, if a new vehicle has been damaged in an amount in excess of 6 percent MSRP excluding bumpers, tires and glass this has to be disclosed to the customer. Specifically, Substantive Rule 109:4-3-16, *Advertisement and Sale of Motor Vehicles* B(14) states: "It shall be a deceptive and unfair act or practice for a dealer, in connection with the advertisement or sale of a motor vehicle, to: (14) fail to disclose prior to the dealers obtaining signature by the consumer on any document for the purchase of the vehicle, any defect and/or the extent of any previous damage to such vehicle, retail repair costs of which exceeds or exceeded 6 percent of MSRP excluding damage to glass, tires and bumpers where replaced by identical equipment. The above disclosure is required when the dealer has actual knowledge of the defect and/or damage and the vehicle is a new motor vehicle as defined in division (C) of Section 4517.01 of the revised code."

Further, the definition of a new vehicle is: "New motor vehicle means a motor vehicle, the legal title to which has never been transferred by a manufacturer, re-manufacturer, distributor or dealer to an ultimate purchaser." Therefore, this includes a demonstrator.

The major questions are: Is it sufficient to inform a consumer that the vehicle has been damaged in excess of 6 percent MSRP without disclosing the actual amount of damage? What is actual knowledge as stated in Substantive Rule and when is the consumer to be notified of the damage? A majority of these questions were effectively answered 20 years ago in a case that was decided in 1991 in the Court of Appeals of Sandusky County, entitled *Sue Andrews nka Brandal v. Scott Pontiac-Cadillac-GMC, Inc.,* Case No. S-89-42 and in a case that was decided in 1998 in the Court of Common Pleas, Montgomery County entitled *Kelly Birch v. Al Castrucci, Inc. II*. The court stated that the Substantive Rule as promulgated states that when a motor vehicle is sold that

incurred damage, the extent of the previous damage must be disclosed to the consumer. The court's reasoning was that the substantive rules were established so that the customer has a right to know and make an informed decision whether or not they want to purchase the vehicle that had damage to it.

However, as indicated, the requirement of disclosure was determined in 1990. As a matter of fact, a 1991 *You Auto Know*© specifically addressed disclosure of damage to automobiles.

Further, documentation should be utilized for a consumer to sign, that the vehicle has been damaged, that he or she has not begun negotiations and that they have been informed of the specific damage amount to the subject vehicle. Naturally, there are several alternatives that can be utilized. However, since the salesperson has so many other functions to do while selling an automobile, it is advised the procedure be as simple as possible.

The bottom line is that a consumer must be notified of the amount of damage on a demonstrator or new vehicle at some point in time prior to executing the sales documentation.

Recently, I have talked to several attorneys across the country regarding damage disclosure. This *You Auto Know*© obviously dealt with a new vehicle, but what about damage disclosure on a *CarFax* or a similar vehicle history report? Vehicle history reports have had a reputation for being inaccurate. Generally, the vehicle history report may state the vehicle was in an accident. The question then is: "Does a dealership have to do any further investigation as to the extent of the accident in order to provide the information to the consumer?" As of the writing of this *You Auto Know*©, there is no such requirement.

However, it is strongly recommended that if you utilize a vehicle history report, the customer should be provided with a copy of it, have the customer execute and initial each page of the report, and keep a copy of the executed copy in your sales file.

Further, the dealership should have another document which specifically states that the vehicle history report was not created by the dealership and the dealership makes no representations or warranties as to the veracity or accuracy of the contents of the report. This author has been in litigation where one vehicle history report utilized by a dealership shows absolutely no accident history, while another vehicle history report may show an accident history. Obviously, the argument is that the dealership searched for a vehicle history report that showed no incidents of an accident. If you do not utilize a disclaimer regarding the vehicle history report utilized, it is recommended that you begin using one and have the customer execute the document and, again, keep a copy in the sales file. Always plan defensively.

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As always, these are highlights of the law and are not to be construed as containing the entire law. This is not to be construed or relied upon as a legal opinion. If you are presented with this problem, contact your legal counsel for advice.

Having been a Chevrolet dealer, Robert A. Poklar's business background and experience in the automotive industry aid him in his representation of numerous Ohio automotive dealerships. He also represents after-market service companies, trade organizations, dealers, advertising associations and corporations. Pursuant to certain ethical standards, this may be construed as advertising.