

Automotive Dealers Newsletter for Legal Resources

Court Upholds \$277,662 Award Against Dealership for Permissive Use

While the award in *Taylor v. Roseville Toyota, Inc.* may be hard for the dealership to swallow, the case does provide an example of why employees in positions of responsibility must strictly adhere to a dealership's policies.

In this case, Derrick Lewis, a detailer only a few weeks into his job at Roseville Toyota, was driving a vehicle owned by the dealership while on a personal errand when he rear-ended another car. As a result of the accident, the driver and passenger of the other car sued both Lewis and the dealership for personal injuries.

At trial, Lewis testified that on the day of the accident, he asked the key shack attendant to use a vehicle for 30 minutes on his lunch break to go over to his mother's house. According to Lewis, the key shack attendant told him it was fine as long as he brought it back because she could get in trouble for it. After getting the keys from the attendant, Lewis clocked out for his lunch break and left in the vehicle. Lewis was on his way back to the dealership when he got into the accident.



While Lewis was not acting within the scope of his employment at the time of the accident, the jury found the

dealership liable because it had given Lewis permission, by words or conduct, to use the vehicle at the time of the accident. The permissive use doctrine generally provides that the owner of a vehicle will be held liable for the negligence of any person operating the vehicle with the permission, express or implied, of the owner.

The dealership, on the other hand, offered evidence to show it had a strict policy where personal use of vehicles is prohibited and every time a person checks out a vehicle, it is for company or business use only.

The key shack attendant testified that she gave a set of keys to Lewis on the day of the accident, but she did not recall Lewis ever saying that it was for personal use or

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At the same time, it shows why it is so important that these policies are adequately described in the employee handbook.

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Beware! Opportunistic Plaintiffs' Attorneys Are Attempting to Take Advantage of New Wage and Hour Case

You should know that plaintiffs' attorneys are hanging their proverbial hat on a recent labor law case decided by the California Court of Appeal titled *Armenta v. Osmose,*

Inc. to sue unsuspecting car dealerships for minimum wage violations.

In *Armenta v. Osmose, Inc.*, the employees sued their employer alleging minimum

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Another Look at Negative Net Equity

Last quarter, the Dealers Advocate alerted you to a California lawsuit which could trigger liability for your dealership based upon trade-ins involving negative net equity. The Court in *Thompson v. 10,000 RV Sales, Inc.* found that creating an “over-allowance” for a trade-in with negative equity amounts to consumer fraud. In the Thompson case, the dealership over-valued the trade in by \$24,000 so that the sales contract would reflect a positive trade-in value, even though the customer still owed \$13,000 to the lien holder. The dealership then accounted for the over-allowance by adding \$24,000 to the total cash price on the sales contract.

While the 10,000 RV case remains the law in California, a federal court in Arizona recently rendered a decision criticizing the case. In *Slover-Becker v. Pitre Chrysler Plymouth Jeep of Scottsdale, Inc.*, the Arizona court looked at the official comments to the federal law and found when a trade-in has negative cash value, federal law only requires that the amount of negative

equity be included in the amount financed, and that the dealership is not required to show a negative amount for the down payment.

The Plaintiff argued that by rolling the net equity into the total cash price the Plaintiff was paying an additional finance charge. The court looked at how federal law defined “finance charge” and disagreed because the increase in the sales price had nothing to do with the fact that the Plaintiff purchased her new car on credit. The court found the increase in the cash price was the result of the negative equity and the Plaintiff would have paid the increase whether she paid with cash or credit.

It is important to remember that in California the 10,000 RV case is still the law and that dealership should comply with the way 10,000 RV has interpreted this issue. The *Slover-Becker* opinion, however, could pave the way for other courts in California to take another look at 10,000 RV. The Dealers Advocate will keep a close eye on this issue.

Court Upholds \$277,662 Award (continued from cover)

asking for the keys so he could go to his mother’s house.

The detail manager for the dealership testified that when Lewis was hired, he explained to him that employees are not allowed to use vehicles for their own personal use. The detail manager also testified that on Lewis’ first day, he gave Lewis a copy of the handbook, which he signed for, and the payroll clerk went over each item and page of the handbook with Lewis.

The dealership’s employee handbook, however, only said that “unauthorized use” of vehicles was prohibited. The very next sentence in the handbook stated that “personal use” of postage machines, photocopy machines and telephones is expressly prohibited, suggesting that other personal use of dealership property, like a vehicle, is allowed if authorized.

Lewis agreed that he had been given and signed for the employee handbook, but he testified the handbook only said

that “unauthorized use” was not allowed. When the key shack attendant gave him the keys, he thought he was authorized to take the vehicle for personal use. Lewis also told the jury he thought it was fine to use the vehicle for his personal errand because the key shack attendant knew about it. As a result, plaintiff’s counsel was able to argue to the jury that the handbook was inadequate and did not clearly describe the company’s policy on personal use of vehicles.

One issue in the appeal was whether the evidence supported the jury’s finding of permissive use. The appellate court, after reviewing the evidence, held that it did. The court reasoned that the jury must have believed the testimony of Lewis that the key shack attendant told him it was okay to use the car for his personal errand on his lunch break as long as he brought it back.

With respect to the personal use policy, the jury likely disbelieved the testimony of the detail manager that he

specifically told Lewis on his first day of employment that no personal use of vehicles was allowed and believed that Lewis was only told what was in the employee handbook. The evidence was sufficient for the jury to find the employee handbook only prohibited “unauthorized use” and the jury likely concluded that Lewis understood that his use of a vehicle, for whatever reason, was permitted so long as it was authorized. And, the jury had ample evidence to find that the key shack attendant, as gatekeeper of the keys, was authorized to permit Lewis to check out and use a vehicle.

After reading about this case, you may want to review your employee handbook to make sure your policies are adequately described. It may also help to review these policies on a periodic basis with all your employees and use this case as an example of why strict compliance with your policies is mandatory 100% of the time.

Avoiding Help Wanted:

○ A Happy Employee is a Loyal Employee

According to a report released at the 89th annual meeting of the National Automobile Dealers Association, the search is on for qualified people to help run dealerships. The employment report, based on a survey by Harris Interactive Inc., estimates that some 104,000 career job slots are available at dealerships across the nation.



In light of competition among dealerships to acquire and retain the best and brightest employees, now is the time to make sure that you are doing all you can to instill loyalty. Perhaps you

○ have already been thinking about different ways to boost morale or give back to your employees. For example, you may have considered creating incentive plans which reward employees for length of employment. Or, you may have looked into profit sharing or 401K plans that may be available. You probably already have sales contests, but have you evaluated whether they have obtainable goals and fair rewards? Also, have you thought of ways to avoid having the same person win every time?

If these ideas are familiar to you, then you are already ahead of the game. But, just thinking of ways to improve is not enough. You also need to make sure your employees know that you think and care about them. The first step in this direction is to make sure your employee handbook is up to date. Does it clearly and adequately identify all of the benefits that come from working at your dealership? Does it include a job description the employee can be proud of? These are just a few of the small things you can do to ensure your best and brightest remain just that – yours.

Don't Forget to Tell IRS About Large Cash Transactions

Most dealerships are probably cognizant of the statutory requirement that they must report to the IRS any transaction involving \$10,000 or more in cash. However, many dealerships may not be aware of the rather draconian penalties potentially facing them if they fail to comply with this reporting requirement, and more importantly, how to avoid them.

Under federal law, a dealership may be penalized up to \$25,000 for each incident in which it intentionally disregards its obligation to report a transaction involving more than \$10,000 in cash. The question then becomes, under what circumstances does a dealership "intentionally disregard" its reporting obligations?

In the recently decided federal court case of *Tysinger Motor Company, Inc. v. United States*, the court examined whether the IRS' decision to levy the maximum \$25,000 per occurrence penalty against a dealership was appropriate. In this case, the IRS had justified its decision to levy \$100,000 in fines because the dealership had a history of past failures to report large cash transactions, the dealership's CFO testified he was aware of the reporting requirement, and the dealership still failed to

report four cash transactions in excess of \$10,000. In its defense, the dealership argued that it did not "intentionally disregard" the reporting requirement because it had instituted a system designed to ensure compliance, but the system just turned out not to be 100% effective due to human error.

Fortunately, the court found in favor of the dealership. It reversed the IRS' imposition of the \$100,000 fine because the court was satisfied the dealership did not intentionally disregard the requirements since it had a system in place designed to ensure compliance with the reporting law.

In sum, dealerships may want to consider implementing a formal system to demonstrate their efforts to comply with IRS' cash reporting law. That way, even if the system is not 100% effective, the mere existence of a formal system may prevent the IRS from levying severe penalties.



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Beware! Opportunistic Plaintiffs' (continued from cover)

wage violations because the employer refused to pay the employees for various non-productive tasks, such as traveling to and from distant worksites. What makes this case interesting is that the employees earned between \$9 and \$20 per hour. In its defense, the employer argued that the employees were paid well over minimum wage because even though they were not paid all hours the employees claimed to have worked, the average amount of hourly wages each employee earned each pay period far exceeded the minimum wage. In other words, the employer asserted they did not violate the minimum wage requirement because the plaintiffs were paid more than the minimum wage multiplied by the number of hours each employee claimed to have worked. According to well established federal case law, it looked as though the employer's argument was going to prevail.

However, in a significant break from prior court rulings relating to minimum wages, the court disagreed with the employer's rationale. Under *Armenta v. Osmose, Inc.*, the new rule in California is that employers cannot retroactively average an employee's wages over a period of time to ensure the employee was paid at least minimum wage. Instead, the employee must receive at least minimum wage for every hour worked.



As a result of this new rule, dealerships will want to be sure to pay their employees for all time worked, including wages for arguably non-productive tasks such as any travel-time and paperwork, to ensure compliance with the minimum wage laws.

Further, we are starting to see opportunistic plaintiff's attorneys attempt to utilize this new rule to target car dealerships and the common methods dealerships use to pay commissioned salespersons. Although it is not yet known how courts will apply this new rule in the context of commissioned employees, as opposed to hourly employees, plaintiffs' attorneys are filing lawsuits alleging minimum wage violations for commissioned salespersons whose annual salaries often substantially exceed minimum wage, but may not be paid for every hour worked. They argue that under *Armenta v. Osmose, Inc.*, a dealership violates the law when it attempts to comply with the minimum wage requirement by "averaging" a salesperson's wages over a month or longer period, instead of paying the salesperson minimum wage for each hour worked.

To avoid any potential minimum wage problems stemming from the dealership's commissioned salespersons, a dealership may want to consider implementing a pay structure which provides that the commissioned employees will be paid

at least minimum wage for every hour worked, plus commissions to the extent they exceed the hourly wage. Although substantively this modification will not likely change a salesperson's compensation structure, it may be enough to comply with the new *Armenta v. Osmose, Inc.* rule, and will hopefully further deter plaintiffs' attorneys from targeting the dealership for alleged minimum wage violations.

Does California's New Standing Requirement for Unfair Competition Claims Apply to Pending Cases?

On May 31, 2006, the California Supreme Court heard arguments on two matters to determine whether Proposition 64, which went into effect after being passed by voters in November 2004, applies to cases that were pending at the time of the statute's enactment. If it does apply to pending lawsuits, the plaintiffs in those cases will be required to show that they have suffered injury and lost money or property in order to sue under California's unfair competition law. Before the change in law, the statute allowed individuals to sue regardless of whether or not they had actually been harmed by the conduct at issue. A decision from the California Supreme Court is expected later this summer.

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