

CENTER FOR AUTO SAFETY

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CENTER FOR AUTO SAFETY COMMENTS ON PROPOSED CONSENT ORDERS WITH GENERAL MOTORS (File No.152-3101), LITHIA MOTORS (File No. 152-3102), AND JIM KOONS MANAGEMENT (File No. 152-3104)

In the Center for Auto Safety's (CAS) comments on the Commission's 2014 Supplemental Notice of Proposed Rulemaking in the Used Car Rule Regulatory Review (Project No. P08764), we stated, "[i]t is an unlawful trade practice under the FTC Act for a dealer to sell a vehicle with an open safety recall and the Commission should be using all its rulemaking and enforcement power to end that practice." A number of other commenters strongly voiced similar positions. We were, therefore, encouraged when we read in the press in July 2015 that the Commission was investigating General Motors' certified pre-owned (CPO) vehicle program because dealers certified vehicles that were in need of recall repairs. Surely, we thought, the Commission would maintain the obvious position that vehicles with open recalls are inherently incompatible with the longstanding claims and image of manufacturer CPO vehicle programs.

Our optimism turned to dismay, however, when we read the details of the proposed GM order and the similar Lithia and Jim Koons orders. The core of each order is that, if the company in question represents that the used vehicles it advertises or markets are safe, have been repaired for safety issues, or have been subject to an inspection for issues related to safety, such as in certification, then the used vehicles may not be subject to open safety recalls, ***unless it discloses, clearly and conspicuously and in close proximity to the representation any material qualifying information related to open safety recalls, including the fact that its used vehicles may be subject to an open safety recall and how consumers can determine whether an individual vehicle is subject to an open safety recall.*** The Jim Koons and Lithia proposed orders go on to require that the dealer provide a consumer a copy of any written notification it receives from a manufacturer that a vehicle is subject to an open safety recall, prior to the consummation of sale of that vehicle. If we could have ended the second sentence of this paragraph immediately before the highlighted portion, we would be singing praises of the proposed consent orders and congratulating the Commission and Staff. As it is, we strongly request that the Commission not approve the proposed consent orders in their current form.

Tenet Number 1

Two tenets underly our comments. The first is that vehicle safety recalls are very serious safety matters. All recalls to correct a safety defect are based on a finding that the vehicle contains a defect "related to motor vehicle safety." 49 U.S.C. §30118(c)(1). "Motor vehicle safety" is defined as "performance of a vehicle . . . in a way that protects the public against unreasonable risk of death or injury in an accident, and includes nonoperational safety." 49 U.S.C. §§30102(a)(8). All noncompliance recalls are based on a finding that the vehicle "does not comply with an applicable motor vehicle safety standard" that "meet[s] the need for motor vehicle safety." 49 U.S.C. § 30118(c)(2); 30111(a).

Perhaps not fully comprehending the above, some suggest many safety recalls are about trivial items and involve little danger. At the risk of overgeneralizing, it appears that many auto dealers, in addition to their associations, hold that view. Those who belittle the importance of some safety recalls do so at their own or someone else's peril because it is very difficult, even with all the information available today, to comprehend the full magnitude of the risk from a defect that is the subject of a recall. The infamous General Motors ignition switch defect recalls are recent and prime examples of this. It is well-established that GM and NHTSA should have acted much earlier to recall the vehicles with the dangerous low torque ignition switches that are prone to turn back to the ACC or Off positions while driving, causing stalling, loss of power brakes and steering, and the airbags not deploying in the crashes that too often resulted. When GM finally came around to the point of recalling the vehicles in early 2014, it reported to NHTSA that it was aware of 13 fatalities attributable to the defect. Eventually it increased that total to 15.

Under pressure, GM established the Ignition Switch Compensation Fund, administered by Kenneth Feinberg. When the fund wrapped up business in 2015, it was announced it had paid 124 fatality claims that had been shown to be linked to the defect. GM agreed to pay another 50 fatality claims in a class action settlement announced in September 2015.¹ That brought the total number of fatalities GM accepted as being related to the ignition switch defect to 174, well over 10 times what GM estimated in its belated recalls. CAS Director Clarence Ditlow noted, however, that "[t]he one thing clear is that we will never know how many people were killed or injured because it goes back so far."²

We submit that any reasonable person objectively considering the above facts from the GM ignition switch must find it very difficult to ever scoff at the importance of an auto safety recall.

Tenet Number 2

Our second tenet is that the disclosure approach, which is embodied in the proposed consent orders, won't be as effective in reducing the safety risk currently posed by dealers selling used vehicles with open recalls as would prohibiting dealers from selling such vehicles. This is essentially axiomatic. We believe that even great champions of disclosure have to admit that disclosure isn't as effective a solution as directly addressing the practice.

Lest anyone is hoping that GM, Koons or Lithia is going to opt for the stricter option that doesn't allow for marketing vehicles with open recalls, we've been to the websites of all 3 companies. They indicate each company is anticipating the proposed order becoming final and using the general disclosure approach of the proposed orders. GM's disclosure language was difficult to find but essentially says that while it requires all CPO vehicles to have open recalls performed, it is still possible that vehicles with open recalls will appear on its site because of timing issues or dealers making errors. Koons and Lithia have general disclosure language about open recalls on the page of each of their used vehicles.

Let's assume the proposed orders' general disclosure approach works well. In that case, sophisticated and motivated shoppers make use of the general disclosures and the reference to the government VIN recall lookup site and steer toward vehicles that don't have open recalls. Unfortunately, harried

¹ "GM Agrees to Settle 50 New Death Cases Related to Ignition Switch," Press Release, Hilliard Munoz Gonzalez, LLP, September 17, 2015. http://www.autosafety.org/sites/default/files/imce_staff_uploads/Death%20Cases%20-%20PR.pdf

² "GM Ignition Fund Ends Review Approving 124 Death Claims," Detroit News, August 3, 2015.

shoppers with less time, less sophisticated buyers, those whose English isn't great, and those who don't much care about safety recalls will get stuck with the unsafe vehicles with open recalls. A number of those buyers won't realize they have an unsafe vehicle with an open recall and some won't care if they do. A significant percentage of those that find out and care won't be able to get their vehicles fixed because the repair for the recall problem isn't yet available. There are millions of used vehicles with recalled Takata air bags that are in that situation, and the Takata recalls are far from the only ones where owners have to drive unsafe recalled cars while waiting for the repair remedy to become available.

Clearly, requiring dealers to not to sell recalled vehicles until the repairs have been made is the far superior safety policy.

The Proposed Consent Orders Will Undercut the Status Quo's Considerable Momentum to Get Dealers to Not Sell Used Vehicles With Open Recalls

The proposed consent orders venture into one of the hottest issues in auto safety. The Motor Vehicle Safety Act has long prohibited new car dealers from selling new cars from their inventory if they have open recalls. The recall remedy must be performed first. 49 U.S.C. §30120(i). In December 2015, after five years of regulatory and legislative battles that began in August 2010 when CAS, Citizens for Automotive Reliability and Safety (CARS) and Cally Houck³petitioned the Commission to take enforcement action against Enterprise for renting vehicles with open safety recalls,⁴ Congress, as part of the Fixing America's Surface Transportation (FAST) Act (PL 114-94), enacted the Raechel and Jacqueline Houck Act of 2015. FAST Act Section 24109.⁵ The Act which goes into effect on or about June 1, 2015, prohibits rental car companies with fleets larger than 35 vehicles from renting vehicles once they receive notice they're recalled. Vehicles with open recalls have to be grounded until they are repaired.

What's often ignored about the Houck Act is that it also prohibits rental companies from selling vehicles with open recalls. Thus, a substantial chunk of the used car market is already required to get open recalls repaired before their vehicles may be sold.⁶ Though dealers were successful in preventing a provision prohibiting any dealer from selling open recall used vehicles from being incorporated in the FAST Act, the Houck Act has contributed significantly to the momentum toward dealers not selling vehicles with open recalls.

³Ms. Houck's daughters, Jacqueline and Raechel, were killed tragically in 2004 when a defect subject to an open recall in their Enterprise rental car manifested itself, causing them to lose control of the car and crash head on into an 18-wheeler.

⁴<http://www.autosafety.org/sites/default/files/Enterprise%20FTC%20Rental%20Car%20Petition%208-9-10.pdf>. When Commission staff ran into difficulty negotiating the necessary remedy of repair, not disclosure, it demurred as Senator Schumer expressed interest in sponsoring legislation on the issue.

⁵ The bill's saga is well chronicled in the LA Times of December 21, 2015 <http://www.latimes.com/politics/la-pol-ca-cally-houck-rental-car-law-20151221-story.html>.

⁶ The wording of the Commission's blog and used car buying advice ignore this fact. At a minimum, they will need to be rewritten after June 1 to reflect that there is a federal law prohibiting rental car company dealers from selling used vehicles with open recalls.

A recent piece in Automotive News⁷ recounts a list of other developments that are contributing to the momentum toward dealers not selling vehicles with open recalls. Among those are that NHTSA officially backs legislation to accomplish that. In addition, an increasing number of manufacturers prohibit their affiliated dealers from selling a used car of their make unless recall work has been completed. The polling conducted for CARS in response to the proposed consent orders clearly shows the strong public support for the approach of not selling open recall cars, as opposed to the disclosure approach in the consent orders.⁸

Besides backing legislation NHTSA has called on dealers to act voluntarily in not selling vehicles with open recalls. Indeed, Automotive News notes that Auto Nation, the largest chain of new car dealerships in the country, is boldly committed among much fanfare, that its used cars will have all recall work performed before they are sold. This places much competitive pressure on other dealers. CAS is very familiar with the power of such competition from its experience with the rental car industry regarding recalls. Safety advocates were first successful in getting Hertz to back a draft federal bill and commit to abiding by its terms even before it became law. The remainder of the major players in the industry didn't jump on the bandwagon immediately, but after much negotiation and a boost from a public challenge from Senator Barbara Boxer, the other majors and the American Car Rental Association (which also represents many smaller companies) committed in 2012 to support federal legislation and to ground their vehicles until recalls are performed. Because of opposition from the auto manufacturers and dealers, the Houck Act didn't pass for another three years, but its safety benefits were already accruing to customers of companies with well over 90 percent of the industry's market.

A tactic the car dealers have used in combatting all this momentum is to seek state legislation expressly authorizing them to sell open recall vehicles with disclosure. These bills, if passed, would undercut efforts to prohibit selling such vehicles and provide dealers a legal safe harbor if they meet comply with the bills' minimal disclosure requirements. In 2015, such bills were stopped in California and New Jersey. In the 2016 legislative sessions, the best information is that safety advocates have been successful in getting open recall disclosure provisions removed from dealer bills pending in Tennessee, Virginia, and Maryland.

Though the Automotive News writer lists the proposed consent orders among the developments building momentum toward dealers not selling open recall vehicles, a fair reading of the article makes it clear it is anything but. The article quotes Aaron Jacoby, a partner with Arent Fox. "It appears that in the bigger picture the FTC is seeking to implement a requirement for disclosure," Jacoby said."⁹ Indeed, safety advocates fighting the dealer safe harbor disclosure bills in state legislatures have heard both dealer lobbyists and legislators point to the FTC's proposed consent orders in support of the bills' approaches. Safety advocates have been able to counter by saying that the proposed orders are just that and opposition is being filed to them being finalized in their current form. If they are approved, however, the orders will accomplish much of what the dealers have sought through state legislation and will bolster the dealers returning next year for such legislation. Indeed, it's likely that the pending

⁷"Used Car Loophole for Recalls Tightens Up," Automotive News, February 8, 2016, <http://www.autonews.com/article/20160208/RETAIL04/302089962/used-car-loophole-for-recalls-tightens-up>.

⁸Public Policy Polling National Survey Results, February 16-17, 2016, commissioned by CARS, http://carconsumers.org/pdf/National_certified_usedcar_safety_recall_poll_results_2016.pdf.

⁹"Used Car Loophole for Recalls Tightens Up," Automotive News, February 8, 2016, <http://www.autonews.com/article/20160208/RETAIL04/302089962/used-car-loophole-for-recalls-tightens-up>

orders are a reason the dealers have withdrawn their controversial provisions with less of a fight than might otherwise have been expected.

The Proposed Consent Orders are a Large Step Backward for Certified Vehicles

If a used vehicle is advertised as certified, consumers have the expectation that it is safe and doesn't have open recalls. Indeed, a 2015 Associated Press story on used car recalls noted that "all major manufacturers say they check for recalls and fix the cars before selling them [in their CPO programs]." ¹⁰ We credit the FTC Staff for showing that this perception and claim wasn't true for General Motors (nor were the claims true for Lithia and Jim Koons. The proposed orders don't get tough on the companies, though. Because the proposed consent orders allow it, it appears that all three companies are going to be hedging regarding completing all recalls on their certified vehicles. If the proposed orders are finalized in their current form a precedent will be set. Will the other manufacturers hold the firm line against unrepaired recalled vehicles in their CPO programs if the orders are approved? We doubt it. The orders will set the precedent of allowing them to hedge some, just as it appears GM is getting ready to do.

What truly scares us about the effect of finalizing these orders, however, is what will happen in non-certified used car sales where there is a failure to disclose that a vehicle has an open safety recall. In short, if these orders set such a low bar regarding certified and safety claims, what precedent will the Commission set regarding open recall used cars in more ordinary sales? We're not optimistic about that prospect if these proposed orders are approved.

The Proposed Consent Orders Allow Inherently Deceptive Advertising and Marketing Practices

The FTC's Policy Statement on Deception notes that "the Commission will find deception if there is a representation that is likely to mislead the consumer acting reasonably in the circumstances." It is misleading to reasonable consumers for a manufacturer to make claims that the vehicles its dealers sell, or for a dealer to make claims its used vehicles are safe, if they are subject to open safety recalls. As we've noted, unrepaired recalled vehicles have been determined to be unsafe, and real world experience confirms that determination. It is especially misleading to represent vehicles as "certified" if they have open recalls because the "certified" label implies that nothing has been found wrong with the vehicle. A vehicle with an open safety recall certainly has something wrong with it and the manufacturer or dealer well knows that.

We understand, of course, that the proposed orders would nevertheless permit the inherent contradiction of express or implied claims of safety for vehicles with open recalls, so long as the dealer or manufacturer discloses clearly and conspicuously and in close proximity to the safety claim that its used vehicles may be subject to open safety recalls and how consumers can determine whether an individual vehicle is subject to a safety recall. The Policy Statement on Deception notes that "[w]ritten disclosures or fine print may be insufficient to correct a misleading representation." We submit this is

¹⁰ "Beware Unresolved Safety Recalls When Buying a Used Car," Tampa Bay Times, February 24, 2015.

such a situation: the disclosure about open recalls is insufficient to correct the misleading and contradictory overriding claim that the used vehicles are safe.

If the above isn't as apparent to the Commission or Staff as it is to us, we note that the Policy Statement on Deception also states that "[i]n all instances, the Commission will carefully consider any extrinsic evidence that is introduced [to prove deception]." The survey results of Public Policy Polling commissioned by CARS for this proceeding and mentioned previously, are relevant extrinsic evidence. While the questions aren't always worded as artfully as they might be due to the time constraints, a number of questions are very relevant, perhaps the most relevant being numbers 8 and 9. Number 8 asked whether the respondents feel it is deceptive when a dealer advertises that a car was thoroughly inspected and qualified to be sold as "certified" but fails to repair a safety recall defect. 89 percent of respondents said they feel that is deceptive, while only 10 percent said it's not. The follow-up in question 9 asked whether respondents think car dealers should be allowed to advertise that a car was thoroughly inspected and qualified to be sold as "certified" without repairing a safety recall defect, if they disclose in writing that there is a safety recall, or whether they think the safety recall issue should actually have to be fixed. Only 21 percent said that the written disclosure made things OK, while 75 percent said the recall should be fixed, indicating that few thought the written disclosure corrected the deception.

With the survey results to bolster the common sense arguments, there is very strong reason to believe approving the proposed consent orders would be approving deceptive trade practices.

The Proposed Orders' Only Requirements to Disclose Recall Status for Individual Vehicles Have Drafting Problems That Appear to Render Them Meaningless

It's somewhat surprising for proposed orders relying on disclosure that the GM proposed order contains no requirements to disclose recall status of individual vehicles and that the Koons and Lithia proposed order contain the identical fairly minor disclosure requirement for individual vehicles. It isn't surprising, therefore, in looking at the companies' websites, which appear to be anticipating the proposed orders becoming final, that we found no recall information specific to an individual vehicle, though the Koons website <http://www.koons.com/> includes this general disclosure on the page of each used vehicle: "Some vehicles may be subject to manufacturer safety recalls that for various reasons may not be repaired prior to sale. You may also check for open recalls at www.safercar.gov."

The Koons and Lithia proposed orders contain the following identical requirement for disclosure regarding individual vehicles: if Respondent receives any written notification from a manufacturer that an individual used motor vehicle is subject to an open recall for a safety issue, Respondent must clearly and conspicuously provide that written notification, or a document that conveys the same information using a substantially similar format, to the consumer prior to consummation of the sale of that motor vehicle."

We're very familiar with the documents associated with recalls and we're not sure which what notification the above refers to. If it's supposed to refer to the recall letters that individual owners receive, dealers rarely receive such letters. Moreover, ordinary recall letters would just deal with recalls, not open recalls. Perhaps it's referring to the notice the dealers would see if they check www.safercar.gov or a manufacturer's site by VIN and find an open recall. Still it seems odd to call what the dealers see on the government site a written notification from a manufacturer. Perhaps it's

referring to the rare case where a dealer might receive a follow-up recall letter on a particular vehicle. At any rate, if this provision can be deciphered it seems clear that it's not going to apply very often, so that there will be many transactions involving vehicles with open recalls where there is no disclosure to the consumer of the status of that particular vehicle.

Conclusion

We congratulate staff for exposing very serious recall issues in the advertising of used vehicles represented as certified or otherwise safe. Unfortunately, the proposed consent orders are so weak that they don't solve the problems found. They are a step backward from the status quo and establish terrible precedent. They need to be changed to get rid of the option of selling certified used vehicles with open safety recalls so long as weak disclosures are made. We like the provisions in the proposed orders that provide for notification of buyers who bought recalled vehicles in the past, but the orders don't do anything for prospective buyers from these companies. Worse than that, they will set terrible precedent that will offer no protection for future buyers throughout the industry. We would, therefore, be willing to sacrifice the retroactive remedy if these proposed orders can't be improved. In regard to General Motors, we have noted that the deferred prosecution agreement of GM with the US Attorney for the Southern District of New York includes an independent monitor with authority to review and assess the adequacy of GM's current procedures in addressing known defects in certified pre-owned vehicles. The monitor also has authority to recommend changes that GM may be required to implement. If the Commission continues to be unable to reach an adequate resolution of its case against GM, we offer our assistance in bringing these matters to the attention of the independent monitor for appropriate action

Respectfully submitted,

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