



VA Dealer University

FIXED OPS LEGAL REVIEW

APRIL 20, 2021

AGENDA

▶ **Statutory Review**

Warranty

Parts Return

New Vehicle Damage – 3% Rule

Lemon Law

Automobile Repair Facilities Act – Customer Rights Signs

▶ **Other Topics**

Charges on ROs

Labor Rates

Mechanics Liens and Abandoned Vehicles

Wage and Hour Issues

Franchise Issues

Warranty Reimbursement

- ▶ VA law protects a dealer's rights to retail labor and parts reimbursement
- ▶ The manufacturer may not impose a surcharge because dealers demand their rights
- ▶ The statute sets forth the process for justifying the reimbursement rate
- ▶ With increasing recalls, and protecting compensation for recall repairs on the same basis as warranty repairs, this is an increasingly important issue.

Franchise Issues

Warranty Reimbursement

§ 46.2-1571. Warranty and sales incentive obligations

- ▶ Compensation of a dealer for recall or warranty parts, service and diagnostic work shall not be less than the amounts charged by the dealer for the manufacturer's or distributor's original parts, service and diagnostic work to retail customers for nonwarranty service, parts and diagnostic work installed or performed in the dealer's service department
- ▶ Based on 100 consecutive repair orders or all repair orders over a 90-day period
- ▶ Calculation excludes discounted services or special promotions

Franchise Issues Audits

- ▶ Know the programs and the rules
- ▶ Train your employees
- ▶ Document your rights to payment fully and carefully
- ▶ Spot check
- ▶ Have one dealership contact person who will be available to the auditor
- ▶ Be prepared to argue your position during the audit
- ▶ Meet with dealership staff before the audit
- ▶ Provide a comfortable work area away from the department being audited
- ▶ Know your rights under your state law
- ▶ Be especially careful if the word “fraud” comes up

Franchise Issues

Audits - Chargebacks

- ▶ **Understand the benefits of vigorously opposing chargebacks.**

- ▶ **Challenge the Audit findings.**
 - Attend the opening meeting to understand what is at issue.
 - Engage the auditor on questions and comments, particularly VA law protections.
 - Prepare for the closing meeting and challenge improper conclusions.

- ▶ **Challenge the decision through the franchisor's internal process and through the state administrative or judicial process.**
 - Internal process is outlined in service manual or equivalent.
 - Complaint to state.
 - Progress at each stage.

Franchise Issues

Audits - Chargebacks

§ 46.2-1571. Warranty and sales incentive obligations

- ▶ Any chargebacks for warranty parts or service compensation and service incentives shall only be for the **six-month** period immediately following the date of the claim and, in the case of chargebacks for sales compensation only, for the **six-month** period immediately following the date of claim.
- ▶ However, such limitations shall not be effective if a manufacturer, factory branch, distributor, or distributor branch has reasonable cause to believe that a claim submitted by a dealer is intentionally false or fraudulent. For purposes of this section, "reasonable cause" means a bona fide belief based upon evidence that the material issues of fact are such that a person of ordinary caution, prudence, and judgment could believe that a claim was intentionally false or fraudulent.

Franchise Issues

Audits - Appeals

- ▶ **A manufacturer, factory branch, distributor, or distributor branch may not collect chargebacks**, fully or in part, either through direct payment or by charge to the dealer's account, for warranty parts or service compensation (including service incentives) or for sales incentives or other sales compensation **until 40 days following final notice of the amount charged** to the dealer following all internal processes of the manufacturer, factory, factory branch, distributor, or distributor branch.
- ▶ Within 30 days following receipt of such final notice, the dealer may petition the Commissioner, in writing, for a hearing.
- ▶ **If a dealer requests such a hearing, the manufacturer, factory branch, distributor, or distributor branch may not collect the chargeback, fully or in part, either through direct payment or by charge to the dealer's account, until the completion of the hearing and a final decision of the Commissioner concerning the validity of the chargeback.**

Franchise Issues Audits - Appeals

§ 46.2-1573.01. Recovery of attorney's fees.

- ▶ Any party to a proceeding under § 46.2-1573 who is found to have violated any provision of this article may be ordered by the circuit court before which an application therefor is pending to pay **the reasonable attorney's fees and costs incurred by the complaining party**, including those attorney's fees and costs incurred as a result of any appeal.

Franchise Issues

Parts Return

▶ **Manufacturer may not:**

- Deny any dealer the right to return any part or accessory that the dealer has not sold within 12 months where the part or accessory was not obtained through a specific order initiated by the dealer but instead was specified for, sold to and shipped to the dealer pursuant to an automated ordering system, provided that such part or accessory is in the condition required for return to the manufacturer, factory branch, distributor, or distributor branch, and the dealer returns the part within 30 days of it becoming eligible under this subdivision.
- "automated ordering system" - "computerized system that automatically specifies parts and accessories for sale and shipment to the dealer without specific order thereof initiated by the dealer."
- Does not apply where mfr "provides for shipment of ordered parts and accessories to the dealer within the same time frame as the dealer would receive them when ordered through the automated ordering system."

Franchise Issues

New Vehicle Damage – 3% Rule

- ▶ On any new motor vehicle, any uncorrected damage or any corrected damage exceeding three percent of the manufacturer's or distributor's suggested retail price as defined in 15 U.S.C. §§ [1231-1233](#), as measured by retail repair costs, must be disclosed to the dealer in writing prior to delivery.
- ▶ Factory mechanical repair and damage to glass, tires, and bumpers are excluded from the three percent rule when properly replaced by identical manufacturer's or distributor's original equipment or parts.



Franchise Issues New Vehicle Damage – 3% Rule

- ▶ What are your rights when a vehicle is damaged in transit to your dealership?
 - Notify mfr of damage within 3 days
 - Right to reject if damage is over 3%
 - If damage over 3% is repaired it must be disclosed to the buyer

Lemon Law

§ 59.1-207.9 et seq. - Virginia Motor Vehicle Warranty Enforcement Act

- ▶ “If a new motor vehicle does not conform to all warranties, and the consumer reports the nonconformity to the manufacturer, its agents, or its authorized dealer during the manufacturer's warranty period, the manufacturer, its agent or its authorized dealer shall make such repairs as are necessary to conform the vehicle to such warranties, notwithstanding the fact that such repairs are made after the expiration of such manufacturer's warranty period. “

Lemon Law

- ▶ Manufacturer must make sure to repair any problem “which significantly impairs the use, market value, or safety of the motor vehicle”
- ▶ Reasonable number of repair attempts permitted:
 1. Same problem 3 times in 18 months
 2. Serious safety defect – one repair attempt
 3. Out of service for 30 days within 18 months

Lemon Law

- ▶ Remedy is replacement of a vehicle or refund to customer (see statute for how refund amount is determined).
- ▶ “The consumer shall have the unconditional right to choose a refund rather than a replacement vehicle and to drive the motor vehicle until he receives either the replacement vehicle or the refund.”

Lemon Law

- ▶ Manufacturer is responsible for obligations under the Lemon Law.
- ▶ Dealer's only obligation under the statute is to forward the written notice to the manufacturer if the customer mails it to the dealership.

Lemon Law

- ▶ But dealership service department is the front line for Lemon Law claims.
- ▶ If the dealership is undertaking multiple repair attempts on a vehicle, it is a good idea to contact your manufacturer.

Automobile Repair Facilities Act

▶ Customer Rights Signs

CUSTOMER RIGHTS

The satisfaction of our customers is important to us. As a valued customer of our service department you are entitled to the following:

1. If repairs will exceed \$25, you may receive, upon request and payment of our estimate fee, a written estimate of repair charges and the estimated completion time.
2. No repair work charge may exceed the written estimate by more than 10% unless the additional work represented by such excess charge has been authorized by you. An estimate fee of \$_____ will be charged to you for our time diagnosing the problem and preparing the written estimate.
3. Requested written estimates will be prepared between the hours of 10 A.M. and 4 P.M. during the working day.
4. You will be offered all replacement parts except warranty, core-charge, or trade-in parts required to be returned to the manufacturer or distributor.
5. Any complaint you have may be made to the Virginia Office of Consumer Affairs, Richmond, VA.

VADA
VIRGINIA
AUTOMOBILE
DEALERS
ASSOCIATION

Automobile Repair Facilities Act

- ▶ Written Estimates
 - Provided on request
 - Estimates cost for labor and parts
 - Description of work to be done
 - Estimated time of completion
- ▶ Hours for estimates may be limited to 10:00 am – 4:00 PM
- ▶ Fees allowed for estimates and diagnostic work if disclosed to customer at time of estimate

Automobile Repair Facilities Act

- ▶ If repair work charge may exceed the written estimate by more than ten percent need authorization from the customer
- ▶ Offer to return all replaced parts except warranty, core charge or trade-in parts required to be returned to a manufacturer or distributor
- ▶ Must provide written invoice that “which clearly indicates the work performed and the charges for parts and labor, separately stated, and which separately identifies those parts provided under warranty and not under warranty, and identifies those parts, if any, which are used, rebuilt or reconditioned.”

Charges on Repair Orders

- ▶ Virginia law does not limit service fees or charges.
- ▶ Many localities have taken action to regulate the practices of repair shops, and dealers should be as mindful of local regulations as they are of state legislation.

Charges on Repair Orders

- ▶ Taking the time to explain who benefits from the fee would certainly strengthen a dealer's protection against a claim in the event of a challenge.
- ▶ An explanation in a brochure, on the service ticket, or posted in the drop-off area that a fee or charge is added to compensate the dealer for materials or services not otherwise paid for in the parts and labor charges would be especially helpful in this regard.

Charges on Repair Orders

- ▶ The Virginia Consumer Protection Act might be implicated if a customer contends that the description of a fee or charge is misleading.
- ▶ Disclose the applicability of fees or charges in advertising, in the service lane, on night drop tickets, on estimates, or on repair orders.
- ▶ Avoid phrases that suggest that the fees or charges are reimbursement for governmental charges.
- ▶ Be careful of multiple fees: Consumers may claim they were misled the fees have different “destinations”, rather than all of them going to the dealership.

Posting of Labor Rates

- ▶ Virginia law does not require a dealer to post its labor rate.
- ▶ Some localities may have regulations that require the rate to be posted.
- ▶ Some franchise agreements require dealers to post their labor rate.

Mechanics Liens

- ▶ Mechanics Liens

<https://www.dmv.virginia.gov/vehicles/msl.html>

- ▶ The purpose of the Mechanic's or Storage Lien (MSL) process is to provide a business that tows, recovers, repairs, and/or stores a vehicle away to recover the cost of repair or storage when the vehicle owner does not pay, or refuses to pay, for the service. This process allows the towing, recovery, repair or storage business to sell the vehicle, if the debt is not paid within 10 days after it is due.
- ▶ "Vehicle Information Request, Application for Mechanic's or Storage Lien Title or Non-Repairable Certificate" ([VSA 41](#)) - instructions on applying for such a lien and/or the subsequent sale of the vehicle.
- ▶ If any of the owners of the vehicle is on active military duty or service, you must obtain a court order granting the enforcement of the lien, regardless of the value of the vehicle, as required under the Servicemembers' Civil Relief Act, [50 U.S.C. App. §535](#).

Abandoned Vehicles

<https://www.dmv.virginia.gov/vehicles/#abandoned.asp>

- ▶ An abandoned motor vehicle § (46.2-1200) can be defined as a motor vehicle, trailer or semitrailer that:
 - is left unattended on public property for more than 48 hours, in violation of a state law or local ordinance, or
 - has remained more than 48 hours on private property without the consent of the property owner, regardless of whether it was brought onto the private property with the consent of the owner or person in control of the private property, or
 - is left unattended on the shoulder of a primary highway
- ▶ Eligible individuals, businesses and government agencies (or their authorized agent) in possession of an abandoned vehicle can initiate a search for the vehicle's owner and/or lienholder of record by using DMV's online [Abandoned Vehicle Process](#) which complies with the statutory requirements for handling a vehicle abandoned in Virginia (§ [46.2-1202](#)).

Don't be a Victim of Cybercrime

- ▶ Fastest growing category of crime
- ▶ Dealers are especially vulnerable because of the size of transactions
- ▶ Concerns
 - **Phishing:** e-mails, text messages, or phone calls to dupe an individual into revealing sensitive information, especially e-mail with a link to a recognizable—but fake—website that prompts the recipient to enter his or her credentials;
 - **Spoofing:** directing to a fake, albeit similar, e-mail account to impersonate an individual and deceive others; and
 - **Malware:** malicious software to infiltrate a system and collect information, intercept communications, or steal credentials

Don't be a Victim of Cybercrime

- ▶ Remember the classic protections
 - Don't share passwords or keep them on desktop or in a drawer
 - Do not click on an email unless you know the sender
 - If it is your job to receive email from prospects, do not click on links or download apps
 - Never reveal sensitive information – yours or a customer's
- ▶ **Be especially careful of wire transfer scams. If a seller, establish immediately the method of payment. In each email or document created, use a message warning against fraud, such as: "Because of the possibility of fraud, only accept payment directions such as wire transfer instructions if you personally verify the information by a telephone call to our publicly advertised phone number." Never accept payment directions, such as wire transfer information, without calling a known person at the seller using the publicly advertised phone number.**

Wage and Hour Issues

EMPLOYEE OR INDEPENDENT CONTRACTOR

- ▶ To the maximum extent possible, the IRS wants people who work for employers to be full-time employees. They want the employers to withhold taxes, make social security and Medicare payments, and issue W-2s at the end of the year.
- ▶ New VA statutes create private right of action for damages and investigative authority for Department of Labor and Industry.

Wage and Hour Issues

► Clean Up Personnel

- Personnel that dealers sometimes consider to be independent contractors are people who do vehicle clean-up. Rather than pay them salaries or hourly, dealers pay an amount per vehicle cleaned. As a result, they consider these workers to be independent contractors and not employees.
- However, where such personnel work solely or mostly for the dealership, their supplies are provided by the dealership, and they are told what cars to clean and when, their classification as independent contractors is questionable.

Wage and Hour Issues

- ▶ Overtimes exemptions for salesmen, partsmen and mechanics.
- ▶ But beware: minimum wage must be paid for all hours worked for commissioned employees.

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QUESTIONS