



AUTOMOBILE DEALERS GROUP AT HAMBURG, RUBIN, MULLIN, MAXWELL & LUPIN
MEMBERS OF THE AUTOMOBILE DEALERS ASSOCIATION OF GREATER PHILADELPHIA AND THE GREATER LEHIGH AUTOMOBILE DEALERS ASSOCIATION

If the Floor Plan Auditor is Wrong, You Could Be the One at Risk.

A recent Federal court case from the Eastern District of Pennsylvania has highlighted the need for dealers to take responsibility for, and closely monitor, their floor plan audits.

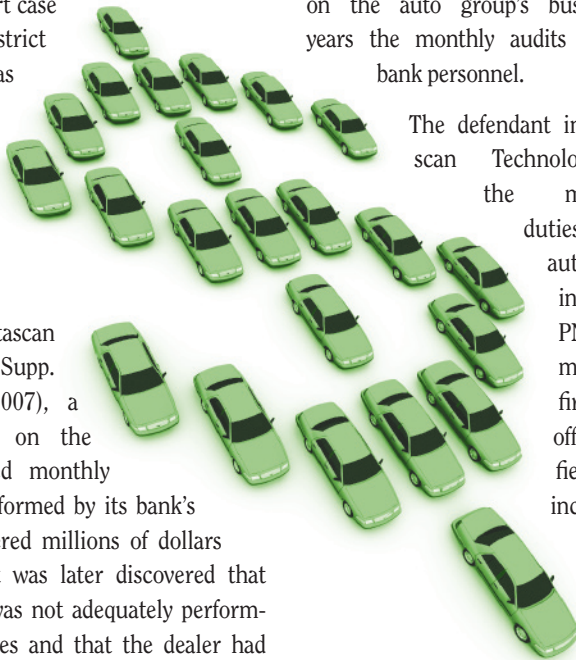
In *Brandow v. Datascan Technologies*, 511 F.Supp. 2d 529 (E.D.Pa. 2007), a dealer, who relied on the accuracy of required monthly floor plan audits performed by its bank's audit company, suffered millions of dollars in damages when it was later discovered that the audit company was not adequately performing its auditing duties and that the dealer had unknowingly defaulted under the terms of its financing documents. The case was before the Federal District Court for the Eastern District of Pennsylvania to determine if the dealer's claims against the audit company for damages could proceed.

Brandow Auto Group is a group of independent companies cooperating to provide automotive services. The auto group had a business relationship with PNC Bank for more than thirty years whereby PNC Bank provided floor plan financing to the auto group's numerous dealerships. The bank required collateral arrangements from the auto group's businesses to secure certain high-limit floor plan financing. In conjunction with the collateral arrangements, PNC Bank required monthly floor plan audits to be performed

on the auto group's businesses. For many years the monthly audits were performed by bank personnel.

The defendant in the lawsuit, Datascan Technologies, took over the monthly auditing duties relating to the auto group's businesses in 2001 or 2002 from PNC Bank. Datascan marketed itself as a firm of specialists offering professional field audit services, including monthly floor plan audits and claims to possess industry expertise in floor plan audits. Datascan was under contract by PNC Bank to perform floor plan audits for PNC customers. Brandow relied on Datascan's monthly floor plan audits to help insure that the auto group's businesses remained in compliance under the terms of the collateral arrangements in place to secure the bank financing.

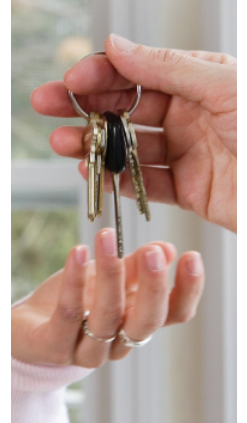
Datascan assigned the same auditor to perform the monthly audits for Brandow for the eight-month period ending July 2004 even though industry standards require auditors to be rotated or alternated each month. In addition, Datascan was not providing Brandow with monthly audit summaries during that same eight-month period. A new Datascan auditor was assigned to Brandow's businesses in July 2004 and reported



The Loaner Crashed – Whose Policy Applies?

by
Adam L. Fernandez

I recently visited a local dealership to test-drive a new model automobile that I had been noticing on the road in growing numbers. I wanted to see for myself what everyone else already seemed to know about this new vehicle. However, as I pulled the car off of the dealership's lot I wondered whether the dealership's auto insurance policy or my own policy would cover the cost of any damages if I were to have an accident while on my test-drive. A similar question is raised when a loaner vehicle is borrowed by a customer from the dealership that services the customer's current car for repairs.



After doing a little research, I found a recent Pennsylvania appellate court case that addressed the issue of which auto insurance policy (i.e. the driver's or the dealership's) would

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If the Floor Plan Auditor is Wrong... *continued*



significant inaccuracies in the inventory resulting in the auto group being in default under the bank's financing documents.

Brandow alleged in its complaint that Datascan did not adequately perform the audits

and as a result the auto group found itself in an "out of trust" position with respect to PNC Bank's financing requirements. Brandow's complaint asserted that its businesses suffered a \$10 million loss as a result of Datascan's

conduct, as well as a loss of an additional \$10 million in lost profits as a result of the auditing inaccuracies. Ultimately, the court dismissed Brandow's claims against Datascan for breach of contract and professional negligence, but permitted its claims for negligent representation and breach of fiduciary duty to proceed.

The Brandow case highlights the importance for all dealerships to take responsibility for, and closely monitor, their floor plan audits as they relate to bank financing for the dealership's business. Dealers cannot simply rely on the audit reports generated

by a third-party contracted by a particular lender. Each dealer must implement appropriate policies to ensure that it remains in compliance under the terms of any financing documents or suffer unexpected financial consequences. Our firm deals with the types of issues that auto dealers face on a daily basis, including those highlighted in the Brandow case. Please contact our office to further discuss the particular legal issues that you face in owning and managing your automobile dealership businesses.

The Loaner Crashed... *continued*



cover the costs associated with any damages to a demonstrator or loaner vehicle while it was being operated by a potential customer. In *Progressive Northern Ins. Co. v. Universal Underwriters Ins. Co.*, 898 A.2d 1116 (Pa. Super. 2006), appeal

denied 909 A.2d 1290 (Pa. 2006), an insured driver was operating a dealer-owned and insured vehicle, which was made available for the driver's use by the dealership, when the driver was involved in an accident with an unrelated third party driver. After a careful review of both the driver's and the dealership's liability insurance policies, the Superior Court held that both the driver's and the dealership's liability insurance policies were not coordinated and, in effect, cancelled each other out. The Superior Court closely analyzed the priority of coverage provisions of both policies and ultimately required each insurer to cover one-half of the loss. The *Progressive* case highlights the importance for dealers to require each driver of a demonstrator or loaner vehicle to sign a demonstrator or loaner liability assumption agreement. In the event of an accident, the

liability assumption agreement could serve to shift the liability for any loss from the dealer's policy to the driver-operator's policy, thereby avoiding the result found in the *Progressive* case. Further, although ultimately the claim by the customer for coverage by the dealer might be denied, it is better to have the assumption agreement than to realize after the fact that you could have shifted the liability for the loss to the driver. An added benefit of having each customer

sign the liability assumption agreement, is that it may cause the customer to drive more carefully with the demonstrator or loaner vehicle.

Our office can assist in drafting or implementing a liability assumption agreement for your dealership's use. Please feel free to contact our office to further discuss the issues raised by the *Progressive* case and a demonstrator or loaner liability assumption agreement.

Hamburg, Rubin, Mullin, Maxwell & Lupin's Automobile Dealers Group focuses on areas of acquisition and sale of dealerships, franchise litigation, succession planning, tax and estate planning, real estate law, environmental issues, employee relations and regulatory issues.

For Further Information, Please Contact:

Steven H. Lupin slupin@hrmml.com or Jonathan Samel jsamel@hrmml.com



HAMBURG, RUBIN, MULLIN, MAXWELL & LUPIN

Lansdale • Perkasië • Limerick • Allentown, PA

Phone 215.661.0400 • www.hrmml.com

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