

THE COMMON LAWYER

New Year, New Decade - Same Scammer, Better Scams



By Justin M. Jakubiak

FIRST, AND MOST IMPORTANTLY, Happy New Year! I wish you, and every other hard working automotive professional and dealership, the very best for 2020.

I truly believe that while the coming year and decade will bring challenges, they will also bring great things to those who are prepared to adapt and to embrace the numerous changes and technological advances the industry will experience.

The next decade will see unprecedented levels of change in terms of the products sold by dealerships and the manner in which those products are sold.

For me, not only is it a new year and decade, I also turned 40 on January 2nd. Ughhh! One of my birthday cards said that



if you keep the status quo you won't grow. I plan to make it my personal goal for the coming decade to constantly challenge myself and push myself out of the comfort zone – I also want to have a mid-life crisis and buy myself a ridiculously expensive and impractical car... dreams of a car lawyer!

What doesn't change in a good way?

Unfortunately, some things do not change for the better. In my 16 years of practice, fraudsters have continually evolved, and are increasingly using technology to target unsuspecting dealers, salespersons, managers and consumers.

Fraud targets all businesses: Small, big, mom and pop shops, franchise dealers, law offices and the like. Also, as times change, and the economy becomes more challenging, more fraudsters are entering the marketplace with ever more sophisticated tools and tricks. In the auto industry, in particular, there has been an increase in the amount of fraud perpetrated by the use of fraudulent identification, insurance information, employment information and employment documentation.

Various dealers throughout Ontario have had high-end luxury vehicles stolen through the use of such scams. The fraudsters present as legitimate car purchasers, but use fraudulent identification and forged documents to

obtain financing for the targeted vehicle. The fraud is often not realized until after several days or weeks have passed, and maybe not until the first payment is missed.

One of my lending clients recently advanced almost \$100,000 to a dealership for the purchase of a fully loaded new Mercedes GLE. Shortly after the vehicle's delivery, the purported purchaser (a senior bank employee), was contacted by her credit monitoring service and informed that her identity had been stolen and used to buy a car, open various credit cards and obtain a phone.

Fortunately, because the victim acted quickly and immediately contacted the police, my client learned of the fraud almost immediately and, through working with the selling dealership, was able to recover the vehicle within days. The vehicle was recovered with only 100 kms on the odometer and no damage.

This was a good ending – unfortunately, too often vehicles obtained this way are destined for export and are already in a shipping container and on the ocean before the fraud is discovered. Or the vehicles are recovered, but have been heavily damaged or stripped of certain valuable parts.

Could this fraud have been prevented?

I think so. In reviewing the file, and in particular the documents used by the fraudster, there were markers that the documentation was fraudulent.



However, in fairness, you really needed to review the documents closely to spot the red flags. I saw them quickly because I was reviewing the fraudulent documents knowing, or strongly suspecting, they were fraudulent. I can certainly appreciate why a salesperson, without adequate training, could have been fooled, especially when dealing with a confident, knowledgeable and attractive purchaser. Some may feel uncomfortable by my reference to attractiveness. However, in my experience, fraudsters are often well dressed, confident and use multiple tools to sell the con – including designer clothing, expensive watches and the like.

OMVIC Considerations

Not only must dealerships be wary of fraudsters, there are important OMVIC considerations to be aware of as well. I have worked with several clients who have been charged by OMVIC in connection with schemes similar to the one described above, on the basis that they have been alleged to have "falsif(ied) [or furnis(h)ed] false] information and documents relating to the trade of a motor vehicle" contrary to sections 26 and 27 of the MVDA.

For one client, a purchaser came in and financed a car using fraudulent employment information and documentation. My client's finance manager, having no idea that the information and documentation was false, submitted same to the lender who ultimately approved the loan. The vehicle was delivered and the purchaser subsequently defaulted on her loan. The lender blamed the dealer when it refused to purchase back the deal, and proceeded to complain to OMVIC.

The result of the complaint was that OMVIC charged everyone who was involved in the transaction from the dealer side - the dealership, the dealer principal, the salesperson and the finance manager - under both sections 26 and 27 of the MVDA. Notice of the charges were published by OMVIC (as required by the MVDA), severely damaging my clients' respective reputations and their business relationships. The financial impact of the charges was also significant – on top of the emotional toll that all defendants experience.

After a fairly lengthy trial, and despite my belief that the evidence had gone in favourably, we lost – COMPLETELY. It was devastating. Fortunately, we felt the decision was wrong and my clients had the courage and will to proceed. We were entirely successful on appeal. Notwithstanding the ultimate success, the trial and the appeal were exhausting and took a significant toll on the health of the dealership, its owners and employees.

I share this story not to tout my legal abilities, but to remind dealers and their staff of the far-reaching impacts of fraud, and the importance of up-to-date fraud training. It also serves as a reminder to dealer principals of the importance of being present and involved in your dealership's affairs.

There are many things that this particular dealership could have done to minimize the potential for the fraud in the first place, and to also protect itself during OMVIC's subsequent investigation. Preventative steps are almost always better than looking for a cure.

The Bottom Line

Studies claim that businesses may lose 5% or more of their annual revenue to fraud. Small businesses are particularly vulnerable to fraud, and often are victims of payroll fraud, cash theft, online banking fraud, false invoicing

and email fraud. Payroll fraud is twice as likely to occur in small businesses than in larger ones. Owners must therefore gain a working knowledge of their payroll system and enforce accountability practices among their bookkeepers.

In regards to cash theft, an owner needs a streamlined cash monitoring process, both for an effective financial process and to maintain supervision of cash flow within the business. On a somewhat related note to cash theft, online banking has increased the threat of funds being transferred into erroneous accounts.

Proper supervision and policies are required to combat these types of fraud within your dealership.

It is also helpful to ensure that you have adequate insurance in place for when frauds do occur. Given adequate insurance coverage is an article topic on its own, I will simply say that you should not assume that a Cyber Policy or a Fraud Policy, for example, will cover all manner of electronic fraud which may occur – insurance policies and coverage issues can be tough, and it is best to make sure that you ask detailed questions of your broker and lawyer when determining the coverage you may require.

Plain old vehicle theft continues to be a concern as well. Recently, OMVIC posted a bulletin warning dealers of a violent car thief targeting GTA dealerships. The alleged thief, "a well-dressed male, posing as an interested buyer" was walking into dealerships and asking to see high-end vehicles. Upon being given the keys he would enter the vehicle, lock the doors and drive away!

Having a good team!

Running an auto dealership is complex, and involves hundreds of transactions relating to multiple parties in a very short amount of time. Unfortunately, each transaction is an opportunity for

fraud. The logical follow up question to this reality is, "What can you do to protect yourself and your dealership?"

An important first step is hiring a trustworthy and diligent team. It is just as crucial that a dealership's employees (management and sales staff) are trained and ready to act diligently and intelligently to identify red flags from the outset. Part of this includes treating employees well and showing them that they are a valued member of the team.

Increasing Leadership

A good team starts with good management. When it comes to policies and procedures, documents should be drafted in plain language and steps should be taken to ensure that everyone knows and follows them. For example, it should be made clear that all cheques should require two signatures, that every transaction should be properly documented, and there should be frequent inventory counts.

It is also important to divide up work duties. This ensures that no one person has control over any given area of operation for the business. Think carefully about the list of authorized people that will handle any assets (such as parts, cash, keys, office equipment, etc). This list of people should be short. A dealer principal should also personally go over the bank reconciliation and floor plan reconciliation on occasion and spot

audit the business. Having a detailed due diligence system in place will greatly assist in the event of an OMVIC investigation, and worse, a charge under the MVDA.

Identity Fraud

Given the rise of identity theft and the use of fraudulent documents to obtain cars, it is recommended that dealers have an "Identification Due Diligence" checklist in place before completing transactions. This checklist should include obtaining and keeping record of:

- the individual's full name
- home address and telephone number,
- occupation, and
- business address and telephone number, if applicable.

Furthermore, if an individual is making a purchase on behalf of an organization (a corporation, partnership, association etc.) you should keep a record of:

- the organization's full name,
- business address and telephone number,
- the organization's incorporation or business identification number,



- the general nature of the organization's business, and the name, position and contact information of the individual making the purchase on behalf of the organization.

Ask for help!

Lastly, get professional help! Lawyers, accountants and other advisors who specialize in dealership matters, know how to deal with fraud and are a great asset that you can use to ensure that your business is protected. A lawyer or an accountant will be able to take a good look at your business and identify areas of vulnerability. They will be able to identify safeguards that you can put in place to protect these vulnerabilities. They usually have extensive experience with fraud identification and therefore will likely have really good tips about how to stop it. ■