

**PREPARING THE USED VEHICLE FRAUD CASE FROM
THE PLAINTIFF'S PERSPECTIVE**

By C. Gibson Vance

INTRODUCTION

How many times has a prospective client walked into your office and informed you that he just discovered that the used vehicle he purchased had previously been wrecked? He informs you that he specifically remembers asking the sales person if the vehicle had ever been wrecked, and the sales person had responded that it had not.

Unfortunately, this exact scenario occurs much too frequently in Alabama to consumers ranging from the uneducated to the highly educated. However, in most used vehicle fraud cases, the single most common similarity shared by the unsuspecting buyer is his inability to detect whether or not a vehicle has previously suffered mechanical and/or body damage from a wreck. The lack of knowledge, combined with the fact that they trust the sales person to properly inform them of the history of the vehicle, many times results in the consumer being defrauded.

This paper is written with the intention of assisting plaintiff's practitioners in pursuing an action in a used vehicle fraud case and procuring favorable results for their clients. After all, the purchase of a vehicle is perhaps the second largest investment that most Alabamians make.

INVESTIGATION

The investigation stage is usually the most crucial part of a used vehicle fraud case and can literally be won or lost at this point. The first step in any fraud case is to ascertain whether or not the representations the defendant made to your client were material as opposed to mere "puffery". All car dealers say how great their cars are, but that is not fraud. You will then be in a good position to determine why your client relied on those misrepresentations.

After you fully understand what transpired during the selling process, it is time to investigate the entire history of the vehicle. A title history can be obtained by sending your written request for a microfilm history of the vehicle to the Department of Revenue, Motor Vehicle Division, along with a check for \$15 and the vehicle identification number. When you receive your title history, you should contact each prior owner to establish a chain of custody of the vehicle, so that you can determine exactly when the vehicle was damaged, the extent of the damage, and the details of any subsequent repairs to the vehicle. Once you establish a chain of custody, you will know the identity of the person or entity who sold the vehicle to the defendant.

The person who sold the vehicle to the defendant is an extremely important source of information, because they will be in a position to advise you as to the exact condition of the vehicle when title was transferred to the defendant. Additionally, they will be able to inform you what the previous owner told the defendant about as to the prior condition of the vehicle. It is crucial to prove that the defendant knew, or should have known, that the vehicle had previously been damaged.

DRAFTING THE COMPLAINT

Once the investigation phase is complete, it is time to draft your Complaint. First, you must determine the identity of the defendant(s). The defendant(s) should include the dealership, owners of the dealership, the salesperson, management of the dealership, and any individuals who misrepresented any material fact(s) to the plaintiff. Whereas, the individual defendants will no doubt attempt to argue that they were only acting in the line and scope of their employment, and not in any individual capacity, this argument will not prevail. In *Taylor v. Shoemaker*, 605 So.2d 828 (1992), it is clear that those persons are liable individually and as agents for their actions.

The Complaint should contain counts for *fraud in the inducement*, *fraudulent suppression and wantonness*. It may also be necessary to include a *conspiracy* count in order to provide you with an avenue on which to pursue the owner(s) of the dealership individually. Furthermore, as in all fraud claims, it is important to be aware of the applicable statute of limitations (two years from the fraud or two years from the date the fraud is discovered). There will often times exist a questions as to when the plaintiff discovered, or should have discovered, that the fraud took place.

DISCOVERY

As in any fraud case, the discovery phase can become a battle with the defendant's attorney. It is essential that you request the production of any and all of defendant's documents which in any way relate to the subject vehicle. This request should include any documents relating to any previous owners of the vehicle, as it is common place for the dealer to sell the same vehicle more than once. Specifically, you need to request the "washout sheet" for the vehicle. A washout sheet is industry language of the document that reflects how much the dealer paid for the vehicle and the cost of any repairs he made to the vehicle. The importance of this document is two fold, i.e., if the document is authentic, you can learn what repairs have been made to the vehicle by the defendant, providing proof that the defendant attempted to conceal damage. Furthermore, the washout sheet (when coupled with the sales documents) can provide the motive for the defendant's fraudulent actions.

The washout sheet and the sales documents will enable you to ascertain exactly how much of a profit the dealership made on the vehicle. The used car industry is a very big business in Alabama, and surprisingly, the usual profit margin on used vehicles is much greater than the margin on new vehicles. As in a fraud cases, the motive behind the fraud is simple... GREED!

Additionally, you should request that the defendant produce all dealership tax records (to further establish motive), all repair documents pertaining to the vehicle, policy and procedures manuals implemented by the dealership, personnel files for all individual defendants, and any other documents relative to your particular facts.

DEPOSITIONS

Obviously, the depositions of all named defendants should be taken as soon as possible. In addition, it may be necessary for you to take the deposition of the prior owners of the vehicle. However, if the prior owners are favorable to your case, you may wish to get an affidavit at your initial interview of them. Perhaps the most important deposition that will be taken during the course of discovery will be the deposition of the person who actually sold the vehicle to your client. It is absolutely essential to know what his testimony will be in terms of what he claims your client was apprised of at the time of sale.

PATTERN AND PRACTICE

Although it is no longer necessary to prove a pattern and practice of fraud in order to get over the unconstitutional punitive damages cap, pattern and practice evidence is still very important circumstantial evidence to assist in proving your fraud case. (*See Alabama Power Co. v. Henderson*, ___So.2d___ (1993)). Additionally, pattern and practice evidence can help provide you with very valuable and essential information.

As provided for in *McElroy's*, Section 70.03, the plaintiff clearly has a right to attempt to establish a pattern and practice of fraud. Therefore, it is necessary for you to request a copy of all the files for all vehicles sold by the defendant dealership relative to the time period the subject vehicle was sold. Once you receive the documents, you should review the documents for any information that may alert you to the fact that a person may have been defrauded in a similar way as your client. The case of *Clarke v. Assoc. Life Ins. Co., et al*, 582 So.2d 1064 (1991) seems to establish the procedure for contacting the defendant's prior customers as potential witnesses for your client's case.

POTENTIAL PROBLEMS

As in all fraud cases, a used vehicle fraud case is sometimes difficult to prove. Furthermore, in a used vehicle fraud case, there will always be certain obstacles that you will have to overcome in order to prevail. During the sales transaction, your client will no doubt be forced to sign several documents in order to consummate the sale. Two documents that are almost always utilized by used vehicle dealers at the *Sales Contract* and a *Buyer's Guide*.

The *Sales Contract* used by most dealers is usually a standard form with some changes made to suit each dealer's situation. Among other things, the Sales Contract will contain verbiage that will attempt to disclaim any and all warranties, either expressed or implied, regarding the subject vehicle. Additionally, the standard Sales Contract will state that the purchaser is not relying upon any representations of any agent of the dealership in deciding to purchase the car and that the purchaser is purchasing the vehicle "AS IS AND WHERE IS".

The *Buyer's Guide* usually consists of two separate documents. The first document pertains to warranties and will generally have two large boxes reflecting whether or not the purchaser is buying the vehicle with or without a warranty. The second document will have the following statement at the top of the document. "Below is a list of some major defects that may occur in used motor vehicle". The document then lists almost all major components of a vehicle, including the frame and body, engine, transmission and drive shaft, differential, cooling system, electrical system, fuel system, inoperable accessories, brake system, steering system, suspension system, tires, wheels and exhaust system.

There is little doubt that the defendants will utilize these documents at the summary judgment level in an attempt to show that there was no justifiable reliance on the part of your client when the vehicle was purchased by your client. Furthermore, the defendant will use the documents to argue that your client purchased the vehicle "AS IS" and, therefore, cannot bring a cause of action relating to the condition of the vehicle at the time of the purchase.

Unfortunately, most people do not read every fine print item of the documents they sign when purchasing a vehicle. In addition, most prospective purchasers will rely upon the

representations made by the salesperson at the time of purchase and will overlook such self serving language as “AS IS”. The Supreme Court recently addressed this exact issue in *Harris v. M&S Toyota, Inc.*, 575 So.2d 74 (Ala. 1991), in stating the following:

“There was also evidence in the record that the forms in question were not read by the plaintiffs and were signed in a perfunctory manner as passed over by Toyota City’s agents. The jury could reasonably infer from this evidence that the document containing the “as is” language, were executed simply as forms necessary to complete the purchase and were signed because the plaintiffs had already been assured that the car had not been wrecked.”

Therefore, as shown in *Harris*, it is my belief that the defendants cannot make material misrepresentations regarding the condition of the subject vehicle, and then attempt to disclaim the representations by having your client sign voluminous documents. As the Court stated in *Hickox v. Stover*, 551 So.2d 259 (Ala. 1989), “Instead of ‘let the buyer beware’ the standard is becoming ‘let the liar beware.’”

RELEVANT CASE LAW

There are volumes of case law in Alabama regarding used vehicle fraud cases. However, in my opinion there are two cases that are very helpful from the plaintiff’s perspective. In a very recent decision released March 4, 1994, the Court addressed the issue of used vehicle fraud in *Quad Cities Nissan, Inc. v. Griffin*, 1994 LEXIS 95 (Ala. 1994). The *Quad Cities* case involved an appeal from a summary judgment for the defendant. The defendant, a rebuilder of wrecked and salvaged vehicles, purchased a vehicle with full knowledge that it had previously had a salvage title. The plaintiff specifically asked the defendant if the vehicle had ever had a salvage title and the defendant responded that although the vehicle had previously been involved in a wreck, it had never had a salvage title. The plaintiff, relying on defendant’s representation regarding the salvage title, purchased the vehicle and later sold it to a customer. The customer soon discovered that the vehicle had previously had a salvage title and returned the vehicle to the plaintiff.

Furthermore, at the time of the purchase, the plaintiff signed a document which reported that the vehicle had been “wrecked and rebuilt”. The Supreme Court reversed the summary judgment entered by the trial court and stated:

“Based on the evidence as viewed in the light most favorable to *Quad Cities* and *McGonigle*, we hold that they presented substantial evidence that Griffin suppressed the fact that there had been a prior salvage title on the car, misrepresented the actual repairs performed on the car, and misrepresented the purpose of the statement at the bottom of the bill of sale; thus, they defeated Griffin’s motion for summary judgment – the evidence did not entitle Griffin to a judgment as a matter of law.”

Perhaps the most enlightening fact regarding *Quad Cities* is that the plaintiff was an automobile dealership. Therefore, the plaintiff can certainly be considered an “expert” in the area of purchasing used vehicles. Furthermore, the plaintiff would also be very well versed in interpreting any statement that they would sign in conjunction with the purchase of a used vehicle. It would

certainly appear that the Court is indicating that the plaintiff was justified in relying upon the defendant's statements, even though the document the plaintiff signed could have placed him on notice that the defendant was misrepresenting the true condition of the vehicle.

In *Harris v. M&S Toyota, Inc., Supra*, the plaintiffs (husband and wife) purchased a used vehicle from Toyota City. Defendant had purchased the vehicle at an auction and disclosed to the plaintiffs that the vehicle's driver's side door had been painted. However, when the plaintiffs asked a sales representative if the vehicle had ever been wrecked, the representative informed them that it had not. The plaintiffs relied on the representative's statement in purchasing the vehicle.

Several months later the plaintiffs were involved in an automobile accident which caused the Harris' automobile to become "totaled". After the collision, the vehicle was towed to a repair shop, where it was soon discovered that the vehicle had been previously wrecked and repaired.

The defendant argued at trial that a directed verdict was appropriate, because any oral representations made by any of the defendant's agents were contradicted by the terms of a written sales contract signed by the plaintiffs. The defendant further argued that any evidence of the oral representations made by its agents would be inadmissible pursuant to the parole evidence rule.

The *Harris* Court, as stated above, found that the defendant could not escape liability for its oral misrepresentations by obtaining the signatures of the plaintiffs on the defendant's disclaimer forms. Apparently, the written disclaimer must be balanced with the oral representations made during the sale.

CONCLUSION

No two used vehicle fraud cases are the same. However, as shown above, there are certain parallel characteristics that are almost always prevalent. Hopefully this article will provide some guidance for the plaintiff's practitioner the next time a client tells you that he just became aware of the fact that he purchased a damaged vehicle.