

November / December 2019



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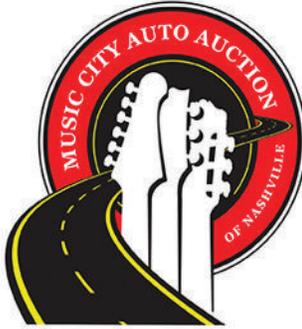
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Season's Greetings. I want to thank our Auction Partners, Advertising Colleagues, Legislators, Motor Vehicle Commissioners, Content Associates and of course our Dealers for making 2019 a success. I will leave you with 2 quotes that I find appropriate for our time. See you in 2020!!

The year-end brings no greater pleasure than the opportunity to express to you season's greetings and good wishes. May your holidays and new year be filled with joy. **-Charles Dickens**

Count your blessings. Once you realize how valuable you are and how much you have going for you, the smiles will return, the sun will break out, the music will play, and you will finally be able to move forward the life that God intended for you with grace, strength, courage, and confidence."

-Og Mandino

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Floorplan Xpress' history dates back to 1974 and began with a simple thought: make it easy for used car dealers to finance their inventory. During the last 10 years Floorplan Xpress began nation-wide expansion and now serves 23 markets across 29 states. Even though our footprint is coast to coast, our focus continues to be on the local market, with our eyes set on continuing to make inventory financing simple.

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Greg Wadsworth
General Manager

BLOCK OUT THE NOISE

I travel a great deal by plane throughout North America. I rarely travel without my latest pair of over the ear Bose noise cancelling headphones. Between the consistent hum of the plane's engines, the sound of air hissing through the overhead vents, the "expert" on all Boeing airplanes seated behind me who also happens to be sharing his "expertise" with anyone who will listen,

I would go crazy without the headphones. As social as I consider myself to be, I really enjoy my privacy on planes. This is my time to focus and think about my days ahead. If the noise level gets to the point where I can hardly hear myself think, I insert a pair of silicone ear plugs and place the noise-cancelling headset on top of those. Ahhhh. Peace and quiet at last.

I so often wish I could convince dealers, general managers and department managers to place a pair of noise-cancelling headphones on their heads to block out such noises as; "floor traffic is terrible, I can't buy any cars at the auction, auction prices are sky-high, if I had more leads we'd sell more cars, nobody wants to work anymore, I can't make any gross... it's all a race to the bottom..." You have to cut the ambient noise by allowing the

"good noise" in. You can do this by no longer comparing your dealership to others or to your past performance. Stop calling the guy up the street to see if he is as miserable as you. Start tuning in to your POTENTIAL. No one cares about your average gross profit per vehicle. What I want to know is, how's your bottom line? I'm not saying gross profit isn't important. What I'm suggesting is that in this challenging and competitive economy, it doesn't matter how much gross is generated. What matters is how much gross profit you got to keep after expenses. Do you and your management team have any idea the percentage of gross profit generated, was spent on operating expenses? Stop fooling yourself into believing, "my people don't need to be worrying about expenses, they need to focus on selling cars and generating gross." Without a doubt, I find when dealers have open, honest and consistent discussions regarding expenses, net profit (before taxes) increases. Do your managers understand the true cost of aged inventory? Do your managers understand the true cost of replacing a lost set of keys (or fobs)? Do your managers understand the true cost to over-night documents that should have been signed correctly in the first place? How much money is being wasted on your ineffective website? Some dealership websites appear to

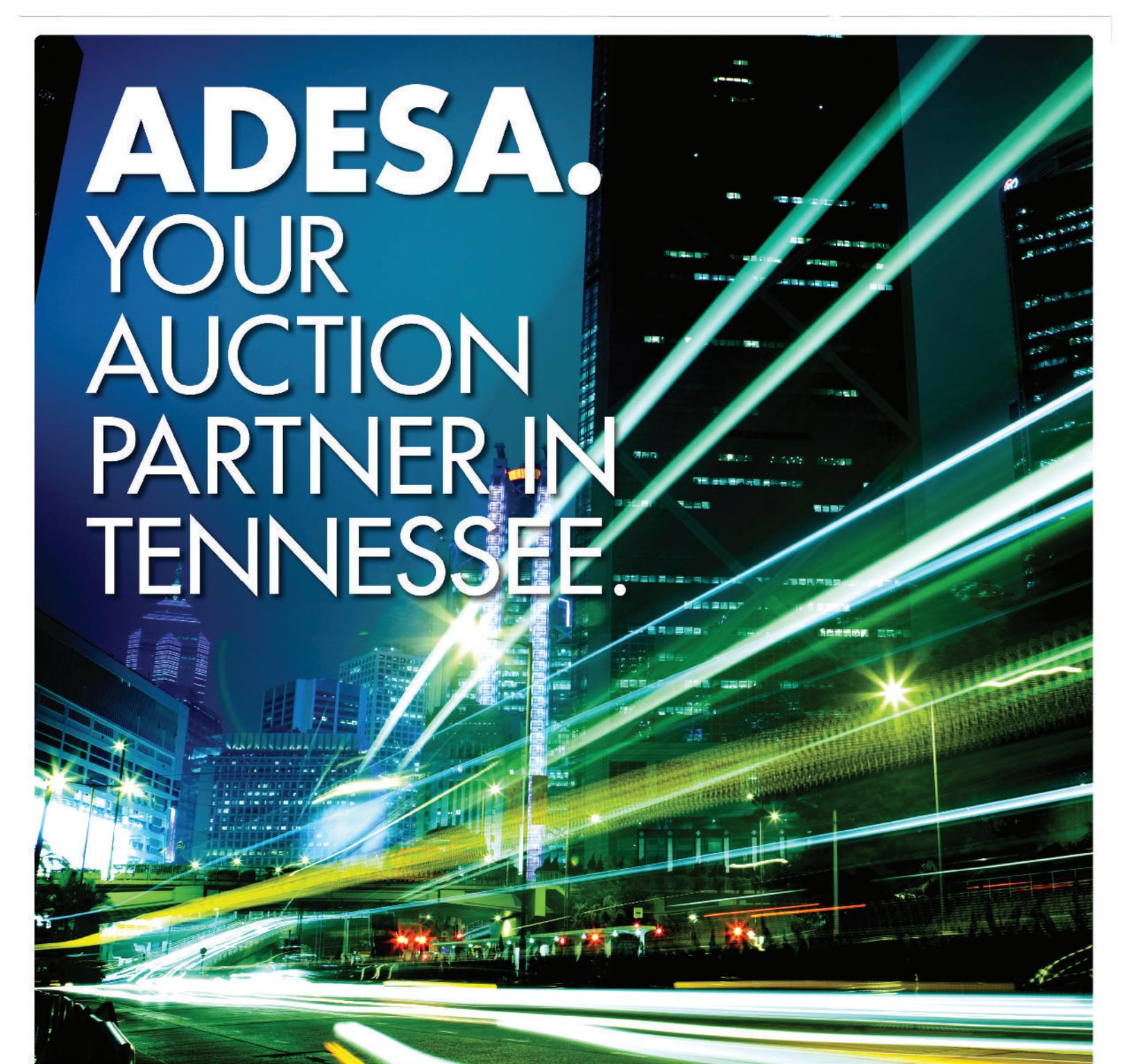
intentionally inhibit potential buyers from buying. When is the last time you actually tried to walk through your own site? Stop spending money on marketing until you know what is actually working and what is not.

Remember this: on your worst day of the month when you sold zero vehicles, some dealership had a great day. Start holding yourself accountable for daily results and teach your team to block out the noise.



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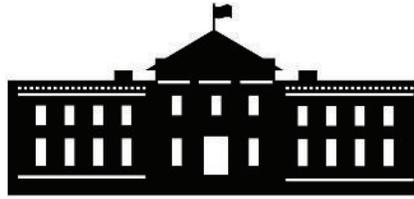
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Auction	Auction	Auction	Auction	Auction	Auction
\$25.00	\$25.00	\$25.00	\$25.00	\$25.00	\$25.00
Jan 2018	Feb 2018	Mar 2018	Apr 2018	May 2018	Jun 2018
Auction	Auction	Auction	Auction	Auction	Auction
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Capital Solutions for Today's Dealership Challenges

Automotive Dealers are confronted with many opportunities for business growth but also many challenges. Intense competition, expensive inventory, capital constraints, and ever-rising business costs are just some of the challenges dealerships currently face. By leveraging your portfolio of receivables, you can raise capital and compete in an evolving marketplace. Whether you want to restock your inventory, expand your operations, make upgrades to your dealership, or strengthen your financial foundation, a Line of Credit or Bulk Purchase Program can be a smart approach to overcoming your dealership's challenges.

It can be difficult to acquire the cars needed to maintain profitability, especially if you don't have enough capital. A Line of Credit is a way to quickly improve your cash on hand. This added capital can be used to purchase additional inventory, refinance constraining debt, or improve operations. This program ensures your cash is never tied up in inventory, gets you out of the cost of car immediately, and allows you to keep your customers.

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For more information, visit their website at Spartan-Partners.com.

EXCUSES, EXCUSES, EXCUSES

"It's tax season, I'll focus on compliance when it's over"

"It's conference season, I'll focus on compliance during the summer"

"Lots of folks are on summer vacation, I'll look at compliance after Labor Day"

"Back to school has been tough on us, let me get back to you about compliance"

"I've got to worry about yearend planning, let's talk about compliance in January"

"It's tax season, I'll focus on compliance when it's over".

*I hear each of these excuses time and time again, I've pretty much been able to set my calendar by them. It's always something, either business is too slow to think about spending money on compliance, or business is busy and there's no time to spend on compliance. **The bottom line is** that not having a comprehensive compliance strategy can cost a used car dealer or finance company big time, and all the excuses won't add up to a hill of beans if a regulator or trial lawyer focuses on compliance efforts.*

***Drop the excuses! Make it your commitment to do SOMETHING.** You don't have to build your compliance house in a day, but you should have a definite roadmap of what needs to be accomplished, how to accomplish it, and the time it will take. It doesn't have to be expensive and it doesn't have to take a ton of time, but it does have to be a commitment that isn't delayed every time something else comes up.*

When I work with new clients, one of the first things I emphasize is the value of a demonstrable compliance strategy. I don't preach this to create compliance busy work. I know the value because

*I've seen firsthand how having this strategy can be the difference between encouraging or discouraging a lawsuit or regulatory scrutiny. It's the difference between having a small inconvenience versus a big problem. **It's okay not to have all of the answers**, but there should be a blueprint in place as to the most pressing compliance challenges faced by the business and how they will be resolved.*

I recently took on a new client that has put off a true compliance system for years, instead taking a "band aid" approach that it hoped would slide by anyone looking. When its new bank looked at the status of its compliance it held up funding, and gave the company 60 days to build a robust compliance management system. This client sure wishes it had gotten started earlier, because now its investment of time and money are mandated from above based on someone else's schedule and its lost all control over the process.

Again, my challenge to you is to take small steps every week and month and have a vision as to what the structure of compliance should look like for a business of its size and complexity. If you don't know where to get started just shoot me an email at info@IgniteCP.com and I'll be glad to give you some ideas, with no commitment, fee or obligation.

Until the next issue.....



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Are you repossessing responsibly?

Motor vehicle financing can be full of compliance minefields. Defaults and repossessions provide more than their fair share of potential mines. However, there are some steps you can take to try to avoid some key issues that arise when customers default, and repossession seems to be the next step.

Strict Compliance

Sometimes you want to be the nice guy and let the customer slide on a few late payments. But when that customer becomes chronically late, you may get fed up and decide that it is time to declare the customer in default and repossess the vehicle. However, Tennessee courts have held that a secured party must give the consumer a notice of "strict compliance" before repossessing collateral, if the creditor has accepted payments in the past without taking action to accelerate the debt. In other words, if you've allowed the customer to make late payments in the past, you have to notify the customer that you plan to hold them to the payment due dates agreed to in the retail installment sales contract **before** you hold them in default under the original terms of the agreement.

The notice of strict compliance could state that:

- from this date forward, the creditor will require strict compliance with the contract terms; and
- if the consumer does not strictly comply with the contract terms, the creditor will enforce its rights under the contract, and may repossess the vehicle.

Personal Property

Another potential mine in repossessions is charging customers storage fees when personal property is found inside a repossessed motor vehicle. While Tennessee does not have a law explicitly addressing the treatment of personal property storage fees, we caution that the Consumer Financial Protection Bureau has expressed concern in this area, stating that it is an unfair practice to require a customer to pay storage fees for personal property in order to get the property back. That is, the customer cannot be required to pay a personal property storage fee as a precondition of getting their personal items--such as car seats, CDcDs, and cell phone chargers--back when their vehicle has been repossessed. Check with your repossession company to see if they make any of these charges.

Instead, customers must be allowed to retrieve their personal items without paying such charges upfront. Note that even though creditors cannot require consumers to pay personal

property storage fees as a condition of getting the property back, the CFPB has said that creditors may recoup personal property storage fees by adding them to the customer's balance that will be due either when the customer redeems the vehicle or when the vehicle is sold pursuant to Article 9.

Sharing Customer Information with the Repossession Company

Federal law allows you to share customer's nonpublic personal information with 3rd parties (including repossession agents) as necessary to enforce or administer a transaction. However, federal law requires that you have a written agreement with all parties you share customer information relating to the sharing, safeguarding, and destruction of such information. In addition, federal law requires that you implement a vendor management policy to ensure your vendors comply with federal compliance laws. These laws cover your dealings with repossession companies. Don't forget to review your compliance obligations when dealing with 3rd parties.

Defaults and repossessions present many minefields. But, making sure you are complying with legal requirements concerning strict compliance and personal property storage fees, as well as proper vendor management, can help you avoid some compliance bombshells.

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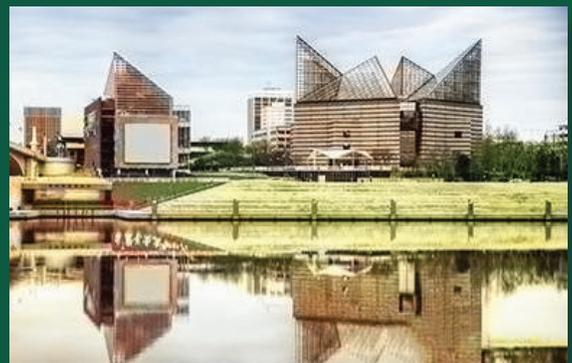


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Case of the Month

by Nicole F. Munro and Thomas B. Hudson

A used car buyer signed a financing contract that was assigned to a bank. The two-page contract included an arbitration provision at the bottom of the second page. There was no signature line beneath the arbitration provision.

However, the first page of the contract included a separate "Agreement to Arbitrate" provision with a signature line below it. This provision stated, in pertinent part: "By signing below, you agree that, pursuant to the Arbitration Provision on the reverse side of this contract, you or we may elect to resolve any dispute by neutral, binding arbitration and not by a court action. See the Arbitration Provision for additional information concerning the agreement to arbitrate."

The buyer did not sign the signature line below this provision. After the buyer fell behind on her payments, the bank repossessed the car.

The buyer sued the bank and others, asserting federal and state law claims. The federal trial court denied the bank's motion to compel arbitration of her claims. The bank argued that the arbitration provision at issue was binding even though there was no signature under it, and that a valid arbitration agreement can be created without either party signing it.

The court distinguished the facts of this case from the precedent case relied on by the bank. In this case, the financing contract explicitly stated that the buyer would agree to arbitrate "[b]y signing" the signature line below the arbitration provision. Therefore, the contract defined the terms of acceptance of the arbitration provision. Because the buyer did not sign the provision, she did not assent to arbitration and thus could not be compelled to arbitrate her claims against the bank.

Sullivan v. PNC Bank, N.A., 2019 U.S. Dist. LEXIS 171672 (M.D. Fla. October 3, 2019).

(Continued on page 20)

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Actions Speak Louder Than Words

One of my all-time favorite sayings is "actions speak louder than words." In other words, what you do has a stronger impact on people than what you say.

I can think of no better application of that maxim than to the Consumer Financial Protection Bureau's actions since Director Kraninger took over at the Bureau. Let me explain.

You may remember that, in April, the new CFPB director outlined her vision for the Bureau in a speech at the Bipartisan Policy Center. As I wrote at the time, her remarks appeared to signal a continued shift in the Bureau's emphasis from using enforcement actions as its primary tool to keep bad actors in check towards the use of the Bureau's other tools-education and supervision.

Specifically, she stated that the Bureau would no longer be engaging in rulemaking through its enforcement actions. She stated that the focus of the Bureau's enforcement tool would be on preventing consumer harm. She further stated that the CFPB would conduct rigorous economic and market analysis in the rulemaking process. Rulemakings wouldn't be rushed, and they would proceed deliberately and transparently.

She also confirmed her view that supervision is the "heart" of the CFPB. At the time, she indicated that she is focused on ensuring that the Bureau uses this tool as effectively and efficiently as possible to prevent consumer harm.

She also stated that the Bureau would ensure that enforcement investigations proceed carefully and purposefully to allow for a fair and thorough evaluation of the facts and the law. The Bureau would hold bad actors accountable and may in some cases engage in a public enforcement action when needed to "send a clear message" to the marketplace to deter unlawful behavior and support a level playing field.

Ok, so that's what she said back in April. But what actions has the Bureau actually taken since then? It was reported recently that the Bureau has ratcheted up investigations and enforcement actions. Companies are receiving more civil investigative demands and notices alerting them to the possibility of an enforcement action. The director has denied at least nine petitions to modify or set aside civil investigative demands since she took over the helm.

That's been our experience as well. Our firm's Government Investigations, Examinations, and Enforcement practice group has been very busy so far this year. The Bureau appears to be bringing the same types of cases against the same types of parties and with the same types of settlement demands as under prior directors. It's been business as usual for the Bureau, notwithstanding the director's comments. A review of the CFPB's enforcement actions so far this year (20) notes that the number of actions it brought in 2019 has increased more than 80% over those brought in 2018.

Does that mean that Director Kraninger's comments may be rhetoric rather than an actual change? She recently told a group of used car dealers that the Bureau has no plans to regulate by enforcement. But, is that true? Let's look at a couple of the CFPB's recent actions that appear to go against some of the director's comments.

Example #1: Declaring that it is an unfair practice to allow repossession agents to charge customers for removing, inventorying, storing, and returning personal property found in repossessed cars, even if state law permits these types of charges.

Example #2: Declaring that it is an unfair practice to allow a vendor to charge a fee to take a phone payment, without first telling the customer about all alternative methods of payment that have no fee or a lower fee, even though the customer was told the fee after stating a payment method preference and expressly agreed to the fee.

These are just two examples where the Bureau's actions certainly appear to be speaking louder than the director's words, and I'm sure there are more. So, what can you do? You can and should still listen to what the director and others at the CFPB are saying; those statements are important to hear.

More importantly however, is to watch and track their actions - who are they enforcing against, what actions are they taking, and whether they are continuing to push the envelope as in the past.

Don't be lulled to sleep by the nice words you may hear from the director and others at the Bureau. Their actions will tell you far more about the types of practices they may find objectionable than any words that may pass through their lips.

Eric L. Johnson is a partner in the Oklahoma City, OK office of Hudson Cook, LLP. Eric can be reached at (405) 602-3812 or ejohnson@hudco.com. This article is provided for informational purposes and is not intended nor should it be taken as legal advice.



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This Month's CARLAWER®

Compliance Tip

(Continued from page 16)

How many documents does your dealership use in completing a sale transaction, a financed sale transaction or a lease transaction? Of those documents, how many require your customer's signature? What precautions do your employees take to make sure that every signature line in every document is signed? Does the dealership have a "signature template" or checklist for each type of transaction? Having a process that assures that all required signatures are captured would help eliminate the risk that your dealership will end up with an issue like the bank faced in the Sullivan case, and would offer the additional benefit of avoiding those nasty chargebacks from your dealership's financing sources when all required signatures are not captured.

So, there's this month's roundup! Stay legal, and we'll see you next month.



Thomas B. Hudson
Of Counsel



Nicole ("Nikki") F. Munro
Partner of Hudson Cook, LLP

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Auctioneer Spotlight



Robin Treadway

I was born and raised in Johnson City, TN. My father was in the real-estate business, but I grew up in the restaurant business. I was asked around age 17 if I would run to Lakeland, FL with a coworker to buy some cars for his Budget Rental Car Agency. He was going to pay me \$75 bucks and I said absolutely ... that was a lot of money back then. I walked in the auction, looked around, and thought it was cool. I watched the auctioneers and felt 'I could do that.' I went to college for a year and a half and decided it just wasn't for me. I called my Dad and asked if he would pay for me to go to Auctioneer School? He paid around \$700 for me to attend and I remember the week I was there they opened the Hickory Hollow Mall.

I had already seen that I wanted to get into the auction business and had my real estate license with my father. The real estate market was very slow in the 70's. So, I leaned back on my restaurant experience and moved to Nashville, Tennessee. Governor Ned McWherter and East Tn Senator Carl Moore bought a hotel in downtown Nashville called The Capital Park Inn. They hired me to run the food & beverage department. Working 80 hours a week in the restaurant business was tough and after one year I decided to seek out an opportunity in the auction business. I went to work for Clive Anderson Auction Company in Nashville. After working with Mr. Anderson in the 80's, commissioned real estate sales were very slow. At that time, I worked with a guy named Tommy Todd & his father-in-law was Tom Beasley, the owner of Nashville Auto Auction. Tom reached out to me with an opportunity & this is where I started my auto auction career as a ring man. Over the past 40+ years this industry has allowed me to work for Memphis Auto Auction, Inc., Anglo American, ADT, Manheim Auto Auctions & Dealers Auto Auction.

My wife Mary Beth and I have been married for 31 years. I have 2 children. My son Tucker is an auctioneer & ring man at Manheim, DAA, & Americas Auto Auction. My daughter is a private flight attendant and flies in the Los Angeles area on private charters.

I have a bunch of rental property and I love to work. I like to work on my rental property. My plan would be to eventually move to Mexico & retire.

One of my most fulfilling achievements is that I have been associated with the Cystic Fibrosis Foundation for 37 years. I received an award last year (2018) as an Outstanding Volunteer of the year for CFF. I served on the board locally & on the national board for the Cystic Fibrosis Foundation & I'm very proud of that!

(CONGRATULATIONS ROBIN!!!!)



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- Mercedes-Benz Financial Services
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- US Bank
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