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CNCDA & KPA Compliance Seminar Series — Register TODAY

As a valued KPA client, we wanted to let you know about an upcoming event that can help your dealership.

The California New Car Dealers Association (CNCDA) has partnered with KPA to offer its members an "Essential Steps to a Compliant Service Department" seminar. For CNCDA membership information, please email [Natalie Perry](#).

8 Dates & Locations

- May 7 — Bakersfield, CA
- May 8 — Glendale, CA
- May 9 — Sacramento, CA
- May 14 — Ontario, CA
- May 15 — Anaheim, CA
- May 16 — San Diego, CA
- May 21 — Santa Clara, CA
- May 22 — Pleasanton, CA

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Selling a Used Vehicle Without a Title

By Robert Ebin

Whether a dealer can sell a vehicle without having physical possession of the title has been the cause of ongoing confusion amongst law enforcement and the DMV alike. In fact, in several recent consumer actions, I have seen the allegation that a dealer “sold the vehicle without the title.” This article will explore, and hopefully shed light on, the myth that a dealer in California must have a vehicle’s title in hand prior to offering it for sale.

Selling a Vehicle Without an Ownership Interest vs. Selling a Vehicle Without Possession of The Title

There is a big distinction between selling a used vehicle without the right to receive the title and selling a vehicle without having the physical title in hand. A dealership must not sell, or attempt to sell, a vehicle to a customer without first having a legal ownership interest in the vehicle. In a typical example, the dealership takes a used vehicle in on trade, and of course, wants to quickly turn around and resell the vehicle. The dealership must first tender (i.e. mail a check or submit an electronic payment) the full lien payoff amount to the current lienholder and must do so within 21 calendar days of acquiring the vehicle. [\[Vehicle Code section 11709.4\(a\)\(1\)\]](#). Be mindful that the law specifies calendar days and not business days, and when sending payoff checks through the mail, you may have to add in a few extra days’ worth of per diem interest because the lender will receive the check a few days after it was sent. This could save the dealership from big headaches down the road because rather than receiving title from the lender, the dealership may instead receive a letter explaining that there is a deficiency remaining on the lien balance. And it is anyone’s guess as to how long it may take the lender to send this friendly reminder, if at all. Only after the full payoff amount is tendered does the dealership have a legal ownership interest in the vehicle, allowing it to offer the vehicle for sale. [\[Vehicle Code section 11709.4\(a\)\(4\)\]](#).

Now assuming the dealership has paid off the entire lien balance on the trade-in vehicle, the question becomes: “Must the dealer actually have the physical used vehicle’s title in hand before selling the vehicle?” The short answer is “no,” and frankly, there is no California statute or regulation that supports the proposition. Make no mistake, however, selling a used vehicle without having possession of the title may be risky in certain respects, but California does not require that a dealership have the physical title in hand prior to selling a used vehicle.

In perpetuating this myth, people have frequently pointed to [Vehicle Code section 11705\(a\)\(4\)](#), which empowers the DMV to suspend or revoke the license of a dealer who has been determined to have “[f]ailed to deliver to a transferee lawfully entitled thereto a properly endorsed certificate of ownership.” People also cite [Vehicle Code section 5753\(a\)](#), which provides that: “It is unlawful for any person to fail or neglect properly to endorse, date, and deliver the certificate of ownership and, when having possession, to deliver the registration card to a transferee who is lawfully entitled to a transfer of registration.” While there does appear to be an absolute legal duty to deliver the title to a buyer, neither of these statutes affirmatively states that a dealer must have physical title in hand at the time of sale. And before we go further, some of you may be saying, “we don’t generally give the certificate of ownership directly to the customer.” That’s because [section 5753\(b\)](#) states that the dealer satisfies the delivery requirement if it submits the proper documents and fees in accordance with [Vehicle Code section 4456](#) (i.e. the Report of Sale requirements).

In fact, various California statutes and regulations contemplate dealerships selling vehicles without the physical titles in hand.

Odometer Disclosure

Per [Chapter 5, Section 5.075](#) of the Vehicle Industry Registration Procedures Manual, California’s Vehicle/Vessel Transfer and Reassignment (REG 262) form is used when “[t]he title is unavailable at the time of transfer.” The REG 262 is used to comply with [49 CFR 580.5\(c\)](#), part of the Federal Odometer Act, which states: “In connection with the transfer of ownership of a motor vehicle, each transferor shall disclose the mileage to the transferee in writing on the title or . . . on the document being used to reassign the title.”

Duplicate Title

Multiple California statutes contemplate a vehicle's title being lost at the time of transfer. [Vehicle Code section 5752\(a\)](#) states in pertinent part that "[w]hen the required certificate of ownership is lost, stolen, damaged, or mutilated, the application for transfer may be made upon a form provided by the department for a duplicate certificate of ownership. "Further, [Vehicle Code section 5911](#) contemplates a transfer of registration of a vehicle to the new owner when "the applicant is unable to present the certificate of ownership issued for the vehicle by reason of the same being lost or otherwise not available." [Section 11.055](#) of the Vehicle Industry Registration Procedures Manual confirms that the use of the Application for Duplicate or Paperless Title (REG 227) form is acceptable in lieu of a California Certificate of Title if such is lost, stolen, missing, or illegible/mutilated.

Posting Bond

[Vehicle Code section 4157](#) provides: "In the absence of the regularly required supporting evidence of ownership upon application for registration or transfer of a vehicle, the department may accept an undertaking or bond. . ." Vehicle Industry Registration Procedures Manual [section 23.000](#) confirms that the DMV may accept a Statement of Facts (cannot be utilized by dealers), bond, or bond alternative to support issuance of a California title for a vehicle.

When Does the Dealer Need to Acquire the Physical Title?

As we can see, many laws and regulations contemplate a dealership not having the physical used vehicle title at the time of sale. However, this begs the question: "When must the dealer acquire the physical title?" Unfortunately, there is no direct answer. In starting with the responsibilities of the lender, [Vehicle Code section 5753\(c\)\(1\)](#) dictates that the lender is obligated to release title and mail the certificate of ownership to the dealer within 15 business days after receiving the full lien payoff. Bear in mind that these are 15 business, and not calendar, days from the day the bank receives the full payoff amount, and not from the day the check was sent.

Now, I'm sure that nearly all dealers have experienced that aggravating situation where the lienholder did not send the title within that 15-business-day window. In this instance, be proactive. Reach out to the bank to see what's the hold-up. Oft times, it may have simply slipped through the cracks, and a reminder will get the wheels turning again. Or, and perhaps more importantly, during this follow up, the lender may inform you that there is a "deficiency in the payoff." There are times, however, when even reputable lenders will just repeatedly drop the ball. In this instance, it may be useful to remind the lender that if it fails to timely release the title, the lender is obligated to pay the dealer \$25 a day for each day it is delinquent (up to a maximum of \$2,500)—this amount can be tripled (up to a maximum of \$7,500 plus attorneys' fees and costs incurred in a collection action) if the lender fails to pay this amount within 60 days following a written demand by the dealer. [\[Vehicle Code section 5753\(d\)\]](#).

The Electronic Lien and Titling (ELT) Program, created by the DMV per [Vehicle Code section 4450.5](#), may eventually help to cut down on these delays. The ELT Program requires that financial institutions' title information be held in electronic format. Rather than issuing a paper title certificate to the lienholder when receiving the application for title, the DMV will instead send an electronic notification of title. And when an electronic lien is satisfied, the DMV will automatically issue the title to the registered owner or to a new lienholder. The DMV anticipates that mandatory enrollment in the ELT Program will occur in early 2021. Here is a link for more information about the [ELT Program](#).

The temporary registration provided by the Used Vehicle Report of Sale and/or Temporary License Plates (TLPs) expires 90 days after the date of sale [[Vehicle Code section 4456\(c\)\(2\)](#)]. Since physical title is needed in order to get the metal plates for the vehicle, and the metal plates take time to be mailed out to the customer, the dealer will want to have the title well before that 90-day post-sale mark. Again, the dealer should be proactive; if the title has not come in and the 90-day mark is approaching, the dealer may want to offer the customer a loaner vehicle or to unwind the deal. It is never fun to receive a call from an angry customer informing you that he or she was pulled over because the temporary registration expired.

Suffice it to say, likely the best answer to "when must the dealer acquire the physical title?" is "as soon as possible." And, again, the best piece of advice is to always be proactive.

Remember, title processing delays can damage favorable customer relations that dealers strive to maintain. Delays in issuance of titles may also violate dealer agreements with lenders, which may result in forced repurchases of contracts.

Questions?

If you have any questions regarding this, or any other situation that may arise in your sales or service departments, hotline clients are invited to contact us at (800) 785-2880 (then press "4" for hotline) or hotline@autoadvisory.com.

Consignment Sales

by Lisa Singer

A guy pulls up in his 2016 Aston Martin DB9 GT. He wants to sell his perfect, meticulously maintained, low-mileage car to the dealership. You do some quick research and determine the car is worth north of \$125,000. The car is beautiful, but the idea of purchasing such a vehicle without having a buyer lined up seems risky. How long will it take to sell? How much can you get for it? In this situation, a consignment might be the ideal solution. This arrangement can benefit both the dealership and the vehicle owner. If the car can't be sold during the consignment period, the dealership isn't stuck with the car. On the flip side, a consignment can help the vehicle owner receive the maximum price for his car without the hassle of selling it himself. This article will review the consignment process and California requirements.

Consignment Overview

[Vehicle Code § 266](#) defines a consignment as "an arrangement under which a dealer agrees to accept possession of a vehicle of a type required to be registered under this code from an owner for the purpose of selling the vehicle and to pay the owner or the owner's designee from the proceeds of the sale." In other words, the transaction is much like the typical consignment of clothes, equipment, or antiques. The owner (consignor) drops off the item with the consignment shop, in this case the dealership (consignee). Once the item is sold, the consignee pays the consignor for the sold item, based on an agreed-upon price or formula.

[Vehicle Code § 11729](#) requires that a dealer engaging in a consignment with a party other than another dealer or a manufacturer must:

- Enter into a consignment agreement in the form prescribed by [Vehicle Code § 11730](#); and
- Pay the consignor within 20 days after the date of sale of the consigned vehicle.

Section [11729](#) also states that failure to comply with either of these two requirements is cause for suspension or revocation of a dealer's license.

Consignment Agreement

A consignment agreement must contain the following specific terms, phrases, conditions and disclosures, which are set forth in [Vehicle Code § 11730](#):

(a) The date the agreement is executed.

(b) All of the following statements:

(1) "I (We), the undersigned consigner(s), hereby consign and deliver possession of my(our) vehicle, which is a (Year) ____ (Make) ____ (ID#) ____ (License) ____ (State) ____ (Mileage) ____, to (Consignee) ____ (Dealer #) ____ for the sole purpose of selling the vehicle and paying, to the consignor or his or her designee from the proceeds of the sale of the vehicle, the amount agreed upon under terms of this agreement. This agreement is effective and valid only for a period of ____ days from this date."

(2) "At the termination of this agreement, the consignee shall return the vehicle to the consignor, or, at the option of both the consignor and consignee, enter into a new

agreement.”

(3) “If the vehicle is sold by the consignee during the term of this agreement, the money due the consignor shall be disbursed within 20 days after the date of sale in accordance with the terms of this agreement. As used in this agreement, a “sale” occurs when the consignee either (A) receives the purchase price or its equivalent or executes a conditional sales contract for the vehicle, or (B) when the purchaser takes delivery of the vehicle, whichever occurs first.”

(4) “The following information shall be completed prior to the signing of this agreement:

Current market value: \$_____ Source: _____.

Outstanding liens: \$_____ Lienholder: _____.

(Any difference between the outstanding amount shown and the actual payoff to the lienholder will be credited to the consignor.)

Repairs to be made: \$_____ Work Order #_____.

Moneys to the consignor: _____ percent of sale price, flat fee of \$_____ or the following specific formula: _____.”

(5) “Within 20 days after sale, the consignee shall make an accounting to the consignor of all of the following: date of sale, repairs authorized by consignor (supported by work records), exact amount of any liens payable to lienholders, evidence of payment of any liens, and the total sales price.”

(6) “The consigned vehicle is delivered to the consignee in trust for the exact terms set forth in this agreement. The consignee agrees to receive this vehicle in trust and not to permit its use for any other purpose other than contained in this agreement without the express written consent of the consignor.”

(7) “Upon payment of the moneys due the consignor, the consignor agrees to furnish the consignee those documents necessary to transfer the ownership of the vehicle to the purchaser.

Signatures:

Consignor Date

Address

Consignee Date

Address

(8) “NOTICE TO CONSIGNOR: Failure of the consignee to comply with the terms of this agreement may be a violation of statute which could result in criminal or administrative sanctions, or both. If you feel the consignee has not complied with the terms of this agreement, please contact an investigator of the Department of Motor Vehicles.”

Note – section [11730](#) does not prohibit a dealer from adding additional terms to a consignment agreement. It merely sets forth minimal requirements. When drafting a consignment agreement, we suggest seeking the assistance of knowledgeable counsel. Additional items that would be wise to address in the agreement include:

- Fee for a vehicle safety inspection – if the consignor will be charged a vehicle inspection fee, state the amount of the fee, whether the fee is contingent upon a successful sale, and when the payment will be due;
- Payment for repairs deemed necessary by dealer – if repairs are necessary, state (1) the process for procuring the consignor’s consent, (2) what happens if the consignor does not consent, and (3) if the consignor does consent, whether and when the consignor will be charged for the repairs regardless of whether the vehicle is successfully sold;

- Insurance requirements – state whether the consignor or the dealership will insure the vehicle while it is in the dealer’s possession and state which policy will be considered the primary policy in the event of a claim;
- Arbitration – include an arbitration clause requiring that in the event of a dispute, the dispute will be decided by arbitration and not in court.

Vehicle Appraisal

[Vehicle Code § 11730\(b\)\(4\)](#) requires the consignment agreement to disclose the “current market value” of the vehicle and the source used to arrive at that value. Dealers are well advised to make sure the valuation is honest, particularly if the consignor is to be paid a flat fee. There are plaintiffs’ attorneys who advertise that they handle cases involving vehicle consignment fraud. These attorneys seek to represent consumers who were provided a lowball appraisal and then offered a flat fee for their vehicle, allowing the dealer to keep the difference between the actual selling price and the agreed-upon flat fee. To avoid such claims, use a reputable source for the appraisal and give a copy of the appraisal to the consignor.

Require an “Arms-Length” Sale

If the consignor will receive a percentage of the sales price, make sure the vehicle purchaser is a legitimate third-party purchaser. As you can imagine, if the dealer were to sell the vehicle to an affiliate, an employee or a family member at a low price and the purchaser were to resell the vehicle for a big profit, the consignor would likely claim the dealer has acted fraudulently.

Confirm Ownership of Consigned Vehicle

The consignment agreement prescribed by [Vehicle Code § 11730\(b\)\(7\)](#) requires the consignor to provide the title, or “those documents necessary to transfer the ownership of the vehicle” upon payment of the monies due. Obviously, waiting until a buyer has paid the purchase price is a bit late to find out whether the consignor has authority to sell the vehicle. Prior to accepting the vehicle for consignment, the dealer should confirm the consignor is the sole owner of the vehicle, and that he or she has the right to enter into the consignment agreement and subsequently transfer the vehicle without authorization from any other party. Review the vehicle’s title and registration, if available, and run a KSR.

Consignment of New Vehicles is Prohibited

Consignment sales are limited to used vehicles. It is unlawful for a franchised new vehicle dealer to consign a new vehicle for sale to another dealer [[Vehicle Code § 11713\(q\)](#)], whether or not the dealer is a broker.

21-Day Payoff Rule Does Not Apply to Consignments

When a dealer purchases a vehicle or obtains a customer’s trade-in, [Vehicle Code § 11709.4](#) requires the dealer to pay off the lienholder within 21 days of acquiring the vehicle. That rule, however, does not apply when a dealer holds a vehicle on consignment. Although the dealership is in possession of the vehicle, it does not own the vehicle while it is being offered for sale, so the dealer is not required to pay off the prior credit or lease balance until after the vehicle is sold. [See [OLIN 2010-4](#)]

Follow Regular Procedures for Used Cars

Under [Vehicle Code § 520](#), a consignment sale is considered a “retail sale.” Therefore, with the exception of the 21-day payoff rule described above, all the usual requirements applicable to retailing a used vehicle still apply in the case of a consignment:

- **Smog and safety and requirements:** The vehicle must comply with [Division 12 of the Vehicle Code](#). Also, unless the vehicle is exempt, it must be smog certified prior to offering the vehicle for sale [[Vehicle Code §§ 4000.1; 24007](#)];
- **NMVTIS:** Obtain a NMVTIS vehicle history report prior to offering the vehicle for sale [[Vehicle Code § 11713.26](#)];
- **Buyers Guide:** Federal and state laws require that a dealer display and provide a Buyers Guide on every used motor vehicle having a gross vehicle weight rating (GVWR) of less than 8,500 lbs., a curb weight of less than 6,000 lbs., and a frontal area of less than 46 sq. ft. [[16 Code of Federal Regulations, Part 455](#); [15 United States Code § 45](#); [16 Code of Federal Regulations § 1.98](#); [Vehicle Code § 11713.1\(t\)](#)]. This excludes most RVs. The Used Car Rule governing Buyers Guides applies to consigned vehicles [See Dealer’s Guide to Used Car Rule:

<https://www.ftc.gov/tips-advice/business-center/guidance/dealers-guide-used-car-rule>];

- **Contract Cancellation Option Agreement (CCOA):** If the selling price is under \$40,000, offer a CCOA [\[Vehicle Code § 11713.21\]](#).

In addition to the above requirements, follow your usual best practices for retailing used vehicles:

- Have the consignor complete a disclosure form similar to the Reynolds and Reynolds "Trade/Purchase Disclosure Form" [\[LAWCA-96135\]](#);
- Run a vehicle history report, have the buyer of the consigned vehicle sign each page, and provide a copy to the buyer; and
- Disclose in writing to the buyer of the consigned vehicle any important and/or required history information as well as any known information regarding prior accidents/material damage.

Registration and Sales Tax

After a buyer agrees to purchase the consigned vehicle, the consignor transfers the vehicle to the dealer, who in turn transfers the vehicle to the buyer. The selling dealer completes a Report of Sale-Used Vehicle (REG 51) [see [Vehicle Industry Registration Procedures Manual § 2.020](#)] and collects and reports sales tax in the same manner as for any other sale [See [CDTFA Publication 34](#), page 11].

Questions?

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