



# Montana Automobile Dealers Association

MAY 2018 NEWS BULLETIN

## PRESIDENT'S MESSAGE:

### 2nd Annual Clay Shoot & BBQ Highlights

Monday, May 14, in correlation with the MTADA Board meetings, we hosted the 2nd Annual Clay Shoot & BBQ. With over 40 people in attendance, it was a great time to network and bond with some of the MTADA Associate Members over guns and BBQ. We also had three of the candidates for the open senate seat come out! Next year we hope to make this a much larger event so please keep your eyes out for the invite! We hope to see you all next year! ■

*Eric Henricksen is the owner of Don Aadsen Ford in Ronan, Montana*



**Eric Henricksen**  
MTADA President



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and more!	

## DIRECTOR'S MESSAGE:

### Grounding All Recalled Used Vehicles Devalues Trade-Ins S. 1634/H.R. 3449 Would Reduce Buyers' Trade-Ins by an Average of \$1,210

Franchised auto dealers play a vital role in ensuring that recalled vehicles are fixed, but dealers cannot repair vehicles until the manufacturer provides the required remedy and parts. From 2010 to 2014, the average delay for parts to fix a recalled vehicle was 60 days.

Sen. Richard Blumenthal (D-Conn.) and Rep. Jan Schakowsky (D-Ill.) introduced bills that could cripple the used car market by halting the sale or wholesale of any used car under open recall by a dealer. These bills are overbroad because most recalls do not require the drastic step of grounding. Also, these bills would create a "trade-in tax" that would instantly devalue a car buyer's trade-in by grounding recalled vehicles for such minor matters as a peeling sticker. The bills would also push recalled cars into the unregulated private market, making it more difficult to complete recall repairs.

S. 1634 (Blumenthal) and H.R. 3449 (Schakowsky) would

prevent dealer sales of all used vehicles under open recall (but not private sales).

A 2015 study by J.D. Power found that enactment of these bills would result in an average "trade-in tax" of \$1,210, and some consumers' trade-ins would incur devaluations of \$4,000 to \$5,000. These bills would prevent car buyers from purchasing recalled vehicles for such minor matters as an incorrect phone number in the owner's manual. Proponents of these bills have offered no supporting safety analysis, despite the estimated \$1.1 billion cost to consumers if these measures were enacted. In the last Congress, the Senate Commerce, Science, and Transportation Committee rejected this legislation when it was offered as an amendment to the 2015 highway reauthorization bill.

■ **These bills would make it difficult for car buyers to trade in vehicles with open recalls and harder for**



**Don Kaltschmidt**  
NADA Director

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## CHAIRMAN'S MESSAGE: S.J. Res. 57 Passes

On May 21, President Donald Trump signed into law S.J. Res. 57 – a measure passed by Congress to reject a Washington bureaucracy's rule which could have eliminated the ability of car dealerships to discount loans for their customers.

"This is a great day for consumers, as Congress and the President have helped to preserve their ability to receive auto loan discounts from local dealerships," said NADA President and CEO Peter Welch. "NADA congratulates the U.S. House and Senate for their focus and perseverance on this issue, and the President for signing the new law to protect consumers."

NADA supported this bipartisan effort that began years ago, after the Consumer Financial Protection Bureau (CFPB) issued "guidance" to auto lenders in 2013. Based on a flawed approach and without any opportunity for public comment, the CFPB threatened to make it impossible for local dealerships to discount loans for their customers. House Financial Services Committee Chairman Jeb Hensarling (R-Texas) issued a number of reports detailing the agency's actions.

Nearly 50,000 new cars and trucks are sold every day, and more than 85% are financed – with the large majority financed at the dealership. Dealerships often discount a rate for a customer – for example, to meet or beat a competing loan offer or meet a customer's monthly budget constraint.


The CFPB's guidance could have ended these discounts by pressuring auto lenders to eliminate discountable loans, and that approach would have increased the cost of auto credit for consumers everywhere.

Fortunately, the new law, sponsored by U.S. Sen. Jerry Moran (R-Kan.), U.S. Rep. Lee Zeldin (R-N.Y.), and prompted by U.S. Sen. Pat Toomey (R-Pa.), disapproved the CFPB's guidance, helping to preserve loan discounts for consumers who need affordable cars and trucks. ■

Source: Jared Allen, NADA, Senior Director of Media Relations



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## LEGAL UPDATE

### Is It a Contract or a Loan? *(Does it really matter?)*

Sales and F & I folks are often heard discussing a “loan” for the pending vehicle purchase – new or used - with the customer. The question arises is the customer financing being discussed with the customer really a loan? If not, what is it? Does it really matter? You may find the answer surprising.

The transaction is actually a Retail Installment Contract, often described as a RISC, between the dealership and the customer. The dealership is not involved in loaning any money to the customer, agreeing only to sell the vehicle on credit on installment payments which include a finance charge to compensate the dealership for agreeing to be paid over time. As explained below, interest is the charge levied for use, forbearance or detention of money. It is the providing of money at interest that creates a “loan.” As between the dealership and the customer, the dealership does not provide the customer any money. After the RISC is signed by the customer and the dealership, it is sold or assigned to a finance source, but this step in the transaction does NOT create a loan between the customer and the financing source. The dealership simply assigns or sells its right to collect the payments from the customer to the financing source for a cash payment.

This distinction is important because “loans” are subject to usury laws which regulate the amount of interest that can be charged. A Montana statute defines interest as ‘the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money.’ Loans are regulated in many other ways as well. A RISC, on the other hand, does not involve “the use, or forbearance, or detention of money.” The finance charge contained in the RISC reflects the “time price differential” included in the cost of goods purchased on credit and paid for in installments.

Montana law recognizes the distinction between the two different types of transactions. In 1959, Montana adopted a Retail Installment Sales Act containing finance charge limitations for covered retail installment transactions which allows finance charges in excess of the maximum interest rate permitted under the general usury statute. (Mont. Code Ann. §31-1-231).

The Act generally covers sales of goods and services by retail sellers to retail buyers pursuant to installment

transactions. It covers in detail the requirements, prohibitions, and contents of such contracts, imposes ceilings on finance and service charges, and provides the method of computation of finance charges.

The distinction between interest charged on loans and the finance charge provided for in a RISC was lost on a State Court District Judge who ruled in Cecil vs. Allied Stores Corporation 162 Mont. 491, 513 P2d 704 (1973) that the finance charges authorized by the Act constituted interest. The Montana Supreme Court reversed the District Court holding that the the finance charges permitted by the Act are time price differentials included in the price of goods purchased on credit and payable in installments, and as such are not subject to constitutional or statutory limitations on interest rates.



R. J. "Jim" Sewell, Jr.  
MTADA General Counsel

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## Legal Update CONTINUED FROM PAGE 4

The Court went on to explain the history of “time price differential.” The explanation helps put the issue in the proper perspective. The Court said:

The time price doctrine exempting bona fide sales from maximum interest rates has been firmly embedded in the common law of England since the eighteenth century. It has likewise been a firmly established rule of law throughout most of the United States for over 100 years, the United States Supreme Court having recognized it in 1861 in the leading case of *Hogg v. Ruffner*, 66 U.S. (1 Black) 115, 17 L.Ed. 38. It is an exception to usury prohibitions because there is no loan of money. Perhaps the best summary statement of the time price doctrine is found in the following statement from 6 Williston, Contracts, s 1685, (Rev.Ed.1938):

*‘The statute of Anne applied only to a loan or forbearance of money, and in the construction of this statute it was held that where property was sold, even though the contract provided*

*in terms for the payment of a fixed price payable in the future with interest at a greater rate than that allowed by the statute, the transaction was, nevertheless, not usurious since everything the buyer promised must be deemed consideration for the sale of property, not interest on a loan or forbearance of money. In the United States like statutes have been similarly construed, so that where property is sold the parties may agree that the price, if paid after a certain time, shall be a sum greater by more than legal interest than the price payable at an earlier day; and though the difference between an agreed price for cash and that for credit is in terms stated in the form of interest at greater than the legal rate, the contract is not usurious.’*

In most jurisdictions in the United States a time price sale is beyond the ambit of usury limitations simply because interest is not involved and the usury laws apply to loans and not to sales contracts.

**There you have it! ■**

**FOR MORE INFO:**  
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**Wes Lutz**, NADA New Chairman, *How the NADA can serve and represent the franchised new-car and -truck dealers of America.*

**Jason Volny**, National Training Manager, DrivingSales, *Human Capital Management and how it can amplify the growth of future leaders in your dealerships.*

**Erik Chase**, Franchise and Dealership Attorney, Bressler Amery Ross, *Top 10 Legal Trends for Auto Dealers in 2018.*

### ACTIVITIES:

- Annual President's Banquet with Legislators from Helena and Washington D.C.
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## Director's Message

CONTINUED FROM PAGE 2

**consumers to afford a newer, safer vehicle.** Because of a shortage of auto parts, it can take months for recalled vehicles to be repaired. As a used vehicle depreciates on average 2 percent a month sitting idle on a dealer's lot, this bill would force dealerships to pay consumers significantly less for trade-ins with open recalls, or not accept them at all.

- **The National Highway Traffic Safety Administration admits that not every recall warrants the vehicle's immediate grounding, yet these bills would diminish a recalled vehicle's trade-in value by an average of \$1,210.** Many car buyers rely on the value of their trade-in as part of their down payment for their new vehicle.
- **Unrepaired vehicles will be pushed into the unregulated private market.** Faced with devalued trade-ins, vehicle owners will have an incentive to sell their vehicles in the private market, making it even less likely that recall work will be done in a timely manner, if at all.

S. 1634 was referred to the Senate Commerce, Science, and Transportation Committee and has 1 cosponsor. H.R. 3449 was referred to the House Energy and Commerce Committee and has 5 cosponsors. Congress should focus on legislation that increases recall completion rates, and oppose proposals that create a "trade-in tax" on millions of customer trade-ins while not guaranteeing that a single, additional recalled vehicle gets fixed.

## WHY MANAGE YOUR INVENTORY THE HARD WAY?

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## IT Security Tip: An Easy Way to Protect Your Passwords

**Erin Dickey**  
IT Services Director  
DIS Technologies

One of the most notorious spyware/malware targets is your keyboard! Keylogger software has been around for ages. The longtime favorite of electronic crooks, keyloggers are easily distributed by the bad guys via many of the security breaches about which you've been hearing. The keylogger does just what it sounds like – it logs every key that you type, and then sends a log of all the keystrokes back to the attacker. How many passwords, account numbers and other sensitive data do you type daily? These are all valuable on the black market.

Luckily, there's an easy way you can make sure sensitive passwords and data are safe from these keystroke-stealing criminals – use the on-screen keyboard when entering sensitive passwords, social security numbers or other data. Your computer will see the on-screen keyboard taps as mouse-clicks instead of keyboard input. Banks are making on-screen keyboards more accessible to their clients because of the added security over traditional keypads and keyboards. This simple change in habit could prevent complex problems in the future.

Would you like to know more about IT security strategies? Download our free report, **The 7 Most Critical IT Security Protections Every Business Must Have In Place Now To Protect Themselves From Cybercrime, Data Breaches And Hacker Attacks.** ■

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## DEALER'S CORNER

### Jim Sewell Re-elected to National Association of Dealer Counsel

R. J. "JIM" SEWELL, JR., Of Counsel to Smith Law Firm, P.C. in Helena and MTADA General Counsel since 2004, was re-elected to a second 3-year term on the Board of Directors of the National Association of Dealer Counsel (NADC) last month during the organization's spring meeting in Naples, Florida. Sewell has been a member of the Association since 2006. The NADC, organized in 2004, is a nationwide professional organization of attorneys who represent motor vehicle dealers. The NADC sponsors twice yearly conferences on dealer related legal topics and provides a forum for members to share information, common experience, and advice related to state and federal legislative and regulatory matters, manufacturer dealer relations, vehicle finance, insurance, tax, buy/sell agreements, real estate acquisition and development and the myriad of other legal issues facing dealers today. ■



### American Fidelity Hires New Rep for Montana

Katie Hensel has been in the Insurance Industry for 16 years and has worked in numerous capacities as a claims adjuster, an underwriter and marketing. Her previous employers include Kemper Insurance, Travelers insurance, and Austin Mutual Insurance. She was relocated to Bozeman, Montana in 2007 from Milwaukee, Wisconsin where was the Marketing Representative for Kemper Insurance and handled the entire state of Montana.

Katie grew up in Wauwatosa, Wisconsin and attended the University of Wisconsin-Milwaukee where she received a BFA in Jewelry and Metalsmithing. She traveled and resided in Paris, France for ½ of a college semester. While in Paris, she and her classmates visited numerous museums and had private tours of some famous metalsmithing companies such as Christofle in Paris, France and Georg Jensen in Copenhagen, Denmark.

She is a highly motivated, self-directed professional with an extensive background managing growth and expansion within assigned territories. She has a proven track record with managing high portfolios and working effectively to produce profitable results. Builds and maintains strong client relationships as well as strategic relationships with internal and external partners including agents, agency partners and internal team members. She utilizes effective negotiation skills to manage policy terms and conditions, ensuring compliance with company policies and procedures and all applicable regulatory standards.

She is excited to be working with American Fidelity Assurance Company and is looking forward to assist clients in creating a more secure future for themselves and their loved ones.

For more information please feel free to check out her LinkedIn profile at <https://www.linkedin.com/in/katiehensel/> ■



# Negotiation & Consumerism in Healthcare When Reference Based Pricing Works

More than ever we see companies who are looking to self-fund their health plans rather than spending another year dealing with the more traditional, fully-insured model. Employers have grown tired of sending their premium dollars to insurance companies without knowing the burden of risk that really fell between their insurance premium and the insurance company profit.

While premium increases continue to move full steam ahead, many companies are deemed 'too small' to assess the data that would provide the justification for an annual increase. We hear things like 'trend' and 'pool' and 'experience,' but often employers are left scratching their heads over how it all calculates while they again, adjust their budget to stretch it a little more... and a little more...

As companies look for a way to migrate to a self-funded model, they must quickly familiarize themselves with their own ability to contain costs. With the right consultant and third party administrator, we can find cost saving solutions in a variety of programs designed with the bottom line in mind. But sometimes even with a telemedicine model, concierge medical tourism benefit, and even an HSA contribution, we still see the impact of the rising cost of healthcare permeating the company finances by thousands or more each year.

This is where reference based pricing (RBP) comes in, and why businesses are looking to take the big leap into a negotiable environment with healthcare providers all over the country.

We all know that the cost of healthcare has finally reached the far corners of what can be considered financially acceptable. We knew that as methods of treatment were advancing, the cost associated with newer and more effective medicine would rise along with the tide. Although this evolution of medicine helps us tackle chronic conditions and can even prevent catastrophic illnesses, it has become near impossible for a company to continue to afford the price tag on the health of their employees. So how do we use RBP to tackle the rising costs?

Everything has a markup – what is produced for a dollar is often sold for ten, and healthcare works in the same way. In the United States we have very little reference when it comes to dictating a fair price for a medical service, but what we do have is Medicare. For those enrolled under the government Medicare program, the costs of services are pre-determined by Medicare using the Resource Based Relative Value Scale (RBRVS), which is universally recognized by providers and facilities as an acceptable cost for services. RBP uses this determination of cost to settle a bill with the provider either before or after medical interaction. In nearly all cases, the ability to negotiate a bill for services will result in a far bigger savings than even your PPO network discount agreement could provide.

Reference Based Pricing doesn't just negotiate those claim markups and save the company money – a good RBP vendor will have protections in place for members as well. If those balance bills should hit, they provide support and even litigation to entirely remove the member from the situation. Bringing on an RBP model also has an interesting side effect of giving the power of consumerism back to the employer. They become a part of the process as educators to employees because RBP cannot be successfully implemented without a stiff conversation between management and staff.

Continued on **NEXT PAGE**



**By Emma Passe**  
Communications Manager  
EBMS

## Educating Your Members Begins with You

The Montana Automobile Dealers Association has partnered with EBMS to provide you and your employees with a variety of resources to keep you physically and financially well on your journeys. So pass it on! Consider sharing this information with your employees so you can empower them to be their healthiest selves. After all, a healthy workforce means a healthy business.

**Healthcare** CONTINUED FROM PAGE 11

In order for RBP to take off, your employees have to know what you plan to do and how their role within this new system is going to work. Transparency is paramount. Discussing the cost of healthcare, not only as a generalization and nationwide problem, but as a day-to-day strain on the company's finances will allow your employees a tangible example of what benefits they truly receive. Often we talk about the total compensation package, but how many of your employees know what your actual healthcare spend is? Do you think they'd be surprised to find it might be in the millions? Or multiple millions?

Employees need to take a front row seat in this too. And if there was ever a reason that RBP wouldn't work, it's because they are not well enough prepared to know how reference based pricing works or haven't been properly shown how to participate in the process. Meetings need to be held – your consultants, TPA, and RBP vendor should all be in attendance to present the method in which your company is going to save its healthcare budget. It's important to provide real life examples of what a good negotiation looks like, but also what a refusal to negotiate costs and what members need to do when the balance bills arrive in their mailbox. They need to know that there is protection in place for them as individuals and consumers. Without these assurances, members will fail to enroll, or fail to engage, leaving you with a population of people who are too scared to seek out services for fear of what will and won't be covered, and what will be left as their burden of cost.

When employees are well educated and appropriately prepared, companies can realize more than a 50% savings on all facility claims that come through their doors. Hospitalizations, surgeries, births, all get negotiated down to a percentage of what Medicare would find acceptable for the same service. And even if a provider settles on 250% of Medicare's allowable, amazingly you're still looking at slashing the cost by half since medical mark-ups can easily and often exceed 600% of Medicare. Can you imagine what, that can save your organization? If a surgical bill is \$100,000 and your RBP partner negotiates that down to just \$45,000, and then continues to realize similar savings for all other facility claims for a year, what would your budget look like at renewal?

A friend of mine, Mark Guanya, says: "Insurance is expensive because healthcare is expensive". And until the costs of healthcare subside, employers need to start looking for cost containment solutions that put them in the driver's seat. Reference based pricing is not just an incredibly effective tool to reduce your claim costs; it's the ability to call out the cost of services as being unjust when they are. ■





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