UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

BILLY COOK and
BARRY KUPERMAN

versus

POWELL BUICK, INC.,
HUB CITY FORD, INC., and
LOUISIANA AUTOMOBILE DEALERS
ASSOCIATION, INC.

CIVIL ACTION NO. 94-1730

JUDGE WALTER

MAGISTRATE JUDGE PAYNE

FINDING AND RECOMMENDATION

The plaintiffs in this action contend that the automobile dealerships named as defendants, the Louisiana Automobile Dealers Association ("LADA") and all other automobile dealerships that are members of the LADA entered an agreement to add an ad valorem tax charge to the retail sales price of virtually all new vehicles sold in this state from January 1, 1988 to present. Plaintiffs contend that by entering this agreement, the defendants engaged in a price fixing conspiracy in violation of §1 of the Sherman Act. Plaintiffs also assert state law claims based on fraud and unjust enrichment. The defendants deny the existence of a price fixing agreement and contend that the challenged conduct was undertaken in compliance with certain state statutes and regulations which pertain to the ad valorem tax. Before the court is the defendants' motion for partial summary judgment as to the antitrust claims, and the plaintiffs' motion for certification of a plaintiff class and a defendant class. As the factual and legal issues presented by

(107)

the motions are interrelated, both are addressed in this report and recommendation. The court has received the benefit of extensive briefing from the parties, testimony and evidence presented at the hearing on the motion for class certification on September 11, 1995, and voluminous submissions of written exhibits, including depositions, affidavits and sales documents from the dealerships. For the reasons which follow, the court recommends that the defendants' motion for partial summary judgment be denied, and that plaintiffs' motion for class certification be granted.

(I) MOTION FOR PARTIAL SUMMARY JUDGMENT

(A) FACTUAL BACKGROUND

(1) Nature of the Ad Valorem Tax

A discussion of the nature of the ad valorem tax is an appropriate prelude to consideration of the factual and legal issues raised by this case. This is particularly so because a major aspect of this case has to do with the sale of automobiles, and it is possible when these two subjects (ad valorem taxation and vehicle sales) are discussed together to develop the impression that ad valorem taxes are assessed on vehicle sales, in some form or another. Actually this is not the case.

An ad valorem tax is a property tax. Because the type of property at issue in this case is the inventory held by automobile dealerships, the term "ad valorem tax" will be used interchangeably with the term "inventory tax." The Louisiana Constitution of 1974 ("La. Const.") authorizes parish and municipal ad valorem taxes, subject to certain millage limitations. La. Const., Art. VI, §§26-

27. The state constitution further provides that "[p]roperty subject to ad valorem taxation shall be listed on the assessment roles at its assessed valuation, which...shall be a percentage of its fair market value," and requires that the percentage of fair market value be uniform throughout the state. Id., Art. VII, §18. The tax is assessed on an annual basis, and the fair market value of a business inventory for annual assessment purposes is the average value of the owner's inventory "during the year preceding the calendar year in which the assessment is made...." La. R.S. 47:1961.

We now narrow our focus to the manner in which the tax has been assessed on the inventories of automobile dealerships. Prior to 1988, the procedure for determining the amount of the inventory tax owed by automobile dealers was the same as that applicable to all businesses holding taxable inventory. As explained by E.W. Leffel, a property tax specialist who has been employed by the Louisiana Tax Commission since 1967:

> The typical, general business would give you an opening and closing inventory value from their books, and you would average by two. If you had a mid-year inventory, you would average by three. Some types of businesses, if they had a highly volatile inventory level throughout the year, may use a monthly average.
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> . . .
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> Any business's inventory assessment would be computed by taking the average inventory and multiplying the constitutionally fixed fifteen-percent rate times that to determine the assessed value for inventory.
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> Leffel dep. (JE-1) at 24, 25

Once the assessed value is determined in this fashion, the amount of the tax then depends on the millage assessed by the local government. Id.

(2) Collection Problems

One problem with this approach for businesses with a large turnover of inventory, such as automobile dealerships, was difficulty knowing in advance how much inventory tax would be due for a particular year. No advance or estimated payments were made during the course of the year, so a dealer might find itself in a position of owing an unexpectedly large sum in a single payment. Leffel dep. at 32-33. In 1987, the LADA, with the support of its dealer members, conceived, drafted and lobbied for House Bill 994, which provided for "monthly remittance of ad valorem tax on motor vehicles." The bill passed the Legislature as Acts 1987, No. 453, was signed by the governor and became effective January 1, 1988. It was codified as R.S. 47:1961.2. Subsection A of §1961.2 contains the following statement of purpose:

> The legislature does hereby find and declare that the collection of the ad valorem taxes on motor vehicles...held in inventory, which are due and payable annually, can be better facilitated if such taxes are identified, computed and collected in advance on a monthly basis.

In order to facilitate monthly collection, the Legislature enacted the provision that is the centerpiece of this controversy, §1961.2.C(1), which, until its recent amendment in 1995, provided in pertinent part that:

> In order to accomplish and facilitate monthly collection of the ad valorem taxes due, each motor vehicle dealer...shall identify the applicable percentage of ad valorem taxes on each motor vehicle...sold that month and shall remit a sum equal to that amount to the sheriff or tax collector in each parish pursuant to a formula and on a form prepared and promulgated by the Louisiana Tax Commission.

As of January 1, 1988, then, each dealer was required to identify for each sale of a vehicle "the applicable percentage of ad valorem taxes" owed for the vehicle. The "applicable percentage" is an estimate of the ad valorem tax owed for the vehicle, calculated according to a formula prepared by the Tax Commission. The estimated amount is essentially an escrow amount for the inventory tax; it is not an amount "due" on the sale, because the inventory tax obligation exists independently of sales. Taxes are eventually owed even on those vehicles that are not sold and remain in inventory at year's end. At the end of each month, the total sum of ad valorem tax estimates for all vehicles sold during that month is remitted to the tax collector. During the year, each dealer makes twelve such payments of estimated ad valorem taxes, which by analogy serve a similar function to quarterly estimated income tax payments made by individuals. Leffel dep. at 32-33. Then, when the dealer receives his annual ad valorem tax bill, showing the amount actually owed based on the average value of his inventory during the preceding year, he is able to determine whether his estimated payments exceed the amount owed (in which case he receives a refund or credit) or whether he

owes additional amounts. See R.S. 47:1961.2(D).[1]

(3) The Ad Valorem Tax Appears on Customer Invoices

Were we to end the narrative at this point, with the enactment of the 1988 legislation, there would be little reason for controversy. The Legislature's provision for the payment of estimated monthly ad valorem taxes through the means described above would appear to serve both the interests of the dealers, by enabling them to avoid a large tax liability at the end of the tax year, and the interest of the taxing authorities in better assuring that what is owed is regularly collected. However, in a sense this controversy begins rather than ends on January 1, 1988, when the new statute took effect. Since that date, most Louisiana dealers have shown the ad valorem tax estimate for each vehicle sold as a separate charge on the customer's invoice that is added to the sales price of the vehicle.

The dealers contend that by separately identifying the ad valorem tax estimate on each invoice in this fashion, they are simply complying with the statute. They also argue at length that there is no law which prohibits them from "passing through" their expenses for ad valorem taxes to buyers, just as they "pass through" other items of overhead expense. Plaintiffs, on the other hand, contend that the LADA and the dealers, acting under the guise of complying with a law that was merely designed to facilitate

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[1] In 1991, §1961.2(D) was amended to provide that any overpayments, rather than being refunded, are to be apportioned by the sheriff or tax collector "among the taxing bodies for which he collects."

payment of estimated taxes, entered an agreement to raise vehicle prices by adding the amount of their estimated tax payments to the sales prices of all vehicles sold. Plaintiffs contend that this agreement violated §1 of the Sherman Act, and it is that contention which is the target of the defendants' motion for partial summary judgment.

(4) Late Breaking Developments

More will be said regarding the respective positions of the parties in the Law and Analysis Section. At present, we return to the chronology of factual events which, in this case, extends past the filing of suit. In reaction to the allegations made in this lawsuit and in a parallel state court proceeding,[2] the LADA lobbied for an amendment to §1961.2(C)(1) which was adopted by the state legislature during the 1995 legislative session. Act 170 of 1995 amends the statute as follows:

> In order to accomplish and facilitate monthly collection of ad valorem taxes due, each motor vehicle dealer...shall identify on the bill of sale or purchase agreement as a separate element of the retail sales price of the vehicle the applicable amount of ad valorem taxes on each each motor vehicle... sold that month...(emphasis added)

Section 2 of Act 170 states that "[t]his Act is interpretive in nature and is intended to clarify legislative intent and shall be given retroactive interpretation." In urging their entitlement to summary judgment, the defendants rely on both the 1995 amendment and the wording of the statute as enacted in 1988.

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[2] Ghoram v. Louisiana Automobile Dealers Association, No. 94-11136, Civil District Court for the Parish of Louisiana.

(B) LAW AND ANALYSIS

(1) Nature of the Alleged Anticompetitive Conduct

It is appropriate to emphasize at the outset two matters that are not at issue. There is no dispute that the dealers have the right to recoup amounts that they must pay for ad valorem taxes by taking those charges into account when determining the sales price of the vehicle. In that sense, ad valorem taxes do not differ from any other overhead expense. Plaintiffs do not argue to the contrary.[3] Secondly, it is not contended by plaintiffs that the dealers' practice of separately identifying the estimate of the ad valorem tax for each transaction on vehicle sales invoices, in and of itself, is illegal or inappropriate.[4] While the defendants devote much attention in their briefs to justifying these two actions, their right to engage in that conduct is not disputed.

Instead, the heart of plaintiffs' Sherman Act claim is the alleged "add on" practice. Because the commonly utilized terminology in this area is often imprecise, the "add on" practice, and the reasons why plaintiffs contend that it is actionable under

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[3] See Plaintiff's Original Memorandum in Opposition to Motion for Summary Judgment ("Opp. Mem.") at 2 ("Plaintiffs agree that inventory tax, like property tax on non-inventory items, utilities, salesmen commission, income tax of the dealer, and all other overhead items, are 'charged', 'collected', and 'passed on' to the consumer in the sale of the product.") (emphasis in original).

[4] Plaintiff's Opp. Mem. at 5 ("plaintiffs do not contest the identification of the ad valorem tax on an invoice nor on any other document"). Plaintiffs do contend elsewhere, in connection with their state law claims, that the manner in which the defendants have identified the tax on the invoice has been misleading. Those claims are not placed at issue by the motion for partial summary judgment, which addresses only the antitrust claims.

the antitrust laws, can best be understood by comparing two hypothetical automobile transactions.

In the first transaction, Customer "A" goes to the dealership and expresses an interest in a vehicle with a sticker price of $12,000.00. He offers to purchase the vehicle for $9,000.00. After some haggling, the parties mutually agree on a negotiated sales price of $10,000.00. The final amount plaintiff pays for the vehicle is $11,000.00, because in addition to the negotiated sales price of $10,000.00, he pays "add on" charges of $25.00 for ad valorem taxes, $925.00 for sales tax and $50.00 for tag, title and license fees. All of these "add on" charges are separately listed on the sales invoice.

In the second transaction, Customer "B" goes to another dealership and expresses an interest in purchasing the same vehicle as bought by Customer "A", sticker price $12,000.00. The parties again agree to a negotiated sales price of $10,000.00. However, the final amount paid by Customer "B" is only $10,975.00, because the "add on" charges are limited to sales tax ($925.00) and tag, title and license fees ($50.00). This dealership does not have an "add on" charge for the ad valorem tax. On the sales invoice, however, there is a statement that the dealer has allocated $25.00 for payment of estimated ad valorem taxes out of the $10,000.00 vehicle sales price.[5]

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[5] Rounded numbers are used in both hypotheticals to illustrate the "add on" concept. In practice, the amount of the ad valorem tax estimate for the two transactions would differ, at least slightly, since each estimate would be based on the amount in each dealership's inventory. Similarly, the amount of sales tax charged

As the court comprehends the pertinent state legislation, both of the foregoing scenarios are permitted under Louisiana law. Under both scenarios an ad valorem tax estimate is identified on the customer invoice, but only in the first case is that estimate added to the negotiated sales price. The gist of the plaintiffs' antitrust claim is not that, in every individual case, the first method is legally prohibited while the second method is required. Instead, the alleged antitrust violation is the agreement or conspiracy among the dealers and the LADA to pursue only the first practice, which we will call the "add on" approach. Among the harms to the competitive market which the plaintiffs contend are caused by the alleged agreement to "add on" the inventory tax are that (1) the typical automobile purchaser will almost always pay the higher price ($11,000.00 instead of $10,975.00); (2) the typical purchaser will believe that he has no choice but to pay an add on charge for the ad valorem tax (i.e., he will believe the charge to be non-negotiable); and (3) the dealer, at least in some cases, will "recoup" the cost of the ad valorem tax from the buyer

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in the second transaction would in practice be slightly less than in the first transaction, because ordinarily sales tax is calculated as a percentage of the sales price plus any ad valorem tax estimate added to that price. Finally, the court is aware of the defendants' position that because each automobile sale involves many variables, such as trade-in value, "add-on" charges for optional equipment, and so forth, it is incorrect to describe the ad valorem tax estimate as an "add-on" charge. That issue is discussed in connection with the motion for class certification, Section II(A)(1), infra. For present purposes, the examples given merely distinguish between a transaction where the ad valorem tax estimate is added to the negotiated sales price of the vehicle, and one in which that estimate is identified on the invoice, but not added to the sales price.

twice, once as part of the negotiated sales price of the vehicle (which includes overhead expenses, including the ad valorem tax), and once as an "add on" charge. In a nutshell, plaintiffs' complaint is that because of alleged concerted action on the part of the defendants, the Customer "A" scenario reflects the standard practice, and there are few if any dealerships in Louisiana where a purchaser can obtain a vehicle under the terms similar to those afforded to Customer "B" in the second hypothetical.

(2) State Action Exemption

With this understanding of the nature of the action, we turn to the specific grounds asserted by the defendants as a basis for dismissal of the antitrust claims. First, the dealers rely on the "state action" exemption, which provides that the Sherman Act does not apply where the challenged action "derived its authority and its efficacy from the legislative command of the state." Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943). In this case, defendants argue that "the legislative command of the state" is found in La. R.S. 47:1961.2(C)(1), both as enacted in 1988 and as amended in 1995. Defendants argue that the language in the 1988 statute which required dealers to "identify the applicable percentage of ad valorem taxes on each vehicle" impliedly required that the identification be made to the customer, since no other party would be concerned with the per transaction amount. They further argue that even if the 1988 statute was unclear as to whether the identification had to be made to the customer, the 1995 statute requires identification of the applicable amount of ad

valorem tax "on the bill of sale or purchase agreement as a separate element of the retail sales price...."[6] Since the Legislature specified that the 1995 amendment was interpretive in nature and should be retroactively applied, defendants submit that they have been compelled by law since January 1, 1988 (the effective date of R.S. 47:1961.2) to engage in the challenged practice, and are thus entitled to summary judgment under the state action exemption.

The flaw in the defendants' argument is that the "challenged practice," that is, the conduct alleged to constitute an antitrust violation, is not the practice of separately identifying the ad valorem tax estimate on the vehicle invoice. The challenged practice is the alleged agreement to add the tax estimate to the negotiated price. There is nothing in the statute, as enacted in 1988 or as amended in 1995, or in the other statutes and Tax Commission regulations cited by the defendants (see footnote 6, supra), which requires dealers to follow the Customer "A" hypothetical discussed above, rather than the Customer "B" hypothetical. No violation of any law would occur if the ad

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[6] Defendants also point to other statutes and regulations, enacted prior to the 1995 amendment, which in their view required them to identify the ad valorem tax estimate on customer invoices. These include La. R.S. 47:1961.2(E), which was amended in 1991 to provide that "[e]ach dealer shall keep a reasonable record of each transaction and the ad valorem tax charged for the transaction." Also, regulations promulgated by the Tax Commission require the dealer to remit to the tax collector "an amount equal to the total shown as a separate line item on sticker, purchase agreement and/or sales invoice as ad valorem...tax for all units sold during the month," and provide that "[u]nder no circumstances shall a dealer remit less in any month than the total that is collected on customer invoices."

valorem tax estimate were merely identified on the sales invoice, but not added to the negotiated sales price. Even assuming, then, that the 1995 amendment is subject to retroactive application, or that the statute as worded prior to the amendment, as well as applicable Tax Commission regulations, required identification of the estimate to the customer on the sales invoice or on some similar document (issues that it is not necessary for this court to resolve), there is no basis for concluding that the dealers were commanded by state law to engage in the practice of adding the ad valorem tax to the negotiated price of the vehicle.

Citing a two-tiered test set out in the Midcal and Southern Motor Carriers cases, the defendants argue that the state action exemption applies not only to conduct which is required by statute, but also to conduct which (1) is permitted by statute as part of a "clearly articulated and affirmatively expressed state policy" and (2) is "actively supervised" by the state. Southern Motor Carriers Rate Conference v. U.S., 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985); California Liquor Dealers v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). Defendants contend that the challenged conduct relates to an affirmatively expressed state policy because that conduct is a method of complying with the legal requirements pertaining to the monthly remittance of ad valorem tax estimates. As evidence that this policy is "heavily regulated" by the state, the dealers cite numerous statutory and regulatory provisions concerning the calculation, assessment and collection of ad valorem taxes, and the penalties imposed for non-

compliance.

Concerning the first step in this two-tiered analysis, the United States Supreme Court explained in Southern Motor Carriers that the state action exemption may indeed apply to anticompetitive conduct which is authorized, but not compelled, by a "clearly articulated and affirmatively expressed state policy." The exemption was applied in that case to collective ratemaking by common motor carriers which was "authorized, but not compelled, by the States in which the rate bureaus operate." 105 S.Ct., at 1723.

Two other examples of state-sanctioned conduct falling within the exemption, and cited by defendants, are DFW Metro Line v. Southwestern Bell, 988 F.2d 601 (5th Cir. 1993) and Woolen v. Surtran Taxicabs, Inc., 801 F.2d 159 (5th Cir. 1986). In DFW Metro Line, the exemption was applied to the defendant's decision to increase telephone line leasing rates charged to the plaintiff in accordance with regulations promulgated by the Texas Public Utility Commission. Because the rate increase was authorized by state regulations, the antitrust claim was dismissed. In Woolen, the exemption was applied as a basis for dismissal of the claim by the plaintiff taxicab drivers that they had been wrongly excluded from the outbound taxicab market at the Dallas/Ft. Worth Regional Airport, pursuant a finding that "the Cities...determined that the single operator concept would be used at the airport and solicited bids only on this basis...." 801 F.2d., at 164. The private defendants "were compelled to participate in the anticompetitive activity if they wanted to provide taxicab service at the airport."

Id.

However, the common ground in these and other cases finding a "clearly articulated and affirmatively expressed state policy" under the first prong of the Midcal-Southern Motor Carriers approach is a showing that the state authorized the challenged anticompetitive conduct itself. There has been no such showing in this case. For the purposes of the motion summary judgment, the court accepts the defendants' proposition that the applicable state statutes and regulations permit an individual dealer to "add on" an estimate of the ad valorem tax to the negotiated sales price (the customer "A" scenario) if it chooses to do so (on the premise that a practice not expressly prohibited by the statutory regulations is implicitly permitted). However, the unilateral decision of a dealer to engage in that practice is not the challenged anticompetitive activity in this case. The challenged activity is the alleged agreement of the competitor dealerships to add the tax to the negotiated sales price. Unlike the Southern Motor Carrier case, where the state regulations expressly sanctioned concerted action among competitors in the area of ratemaking, the record in this case provides no basis for concluding that the statutes and regulations pertaining to the ad valorem tax authorize (much less require) concerted action among the dealers to collect an estimate of the tax by adding it on the negotiated sales price.

The first prong of the Midcal-Southern Motor Carriers inquiry in this case, then, is whether there is a "clearly articulated and affirmatively expressed state policy" which authorizes the dealers

to agree among themselves that they will add the ad valorem tax estimate to the negotiated sales price of each vehicle. For the reasons stated, the defendants have not shown the existence of such a clearly articulated and affirmatively expressed policy.

Although the foregoing conclusion makes it unnecessary to further consider the state action exemption, it is noted that, for reasons similar to those discussed above, the defendants have not made the showing necessary to carry the second prong of the Midcal-Southern Motor Carriers inquiry, i.e., a showing that the state has engaged in "active supervision" of the challenged practice. This part of the inquiry looks to whether "the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." F.T.C. v. Ticor Title Ins. Co., 112 S.Ct. 2169, 2177 (1992). "Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." Id. This aspect of the inquiry "prevents the state from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." Southern Motor Carriers, 105 S.Ct., at 1729, quoting Midcal, 100 S.Ct., at 943. See also Hardy v. City Optical, Inc., 39 F.3d 765, 768 (7th Cir. 1994) ("Permission is not policy unless the state has a definite intention as to how the permission will be exercised and takes measures to see that it is exercised in the

intended fashion.")

As discussed above, the state has neither authorized nor required the dealers to agree among themselves to add the inventory tax estimate to the negotiated price. Accordingly, there is no basis for concluding that the defendants' alleged decision to engage in such an agreement is "a product of deliberate state intervention," as opposed to "a mere agreement among private parties." Ticor, supra, 112 S.Ct., at 2177. Another way of stating the same conclusion is that there is no basis for concluding that the state, through enacting the statutes and regulations at issue, intended "that the result will be an economic regime different from that of competition." Hardy, supra, 39 F.3d., at 768.

In summary, the defendants would be entitled to judgment as a matter of law under the state action exemption only if they could establish the applicability of both prongs of the Midcal-Southern Motor Carriers inquiry. As they have been unable to make the requisite legal showing as to either element of the two-part inquiry, summary judgment on the basis of the state action exemption is inappropriate.

(3) Merits of the Antitrust Claim

Defendants' next asserted basis for summary judgment is that even if the state action exemption is inapplicable, "the rudimentary elements of horizontal price fixing are glaringly

absent."[7] Although the court previously denied defendants' motion to dismiss the antitrust claim on the pleadings under Rule 12(b)(6) (see Order of 2/21/95, adopting Report and Recommendation ["12(b)(6) R&R"] dated 1/5/95), defendants now seek summary judgment on the ground that plaintiffs can present no evidence in support of their factual claims. Thus, we do not revisit the court's previous legal determination that "[a]n actual agreement among competitor dealerships to include an 'add-on' charge of any kind in the price that they will charge consumers" is "conduct which would normally constitute an illegal price fixing agreement and a per se violation of the Sherman Act." 12(b)(6) R&R at 7. Instead, we consider the defendants' contention that the extensive documentary record compiled through discovery reveals no credible evidence of such an agreement.

This is the type of summary judgment argument that might best be described as a "put up or shut up" motion. Merely by denying that there is evidence which supports the essential elements of plaintiffs' antitrust claim and moving for summary judgment, defendants shift the burden to plaintiffs to come forward with evidence that demonstrates a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed 2d 265 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1355-56, 89 L.Ed 2d 538 (1986). On the other hand, in order to avoid summary judgment,

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[7] Defendants' Original Memorandum in Support of Partial Motion for Summary Judgment ("Mem. in Support") at 23.

plaintiffs need only show that there is evidence which could lead a rational trier of fact to find in their favor. Matsushita, 106 S.Ct., at 1356.

There is extensive evidence in the record, including depositions, affidavits, minutes of LADA board of directors meetings, LADA monthly newsletters, LADA special bulletins and the records of individual automobile transactions. Much of the evidence surrounds LADA's efforts to obtain passage of La. R.S. 47:1961.2 in 1987 and its communications with the dealer members of the organization both before and after the passage of that law. There is similar evidence regarding the 1995 amendment of that statute, an amendment which the defendants acknowledge was prompted by this litigation. The defendants' position is that this evidence shows that LADA merely promoted laws that were in the best interest of its membership and, after the passage of the 1988 amendment, merely assisted its membership in understanding the change in the law and complying with its requirements. The defendants assert that (1) LADA's lobbying activities are exempt from the application of the anti-trust laws by the Noerr-Pennington doctrine, and that (2) LADA's efforts to assist its members in understanding and complying with the law cannot be construed reasonably as an agreement to fix prices.

The Noerr-Pennington issue does not require extensive discussion. That doctrine provides immunity for conduct associated with lobbying efforts by those who "petition the government for governmental action favorable to them...even though their petitions

are motivated by anti-competitive intent."[8] Video International Production, Inc. v. Warner-Amex Cable Communications, 858 F.2d 1075, 1082 (5th Cir. 1988). However, the plaintiffs do not seek to impose antitrust liability on LADA for lobbying efforts, either in connection with the initial passage of the subject legislation in 1987 or the 1995 amendment. Instead, they contend that the antitrust violation occurred after that law was adopted, when the trade organization and its dealer members allegedly entered a price fixing arrangement under the guise of complying with the 1988 legislation.[8] To be sure, the plaintiffs point to LADA's ongoing political efforts in the area of ad valorem vehicle taxation, both before and after the enactment of the 1988 legislation, as evidence of motive or intent for confecting the alleged price fixing agreement, but their claim is not based on LADA's lobbying activities.

Placing Noerr-Pennington to the side, we turn to the more substantial issue raised by this aspect of defendants' motion -- whether there is evidence from which reasonable jurors could infer the existence of a price fixing agreement. As to that issue, the following is a summary of the evidence upon which the plaintiffs rely in support of their conspiracy allegations.

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[8] See Plaintiff's Reply Brief in Opposition to Defendants' Motion for Partial Summary Judgment at 11 ("Plaintiffs have not sued Defendants on account of their 'petitioning' activities in the legislature. Rather, Plaintiffs' case is that the automobile dealers conspired with each other with the leadership and assistance of their trade association to add the ad valorem tax to the price of every car sold from 1988 forward.")

On July 9, 1987, Governor Edwards signed the legislation which, effective January 1, 1988, was to become R.S. 47:1961.2. Twenty days after the governor signed the new law, on July 29, 1987, LADA sent a confidential memorandum to its membership which stated in pertinent part that:

> On July 9, 1987, Governor Edwards signed HB 994 by Representative Leach. That is the bill which will allow you to pass the inventory tax on directly to the customer. Yes, careful reading of this bill discloses that the mandate is that "each motor vehicle dealer shall identify the applicable percentage of ad valorem taxes on each motor vehicle sold and shall remit a sum equal to that amount to the sheriff or tax collector in each parish." That means that your sales invoice to the customer will show the vehicle selling price, plus the inventory tax plus the sales tax. (emphasis added).

At LADA's Fall Business Conference, LADA's counsel made a presentation on the new law. Each Louisiana automobile dealer was encouraged to "have at least one key person present" to receive "long-awaited explanations of the new bill," and to "assist in carrying back the tabulated savings!" (LADA Newsletter, October, 1987). An audio cassette tape of this presentation was made, and one-hundred twelve copies of the tape were sold on site. In response to plaintiffs' discovery requests, the defendants have stated that they have been unable to locate a copy of the tape.[9]

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[9] Defendants also have been unable to locate copies of the minutes of certain LADA Board of Directors Meetings during this general time frame (September, 1986-January, 1987; March, 1987; June, 1987 through August, 1987 and October, 1987.) They have located and produced copies of the minutes of all other LADA board meetings between 1985 and 1995. The failure to produce these documents may give rise to a presumption that they would contain evidence adverse to defendants.

However, the November, 1987 LADA newsletter does contain further information concerning the new law, including the following:

> One of the most often asked questions about the new law has been "It makes sense to me, but what if my competitor doesn't do it?" Act 453 clearly states "To enact R.R. 47:1961.2, relative to ad valorem taxation; to authorize the monthly remittance and collection of that tax on certain motor vehicles....
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> We see no reason why a dealer would want to resist identifying the inventory tax the customers have always paid as part of the general sales price of the vehicle. Even though the tax will vary from parish to parish and, very slightly, from dealership to dealership, it will only range between $15 to $35 per car; hardly a competitive edge. There is no more reason for a dealer to offer to waive this tax than there is to pay the sales tax which is a much greater amount.
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> If an explanation to the customer is needed: "First it's the law, Act 453 of the 1987 Legislature." "Second, it has always been there, the state just makes us show it to you now, kind of like the Federal government makes us do with Excise tax on tires. We now have to break that out too."

In December, 1987, the month before the new act was to go into effect, LADA's newsletter instructed its members that as of January 1, 1988, the inventory tax for each vehicle sold "must be shown on the customers' buyers order and should be placed after the 'Price of the Vehicle' and before the 'Sales Tax.' This amount should be identified as 'ad valorem (inventory) tax.'"

In November, 1988, by which point the new law had been in effect for almost a year, the LADA advised its members through its newsletter that:

> You see before you the real dollars and cents evidence of what LADA can do for you.

> However, some elected officials and other merchants are jealous of your political stroke. Some would jump at the chance to undo our solution. That's what could happen if dealers don't follow the rules. If we get greedy, if we misrepresent, if we try to stretch a system which works when properly applied, we will lose it. Please follow the guidelines.

LADA's President, C. John Murphy, III, issued similar words of caution in a letter to the dealer/members dated June 29, 1989, which stated that:

> We always felt that if the dealers follow the rules and did not abuse the arrangement, we could hold the political front. Unfortunately, there are always a few who refuse to follow the rules. Be it greed, stubbornness, or lack of cooperation, those few have seriously endangered us all.

* * *

The dealers contend that the foregoing evidence, as further explained in the depositions of LADA officials and counsel, has nothing to do with a conspiracy to raise prices and instead supports the following conclusions. Prior to 1988, LADA had made extensive efforts on behalf of the dealers to abolish outright the ad valorem tax on motor vehicle inventories.[10] Business interests in general and automobile dealers in particular viewed the tax as unduly burdensome, regressive and unfair, not only to business but also to the consumers, who ultimately bore the burden of the tax by paying higher prices. According to LADA's counsel at the time of

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[10] In 1984, in large part through the lobbying efforts of the LADA, the Louisiana Legislature approved a constitutional amendment exempting motor vehicle inventories from the tax, but the proposed amendment was rejected by the voters in a statewide election held in November, 1984.

these events, Herschel Adcock, one of the main reasons the LADA pushed for the 1988 legislation was its belief that if the tax were identified on every vehicle invoice, the buying public would become more aware of its existence and impact on vehicle prices, and thus be more likely to support the next attempt to repeal the tax. Adcock dep. at 89. See also LADC Newsletter, March, 1987: "We will have a legislative proposal to shift the attention of the tax, focus on who really pays it and demonstrate how much it costs in dollars and jobs."

The LADA further submits that its communications to its membership in connection with the passage and implementation of the 1988 legislation served a legitimate purpose of helping to explain a complex new law to the dealers and to insure adequate compliance with that law. For example, the defendants point out that a significant amount of the information which the LADA provided to the dealers concerned the method of calculating the amount of ad valorem tax estimate for each transaction, a process linked to the amount of each dealer's inventory. Defendants also submit that the LADA's admonitions to the dealers to "follow the rules" had nothing to do with a price fixing scheme, but instead were designed to insure that all dealers obeyed the law and did not engage in practices (such as charging excessive amounts not based on the statutory formula) which would provoke a negative political reaction and lead to a repeal of the 1988 legislation.

At this point in the litigation, the court certainly cannot exclude the possibility that upon hearing all the evidence (with

the benefit of live testimony and the ability to make credibility determinations), reasonable jurors might reach some or all of the conclusions urged by defendants. On the other hand, the court also cannot exclude the possibility that reasonable jurors considering the same evidence might reach an entirely different set of conclusions, similar to the conclusions now urged by plaintiffs. In particular, since the 1988 legislation merely called for identification of "the applicable percentage of ad valorem taxes on each motor vehicle," reasonable jurors could conclude that the LADA had more in mind than explaining the law when it instructed dealers in July, 1987 that "your sales invoice to the customer will show the vehicle selling price, plus the inventory tax plus the sales tax," and when it again advised the dealers in December, 1987 that the inventory tax for each vehicle sold "must be shown on the customers' buyers order and should be placed after the 'Price of the Vehicle' and before the 'Sales Tax.'" As previously discussed, there is nothing in the "identification" requirements of the statute, as adopted in 1988 (or as amended in 1995), which requires any amount attributed to ad valorem taxes to be added to the sales price. Since the law imposed no such requirement, reasonable jurors could infer that the defendants entered such an agreement for the purpose of increasing vehicle prices.[11]

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[11] The defendants argue that LADA's instructions to dealers to add the ad valorem tax estimate to the sales price "before the sales tax" (December, 1987 LADA newsletter) were given simply in order to insure that the amount of the ad valorem tax estimate was included in the base amount subject to sales tax. See Adcock dep., p. 153. This argument seems to beg the question of why an ad valorem tax estimate has to be added to the sales price in the

Additional evidence which indirectly corroborates plaintiffs' interpretation of the evidence is the repeated reference in LADA documents to the expected and actual financial savings provided by the 1988 legislation. As acknowledged in LADA's November, 1987 newsletter, dealers had always "passed through" the expense of the ad valorem tax to customers in the same way that they "passed through" other overhead expenses. Thus, the LADA instructed its members to inform any customers asking about the inventory tax (which was to be identified on all vehicle invoices after January 1, 1988) that "it has always been there, the state just makes us show it to you now." That being the case, the impact of the new statute's identification requirement should not have been an increase in the amount paid by the customer or in savings to the dealers, but simply an identification of what "has always been there." Yet the LADA literature written two months prior to the effective date of the new law anticipates "tabulated savings" from the new procedure. Eleven months after the passage of the law, LADA's newsletter refers to "the real dollars and cents evidence of what LADA can do for you." A reasonable jury might infer that these references to expected financial gain evidence an agreement among the defendants that they would comply with the "identification" requirement in the statute by making the ad

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first instance. For present purposes, however, the court need only conclude that genuine issues of material fact concerning the reasons why the defendants engaged in the "add on" practice preclude summary judgment; the defendants are of course free to urge the sales tax explanation as part of their defense at trial.

valorem tax estimate an add-on charge. Such an agreement could have been viewed by the dealers as creating additional revenue because it would provide for both (1) the recoupment of the tax expense through the overhead component of the sales price, i.e., the element of the price "that has always been there," and (2) an "add-on" charge that was essentially pure profit.[12]

Plaintiffs also argue that there is evidence indicative of efforts by the LADC to discourage dealers from deviating from the "add on" practice, most notably the discussion in the November, 1987 newsletter discouraging dealers from "waiving" the charge. Because the meaning of the waiver reference is somewhat unclear and is subject to more than one interpretation, this newsletter passage, standing alone, is not compelling evidence of the existence of an anticompetitive agreement. Nevertheless, for

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[12] The defendants strenuously dispute the "double recoupment" theory and argue that the notion that, prior to 1988, dealers allocated a portion of the sales price to specific overhead costs on a per vehicle basis is largely a fiction. Defendants' Reply Brief in Support of Motion for Summary Judgment at 8. They argue that the financial advantage of the 1988 legislation was simply that it provided dealers with a means of assuring that they were recouping the cost of the ad valorem tax, whereas previously there had been no such assurance. Id. at 5, 8-10. This argument seems somewhat inconsistent with telling inquiring customers that the charge "has always been there." LADA Newsletter, November, 1987. See also deposition of Robert C. Israel, LADA vice president and CEO, at 77 ("It's always been part of the selling price to the consumer.") Nevertheless, it is not necessary to determine now whether there was "double recoupment," or even whether the dealers realized any kind of profit from the add-on practice. The inquiry in the text is whether there is any evidence of an agreement to fix prices, and the LADA's references to anticipated profits, not wholly explainable by the "identification" provisions of the 1988 legislation, provide indirect evidence of such an agreement. Once again, the defendants' counterarguments raise fact issues which are inappropriate for summary judgment.

summary judgment purposes, one reasonable interpretation of the passage is that dealers are being instructed not to follow the Customer "B" scenario (where the dealer does not add the inventory tax estimate to the sales price.) A dealer who pursued that approach would have a competitive advantage over a dealer who did not -- possibly the concern expressed in the same newsletter ("what if my competitor doesn't do it?"). Therefore, the record contains evidence which supports a finding that LADA encouraged its members not to deviate from the add on practice, although the evidence in this area involves more ambiguities than the evidence discussed in connection with plaintiffs' other arguments.[13]

In addition to arguing that there is no evidence of a price fixing agreement, defendants contend that it is erroneous to conclude that the identification of the ad valorem tax estimate on customer invoices, even as an "add-on" charge, necessarily causes an increase in vehicle prices. They argue that in a vehicle sale, what is negotiated is the final price paid by the customer, inclusive of taxes and other charges (and often with a credit for a trade vehicle). They also contend that it is not infrequent for buyers to negotiate based on the total amount that they will pay, inclusive of all costs, unlike the Customer A and Customer B scenarios where the buyer negotiates a sales price and then pays

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[13] Similarly, references in LADA literature in 1988 and 1989 to the need for dealers to "follow the rules" with regard to the ad valorem tax may not relate to the "add on" procedure, but instead caution dealers to avoid practices unrelated to this case (such as designating an excessive amount for the inventory tax estimate, or failing to remit the amount designated and collected on a monthly basis).

the applicable taxes. Even under these scenarios, however, the ad valorem tax estimate remains a separate component of the total price that is added to a base sales price. In order to accept the defendants' contention that the adding of the ad valorem tax to the base sales price does not actually increase the cost of the vehicle, the court would have to be able to conclude that the buyer would pay the same total price for the vehicle if that add-on charge were not made, i.e., that the base sales price would increase by the amount of the add-on charge if the add-on charge were not separately listed on the invoice. The record does not permit such a conclusion at this stage of the proceedings. At the very least, there are genuine issues of material fact regarding whether the "add-on" practice increases the total amount paid by the buyer.

* * *

In summary, the evidence before the court is subject to more than one reasonable interpretation on the key issue of whether the defendants entered an illegal price fixing agreement. A sound determination of which interpretation of the evidence is correct requires the benefit of trial on the merits. On the present record, plaintiffs should avoid summary judgment because they have presented evidence which would permit a reasonable jury to infer the existence of an agreement to fix prices.

In reaching this conclusion, the court observes that direct evidence of a formal agreement to fix prices is not required. American Tobacco Company v. United States, 328 U.S. 781, 66 S.Ct.

1125, 90 L.Ed. 1575 (1946). An antitrust plaintiff may prevail through "direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). Because plaintiffs have presented such evidence, and because the defendants' arguments in response to that evidence involve disputed factual issues that cannot be resolved under Rule 56, the case should proceed to trial.

II. MOTION FOR CLASS CERTIFICATION

(A) REQUIREMENTS FOR CLASS CERTIFICATION

The proposed plaintiff class, as set forth in the first amended complaint, consists of:

> All persons, whether corporations, partnerships, individuals or other, that purchased one or more new motor vehicles from a motor vehicle dealership during the applicable prescriptive periods which purchase price included an additional fee or charge identified as an "ad valorem tax", "ad valorem (inventory) tax", or similarly styled add-on charge, generally referred to herein as "ad valorem tax" or "ad valorem taxes."

The proposed defendant class is defined as follows:

> All of the motor vehicle dealerships who are members of the LADA and who have included in the sales price an additional fee or charge identified to the customer as "ad valorem tax", "ad valorem (inventory) tax", or similarly styled add-on charge, generally referred to herein as "ad valorem tax", or "ad valorem taxes" in connection with the sale of its motor vehicles. "Motor vehicle dealership" means and refers to all persons, whether corporations, partnerships, sole proprietorships, or other, that engaged in the retail sale of new motor vehicles in the State

> **of Louisiana during the applicable prescriptive periods and are members of LADA during these same periods.**

Rule 23(a) of the Federal Rules of Civil Procedure provides four prerequisites to a class action: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality), and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy of representation). If these prerequisites are met, a class action may be maintained if any one of three factors listed under Rule 23(b) is present. Those three factors concern (1) inequities arising from the prosecution of separate actions by or against individual members of the class; (2) the need for injunctive relief when the party opposing the class has acted or refused to act on grounds generally applicable to the class; and (3) whether questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Given the limited nature of the defendants' opposition to class action certification, it is unnecessary to discuss at length each of the requirements set forth in Rule 23(a) & (b). The defendants concede that the numerosity requirement is satisfied for both proposed classes. They also concede that the remaining

requirements are satisfied as to certain "institutional issues." The court therefore addresses in detail only the specific arguments set forth by defendants in opposition to class certification.

(1) Differences in Each Automobile Transaction

Contending that "every deal at every dealer is different," the defendants directly challenge the proposition that they engage in a common practice of "adding" the ad valorem tax estimate to the vehicle price. Rather, they contend that the inventory tax estimate is simply a component of the sales price that is no different than other components, such as charges for special accessories. While conceding that they engage in the common practice of identifying the estimate on the buyer's invoice (as they contend that they are required by law to do), defendants deny that there is a common practice of adding that charge to the sales price of the vehicle only after the buyer has agreed to a price. In support of their argument, defendants give examples of invoices from five different dealerships, together with the "sample methodology" provided to dealers by the LADA, none of which break down the price of the vehicle in precisely the same way.[14] Apparently, it is the defendants' position that these variations defeat the prerequisites of commonality or typicality, as well as the requirement that common issues predominate, as to any theory of recovery based on the alleged add-on practice.

To be sure, the samples listed by the defendants show that

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[14] Defendants' Post Hearing Memorandum on Class Certification at 16-18.

dealer invoices vary in certain respects. Some, for example, show separate charges for delivery or accessory fees while others do not. Nevertheless, there are two common features on all five of the sample vehicle invoices (as well as on the LADA's sample methodology.) First, all contain a base price for the vehicle (variably identified on the sample invoices as "price of vehicle," "list price per label," "cash price of vehicle," "cash delivered price of vehicle," and "base price per label"). In each instance, this base price makes up the bulk of the total amount charged to the customer and is rounded to the nearest dollar ($10,900.00; $9,600.00; $17,666.00; $7,430.00; $7,649.00; $34,381.00). Secondly, in each case, a relatively small amount designated "ad valorem tax" or "ad valorem inventory tax" ($23.78; $16.13; $62.66; $9.80; $22.02; $92.13) is added to the base price to achieve a "subtotal" or "total price," to which sales tax is then applied. Semantics aside, and whatever other variables may exist for each transaction, it is clear that an ad valorem tax estimate is being added to the base price of the vehicle. The questions of whether the defendants entered an agreement to add that estimate to the price, and whether, by so doing, they violated §1 of the Sherman act or engaged in conduct warranting the imposition of liability on the state law claims, are questions common to all members of the proposed plaintiff class and the proposed defendant class. Other variables existing in each vehicle transaction are not an obstacle to class action certification.

(2) Issues of Intent (State Law Fraud Claims)

Defendants also contend that, with respect to the state law fraud claims, common questions of law or fact do not predominate over questions affecting only individual class members. The premise of the fraud claims (Amended Complaint, Count II) is that when the defendants listed a charge for "ad valorem tax" on vehicle invoices, without any additional explanation, buyers were misled into believing that they (rather than the dealers) were responsible for paying the charge, and did not consider the charge to be negotiable. Had they been aware that the charge was owed by the dealers, plaintiffs argue, many buyers might have refused to pay the estimate as an "add on" charge. As discussed in connection with the motion for partial summary judgment, such a refusal would not have required the dealer to sell the vehicle in violation of §1961.2(C)(1), even as amended in 1995, as long as the applicable estimate was identified on the invoice as part of the sales price of the vehicle.

Under Louisiana law, fraud is defined as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." La. Civ. Code art. 1953. "Fraud may also result from silence or inaction." Id. Defendants contend that it is inappropriate to certify a defendant class as to these claims because, as to each vehicle sale, there is a need for a showing that each dealer who engaged in the challenged practice had an intent to deceive.

This argument does not provide a persuasive basis for denying certification of the defendant class as to the fraud claims. The plaintiffs contend that the LADA and its dealer members deliberately engaged in a common course of conduct, or pattern of misrepresentation, in order to obtain an unjust financial advantage over automobile purchasers. The fraud was allegedly perpetrated in the same manner by all members of the proposed defendant class: listing a charge on the buyer's invoice for "ad valorem tax" without explaining that the buyer did not owe the tax. Rather than contending that there were affirmative misrepresentations that varied with each sale, plaintiffs contend that, at least in the vast majority of cases, the misrepresentation resulted from silence or omission. Under these circumstances, common issues of law or fact predominate over individual issues.

The common issue is whether there was a scheme or plan to mislead customers in the manner alleged. At trial, plaintiffs will either prove the existence of such a scheme, through direct or circumstantial evidence, see La. Civ. Code art. 1957, or they will not. If they do not prove a common practice that falls within the statutory definition of fraud, then of course they will not prevail on this cause of action. On the other hand, proof of a scheme to defraud does not require evidence of the intricacies of every transaction. Were that the case, consumer fraud claims would virtually never be appropriate for class certification. There are in fact numerous decisions which hold that class certification is appropriate in cases involving allegations of a scheme or common

course of conduct accomplished by similar misrepresentations. See, e.g., Blackie v. Barrack, 524 F.2d 891, 903 (9th Cir. 1975); cert. denied, 429 U.S. 816 (1976); In re American Continental Corporation/Lincoln Savings and Loan Securities, 140 F.R.D. 425, 430 (D.Ariz. 1992); Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669 (N.D. Ill. 1989); Longden v. Sunderman, 123 F.R.D. 547, 550 (N.D. Tex. 1988).

In addition to questions concerning each dealers' intent, the defendants assert that the fraud claims trigger the need to consider individual issues pertaining to each buyer. In support of this proposition, the defendants rely on La. Civ. Code art. 1954, which provides that "[f]raud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill." Defendants suggest that the level of knowledge or sophistication possessed by each buyer must be examined on a purchase-by-purchase basis.

Once again, however, a common issue overrides the specifics of each transaction. That issue is whether a reasonable buyer should question whether an entry for "ad valorem tax" shown on the buyer's invoice is truly a tax owed by the buyer. Either a reasonable person should be held to such a standard or he should not, and there is no necessity for evidence regarding each class member's educational background, level of knowledge regarding the mechanics of ad valorem taxation, and so forth.

It also should be noted that a caveat to the "due diligence"

defense relied upon by the defendants, as set forth in the second paragraph of art. 1954, is that "[t]his exception does not apply when a relation of confidence has reasonably induced a party to rely on the other's assertions or representations." Whether a buyer is entitled to assume on the basis of the dealer-customer relationship that the dealer's invoice will only add charges for taxes that the buyer owes is also an issue common to all class members.

(3) Adequacy of Class Representatives (State Law Fraud Claims)

The defendants' next objection to class certification is that none of the named plaintiffs or plaintiff-intervenors are capable of adequately representing the plaintiff class as to the state law fraud claims. The deposition testimony of each of these individuals regarding their vehicle purchases reveals that none of them recall any pre-sale discussions with dealer representatives regarding the ad valorem tax estimate, and that none of them made any pre-sale inquiry concerning why the charge appeared on the sales invoice. Defendants argue that each of the proposed representatives had an educational or employment background which should have caused them to either know why the ad valorem tax estimate appeared on the sales invoice, or to make inquiries regarding the same. Because each of these buyers could have "ascertained the truth without difficulty, inconvenience or special skill," La. Civ. Code art. 1954, they could not prevail on a fraud claim and thus are not appropriate class representatives. For example, defendants argue that plaintiff-intervenor Eva Faye

Agnelly easily could have "ascertained the truth" about the ad valorem tax estimate because her daughter is a paralegal who accompanied her to the dealership at the time of her purchase.

To accept the defendants' argument would be to conclude as a matter of law that no member of the plaintiff class, with the possible exception of those who were wholly uneducated or illiterate, may prevail on a fraud claim unless he inquired about the nature of the ad valorem tax estimate and received a response from the dealer representative that constituted an affirmative misrepresentation. The defendants' position is that absent an affirmative misrepresentation, a literate buyer should be presumed to know the basis for the charges that appear on an invoice that he voluntarily signs. Perhaps a jury could reach that conclusion. On the other hand, the court is unprepared to declare as a matter of law that the plaintiffs cannot establish a case of fraud "by silence or inaction" under these circumstances, or that the failure of a buyer to make an affirmative inquiry as to the nature of the charge bars a fraud claim. Indeed, as the essence of the fraud claim is that a reasonable buyer normally would have no occasion to question whether a charge shown on his invoice as a tax is in fact a tax that he owes, the transactions involving the proposed class representatives, in which there were no discussions of the nature of the tax whatsoever, concern precisely the type of transactions in which plaintiffs contend that there was fraud by omission. Therefore, the court has no basis for concluding that the named plaintiffs and plaintiff-intervenors are not able to adequately

represent the plaintiff class as to these claims.

(4) Unjust Enrichment

Defendants also argue that class certification is inappropriate for plaintiffs' state law unjust enrichment and restitution claims (Amended Complaint, Counts III-V). An essential element of any claim for unjust enrichment is absence of justification or cause for the enrichment or impoverishment. See generally Edwards v. Conforto, 636 So.2d 901 (La. 1993). The defendants concede that the question of whether they were required by law to show the amount of the ad valorem tax estimate on customer invoices is a common question that is applicable to all class members asserting unjust enrichment claims. They argue, however, that since they were statutorily required to follow that practice, there was clearly "justification" for the alleged enrichment and impoverishment. Aside from that common issue, which they contend must be resolved in their favor, the defendants submit that any remaining unjust enrichment claims are based on the peculiar facts of each sale, and are thus inappropriate for class certification.

As is the case with the antitrust and fraud claims, however, a finding that the practice of separately identifying the ad valorem tax estimate on the buyer's invoice was authorized, or even mandated by statute does not close the door on plaintiffs' unjust enrichment claims. As discussed at length above, the challenge is not to the identification practice, but the add-on practice. The unjust enrichment claims raise common issues of

whether the add-on practice resulted in payment through mistake, or payment of a thing not due. La. Civ. Code arts. 2301 & 2302. These common issues predominate over any individual issues peculiar to each claim, and therefore class certification of the unjust enrichment claims is also appropriate.

(5) Applicable Prescriptive Period

The proposed class definitions refer to vehicle purchases during "the applicable prescriptive periods," but the briefs of the parties devote little attention to what periods are applicable. The various causes of action asserted in the amended complaint have differing prescriptive periods. The statute of limitations applicable to the antitrust claims is "four years after the cause of action accrued." 15 U.S.C. §15b. The state law unjust enrichment or restitution claims are governed by a ten year prescriptive period. La. Civ. Code art. 3499; Minyard v. Curtis Products, Inc., 251 La. 624, 205 So.2d 422, 433 (La. 1967); Slocum v. Daigre, 424 So.2d 1074, 1079 (La. App. 3d Cir. 1982), writ denied 429 So.2d 128 (1983). The state law fraud claims appear to be delictual in nature, and thus are governed by a one year prescriptive period. La. Civ. Code art. 3492.[15]

Under these circumstances, the longest available prescriptive period, ten years, sets the outer parameters of the class. As suit

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[15] Fraud claims asserted as a basis for rescinding a contract are subject to a prescriptive period of ten years. See, e.g., Fuller v. Barattini, 574 So.2d 412, 416 (La. App. 5th Cir. 1991). Since it is clear that the prescriptive period applicable to the unjust enrichment claims is ten years, it is unnecessary to make a definitive determination at this time of whether the fraud claims could also be governed by a ten year prescriptive period.

was filed September 20, 1994, the class should thus encompass all transactions occurring on or after January 1, 1988, the first date on which the defendants engaged in the challenged practice. At an appropriate time, subclasses may be defined for the purpose of differentiating between those class members who, because of prescription, have the right to pursue certain claims but not others. Some class members may have claims which arise solely under state law, because their federal antitrust claims are barred by prescription. However, because the state law claims are so related to the federal law claims as to form part of the same case or controversy under Article III of the United States Constitution, and the number of class members having federal claims (those purchasing vehicles on or after September 20, 1990) will predominate over claimants with state claims only (those purchasing vehicles between January 1, 1988 and September 19, 1990), the exercise of supplemental jurisdiction over the claims of the class members whose sole remedies arise under state law is appropriate pursuant to 28 U.S.C. §1367.

Accordingly, **IT IS RECOMMENDED** that the defendants' motion for partial summary judgment be **DENIED**; that the plaintiffs' motion for class certification be **GRANTED**; and that the plaintiff and defendant classes be defined as follows:

Plaintiff Class

> All persons, whether corporation, partnership, individual or other who purchased one or more new motor vehicles from a motor vehicle dealership on or after January 1, 1988 with a buyer's invoice showing a fee or charge identified as an "ad valorem tax", "ad valorem

(inventory) tax", or similarly styled add-on charge.

Defendant Class

All of the motor vehicle dealerships who are members of the Louisiana Automobile Dealers Association and who have shown on the buyer's invoice a fee or charge identified to the customer as "ad valorem tax", "ad valorem (inventory) tax", or similarly styled add-on charge. "Motor vehicle dealership" means and refers to all persons, whether corporations, partnerships, sole proprietorships, or other, that engaged in the retail sale of new motor vehicles in the State of Louisiana on or after January 1, 1988 and were members of LADA during the same period.

Objections

Under the provisions of 28 U.S.C. section 636(B)(1)(C), and Fed.R.Civ. Proc. 72(b), the parties have ten (10) business days from receipt of this Report and Recommendation to file specific, written objections with the Clerk. Timely objections will be considered by the district judge prior to a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE, OR WITHIN THE TIME GRANTED PURSUANT TO FED.R.CIV. PROC. 6(B), SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL EXCEPT UPON GROUNDS OF PLAIN ERROR OR MANIFEST INJUSTICE. SEE THOMAS V. ARN, 474 U.S. 140, 106 S.CT. 466 (1985); CARTER V. COLLINS, 918 F.2D 1198, 1203 (5TH CIR. 1990).

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 8th day of JANUARY, 1996.

Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

COPY SENT
DATE 1-9-96
BY cag
TO. ~~Hardaway~~
Wiedl
Whitney
Sachse
Beard
Hoffman
Kavanagh
Mayeaux
Riess
Reynaud