

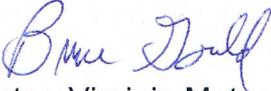


COMMONWEALTH of VIRGINIA
Motor Vehicle Dealer Board

October 28, 2011

MEMORANDUM

TO: The Honorable Yvonne B. Miller
Chair, Senate Committee on Transportation
The Honorable Phillip P. Puckett
Acting Chair 2011 Session, Senate Committee on Transportation
The Honorable David W. Marsden,
Patron of SB 1372 (2011)
The Honorable Susan Clarke Schaar
Clerk of the Senate

FROM: Bruce Gould 
Executive Director, Virginia Motor Vehicle Dealer Board

RE: Motor Vehicle Transaction Recovery Fund Report

I am pleased to present to you a study report concerning the Motor Vehicle Transaction Recovery Fund. This report was initiated as a result of SB 1372 (2011).

I would be happy to answer any questions or provide additional information. You can contact me directly at 804-367-1100; ext 3002; or by email at bruce.gould@mvdv.virginia.gov or at the address printed at the bottom of this memorandum.

Attachment

Copy emailed to:
Motor Vehicle Transaction Recovery Fund Legislative Study Work Group
Members of the Motor Vehicle Dealer Board

Motor Vehicle Transaction Recovery Fund Report

Motor Vehicle Transaction Recovery Fund Legislative Study Work Group



Report Submitted to:

The Honorable Yvonne B. Miller, Chair, Senate Committee on Transportation
The Honorable Phillip P. Puckett, Acting Chair 2011 Session, Senate Committee on Transportation
The Honorable David W. Marsden, Patron of SB 1372 (2011)
The Honorable Susan Clarke Schaar, Clerk of the Senate

October 28, 2011

Definitions:

“Board” means the Motor Vehicle Dealer Board

“Code” means the Code of Virginia

“Floor planner” means an entity that lends money to dealers to purchase and replenish their inventory of motor vehicles and which might claim a security interest in the vehicles.

“Fund” means the Virginia Motor Vehicle Transaction Recovery Fund

Background:

The Fund was established over 22 years ago as a means to reimburse persons who have suffered financial loss or damage due to fraudulent actions of licensed or registered motor vehicle dealers or salespersons in connection with the purchase or lease of a motor vehicle. The Code requires that the minimum balance in the Fund be \$250,000.

Any person who has been awarded a final judgment against a licensed or registered motor vehicle dealer or salesperson in a State or Federal court in Virginia may file a claim with the Board requesting payment from the Fund for any portion of such judgment that has not been satisfied. A claim is limited to \$20,000 involving a single transaction. Multiple claims involving the same dealer or salesperson are limited to a total of \$100,000. The \$100,000 shall be prorated among all purchasers who have filed claims against the same dealer or salesperson if the total number of claims exceeds \$100,000.

It should be noted that in 2009 and 2010 the Fund made payments to a total of twenty-four claimants. Of that number, six claims were for greater than the maximum \$20,000 for a single transaction. (The claimants therefore received \$20,000.) As of the date of this report, total claims involving a single salespersons or dealer have never reached the \$100,000 maximum.

Dealers who have been in business for less than three years must carry a \$50,000 bond. The bond pays for the first \$50,000 in judgments that are paid on behalf of a dealer. The Fund would pay up to the second \$50,000 in claims. These dealers must also pay \$250 per year into the Fund.

When a payment is made from the Fund, the dealer or salesperson must reimburse the Fund within 30 days. If the Fund is not reimbursed, the dealer's or salesperson's license will be automatically revoked. The Board may also take additional actions against the dealer or salesperson.

The Fund is maintained through assessment fees paid by licensed and registered motor vehicle dealers and salespersons. The Fund is not supported by tax revenues.

In addition, the Board has the option of requiring all dealers to pay an annual Fund fee of \$100 and an additional \$10 per licensed salesperson, but not more than an additional \$100 per dealer. The Board has the option of suspending the assessment of these two fees. Lastly, the Board also has the authority to place a special assessment on all dealers should the Fund be in danger of falling below the required minimum balance.

As of August 31, 2011, the balance in the Fund was about \$326,547. In FY10 the Budget Bill transferred \$700,000 from the Fund to the General Fund, and in FY03 the Budget Bill transferred nearly \$4.2 million from the Fund to the General Fund.

Legislative Mandate

Senator Marsden introduced SB 1372 during the 2011 session of the General Assembly. SB 1372 would have increased the maximum claim for a single transaction against either the Fund or the Bond from \$20,000 to \$50,000.

Senator Marsden agreed to withdraw SB 1372 and the Board agreed to convene a meeting with stakeholders. In conjunction with Senator Marsden's action, Senator Puckett, the acting Senate Transportation Committee Chair, sent a letter to the Board's Executive Director, directing the Board to convene a meeting to *"discuss options available to ensure the long term viability of the Motor Vehicle Transaction Recovery Fund"* and *"consider how the fund would be adjusted for inflation, and how you [we] might resolve any other outstanding issues relevant to the fund."*

Stakeholder meetings were held on May 9, July 11 and September 12, 2011. All meetings were held in Room 702 in the Department of Motor Vehicles Headquarters Building at 2300 West Broad Street, Richmond, VA 23220.

Representatives from the Board; the Department of Motor Vehicles; the Virginia Trial Lawyers Association; the Virginia Independent Automobile Dealers Association; and the Virginia Automobile Dealers Association attended all three meetings. The table below lists members of each of these stakeholder groups who attended one or more of the meetings.

Motor Vehicle Dealer Board (MVDB)	Department of Motor Vehicles (DMV)	Virginia Trial Lawyers Association (VTLA)	Virginia Independent Automobile Dealers Association (VIADA)	Virginia Automobile Dealers Association (VADA)
Joe Tate	William Childress	Steve Pearson	David Boling	Michael Charapp
Jimmy Whitten	Ron Thompson	Steve Swan	Pete Iaricci	Anne Gambardella
Lynn Hooper		John Gayle	John Porter	
Wanda Lewark			Gail Davis	
Rodney Williams			Lois Keenan	

Bruce Gould, the Board's Executive Director, facilitated the meetings. Board staff members Prin Cowan and Wanda Neely also attended all three meetings. Eric Fiske from the Office of the Attorney General attended the September 12, 2011 meeting.

Results

Agreement was reached on the following suggestions for amending the Fund Laws:

- *The current maximum claim amount should be increased from \$20,000 to \$25,000, with future increases tied to a standard such as the federal Consumer Price Index (CPI) for used cars. If the CPI went down, the maximum claim would not decrease.*

The Bureau of Labor Statistics (BLS) reports an annual average change in the price of used motor vehicles. For example, if the BLS reports that the annual CPI for used motor vehicles for 2013 is 2%, and the 2012 General Assembly establishes the maximum claim at \$25,000 for a single transaction, the maximum claim for transactions that occurred in 2013 would be $\$25,000 \times 1.02\%$ or \$25,500. If the CPI was 3% in 2014, the maximum claim would be $\$25,500 \times 1.03\%$ or \$26,265.

- *The current maximum that can be paid on behalf of a dealer for multiple claims is \$100,000. If the amount is increased for individual transactions as noted above, the maximum amount paid on behalf of a dealership for multiple claims should be four times the amount for a single claim.*

Using the example above, the maximum in 2013 would be \$102,000 (\$25,500 X 4) and in 2014 it would be \$105,060 (\$26,265 X 4).

- *Lift the restriction on the bond to pay attorney fees. Under current law, attorney fees cannot be paid from the bond. For example if a claimant's loss is \$10,000 plus attorney fees of \$5,000; the bond would pay the amount of the claimant's loss (\$10,000) and the purchaser/attorney would need to file a separate claim against the Fund for the attorney fees. The law should be amended to allow payment of the attorney fees from the bond up to the statutory limits for payments from the Fund. There does not appear to be any logical reason as to why attorney fees can be paid from the Fund and not the bond.*
- *Eliminate the \$250,000 minimum Fund balance. This minimum was put in place when the General Assembly established the Fund over 22 years ago. The rationale for establishing the minimum was in the event the Fund concept did not work. If the Fund concept was abandoned, the thought was that the \$250,000 minimum would be sufficient to pay any pending claims at that time.*

A common scenario that results in a claim being paid from the Fund is when a consumer purchases a vehicle and does not receive title to the vehicle as a floor planner is holding the title because the dealer failed to pay-off the floor planner. In most of these cases, the dealer has gone out of business owing money to the floor planner. The purchaser may be an "innocent third party": They purchased a vehicle expecting to receive a title but do not. It could be argued that the floor planner made a bad investment or loan. In such cases, floor planners routinely tell the purchaser that if the purchaser pays the floor planner for the vehicle, the planner will release the title. This puts the purchaser in the position of paying for the same car twice: First to the dealer and second to the floor planner.

In order to resolve this situation, the purchaser typically hires an attorney and obtains a default judgment of fraud against the dealer. The out-of-business dealer does not pay the judgment and the purchaser subsequently seeks relief from the Fund. The Fund makes payment to the purchaser who pays the floor planner who then releases the title. Many floor planners advise purchasers on how to file a claim against the Fund. The floor planners are effectively using the Fund as insurance for their loans.

All stakeholders who attended the Work Group meetings agreed that floor planners should not be able to refuse release of a title when a consumer has purchased a vehicle in good faith.

One way to insure the long term viability of the Fund would be to find a means for purchasers to obtain a title in these situations thereby avoiding having to make a payment from the Fund. Under existing certificate of title laws, DMV cannot simply issue a new title to the purchaser without some judicial decision. But, due to the doctrine of sovereign immunity, DMV could not (and should not) be made a party to such a proceeding. Hence, one solution where all the facts can be brought out in a fair setting would be a streamlined judicial proceeding involving the floor planner, purchaser and/or dealer who can explain the facts and the court could make a determination as to who is entitled to title to the vehicle. The prevailing party could then bring that judicial factual determination to DMV as a guide to issue a new title. Towards that end, the following proposal was endorsed by the group:

- *For claims by a purchaser for a title that is being held by a floor planner, make it a requirement under the Fund that these purchasers must pursue getting the title from the floor planner as a buyer in the ordinary course of business before filing a claim against the Fund. This would be similar to current requirements in the Real Estate Transaction Recovery Fund, Section 54.1-2114, that if the real estate broker is in bankruptcy, the claimant must first seek an order in bankruptcy determining dischargeability of the debt before a claim can be filed against that Fund.*

Further a change in the civil law could be made that would provide a means by which a court could order the floor planner who is claiming a security interest to and holding the title to the vehicle purchased from a dealer, to surrender the title to the purchaser. This would only apply if there is not a recorded lien on the vehicle or if the lien was recorded after the consumer purchased the vehicle. In order to encourage attorneys to represent the purchaser in these proceedings, the court would be authorized to award attorney's fees to the purchaser that would be paid by the floor planner who is holding the title. Otherwise, attorneys might not have an incentive to take such cases. Again, DMV is not a necessary party to these proceedings as sovereign immunity is a bar. However, in a proceeding between the floor planner and the purchaser, the Court could make the necessary factual determination for DMV to know who is entitled to title.

The above would not only provide a more streamlined process for purchasers to obtain titles to vehicles they have purchased, but also to protect the Fund because it could not be used to provide monies to the consumer who would then have to pay-off the floor planner to obtain title.

Another idea that was considered but for which no consensus was reached was as follows:

- *Establish a different Fund claim process for dealers that are still in business, as opposed to dealers that are out business. For those still in business, the present procedure of obtaining a judgment against the dealer, giving various notifications; convening an informal fact finding conference; and the hearing officer submitting a recommendation to the Board who makes a decision would remain intact.*

For dealers that are out of business, a procedure would be adopted allowing direct claims by purchasers against the Fund. A hearing officer would hear the case of the claimant and make a recommendation to the Board in order to make a decision. If the Board approves the claim, the claimant would assign the claim to the Board and the Fund. The Board would then make a decision whether legal action against the defunct dealership or any of its officers or directors should be filed, with any future repayments being deposited to the Fund.

If the Hearing Officer recommended that the claim not be approved, the claimant would still have the option to seek a judgment in court.

The Office of the Attorney General has expressed reservations with the concept of two different claim processes.

COMMONWEALTH OF VIRGINIA



SENATE

February 1, 2011

COMMITTEE ASSIGNMENTS:
AGRICULTURE, CONSERVATION AND
NATURAL RESOURCES
COMMERCE AND LABOR
PRIVILEGES AND ELECTIONS
TRANSPORTATION
RULES

PHILLIP P. PUCKETT

38TH SENATORIAL DISTRICT

ALL OF BLAND, BUCHANAN, DICKENSON,

RUSSELL, AND TAZEWELL COUNTIES; AND

PART OF PULASKI, SMYTH, WISE, AND WYTHE COUNTIES

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(276) 889-0650 LEBANON

(276) 889-5736 HOME

Mr. Bruce Gould
Executive Director
Virginia Motor Vehicle Dealer Board
2201 West Broad Street, Suite 104
Richmond, VA 23220

Dear Mr. Gould:

Senator Dave Marsden recently submitted Senate Bill 1372, which would raise the claim one judgment creditor could make against the Motor Vehicle Transaction Recovery Fund from \$20,000 to \$50,000. Since the submission of this bill I have heard from interested parties, and believe that an accord can be reached outside of legislation.

If you would be willing to arrange a meeting with DMV Commissioner Richard Holcomb, Steve Pearson with the Virginia Trial Lawyers Association, David Boling with the Independent Auto Dealers, and Don Hall of the Virginia Automobile Dealers to discuss options available to ensure the long term viability of the Motor Vehicle Transaction Fund, it would be greatly appreciated.

Please consider how the fund would be adjusted for inflation, and how you might resolve any other outstanding issues relevant to the fund.

Senator Marsden will strike the bill and re-file next year, if you are willing to convene this informal group of interested parties. If you are willing to do so, please contact me at my Senate office.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Phillip P. Puckett".

Phillip P. Puckett, Acting Chairman
Senate Transportation Committee

cc: Mr. Richard Holcomb
Mr. Steve Pearson
Mr. David Boling
Mr. Don Hall

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FEB 02 2011

DEALER BOARD

COMMONWEALTH OF VIRGINIA

SUSAN CLARKE SCHAAR
CLERK OF THE SENATE
P.O. BOX 396
RICHMOND, VIRGINIA 23218



SENATE

March 4, 2011

Bruce Gould, Executive Director
Motor Vehicle Dealer Board
2201 W. Broad Street, Suite 104
Richmond, VA 23220

Dear Mr. Gould:

This is to inform you that, pursuant to Rule 20 (l) of the Rules of the Senate of Virginia, the subject matter contained in Senate Bill 1372 has been referred by the Senate Committee on Transportation to the Motor Vehicle Dealer Board for study. It is requested that the appropriate committee chair and bill patron receive a written report, with a copy to this office, by November 1, 2011.

With kind regards, I am

Sincerely yours,

A handwritten signature in black ink, reading "Susan Clarke Schaar".

Susan Clarke Schaar

SCS:dhl

cc: Sen. Yvonne B. Miller, Chair, Senate Committee on Transportation
Sen. Phillip P. Puckett, Acting Chair 2011 Session, Senate Committee on Transportation
Sen. David W. Marsden, Patron of SB 1372

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MAR 07 2011

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