



**STATEMENT OF PUBLIC CITIZEN**

*“Consumer Protection in the Used and Subprime Auto Market,”*

A Hearing Before the Subcommittee on Commerce, Trade and Consumer  
Protection of the House Committee on Energy and Commerce

Thursday, March 5, 2009

Public Citizen would like to thank the Subcommittee for holding the hearing “Consumer Protection in the Used and Subprime Car Market.”<sup>1</sup> We would like to draw particular attention to several issues before the subcommittee relevant to this hearing:

- Problems with implementation of the National Motor Vehicle Title Information System (NMVTIS)—an important database that will let consumers learn the history of used cars. Although the Justice Department has finally issued regulations and launched consumer access to the system, obstacles remain: Many states are not yet participating fully, insurers and salvage yards have yet to start reporting data, and additional funding and action by the FTC are needed.
- A February 20, 2009, press release circulated by Carfax, which falsely claims that “one in five fatal accidents involve cars that have missing airbags,” highlights the need for implementation of NMVTIS.
- Investigation of the authority of the FTC to prohibit binding mandatory arbitration clauses, which require consumers to waive their right to a fair trial and instead submit disputes to corporate-run arbitration systems. The FTC should use its authority to prohibit such clauses in auto sales contracts, finance contracts, and leases.

#### **I. Implementation of the National Motor Vehicle Title Information System.**

In 1992, Congress passed the Anti-Car Theft Act, which required the federal government to establish NMVTIS, a vehicle-history database that would provide public access to critical information about the reliability and safety of used automobiles gathered from states, insurance companies, and junk and salvage yards.<sup>2</sup> The Act requires that the database allow consumers to instantly and reliably establish not only the validity of a vehicle’s title, but also its mileage and theft or damage history, which

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<sup>1</sup> This statement was prepared by Public Citizen’s Auto Safety, Litigation, and Congress Watch divisions, by Lena Pons, Deepak Gupta, and Graham Steele, respectively.

<sup>2</sup> P.L. 102-519, §§ 202-04, 106 Stat. 3390-93.

would indicate whether a vehicle had been branded as a junk or salvage vehicle. Congress mandated that the database be set up by January 31, 1996.

*A History of Delay.* NHTSA, the agency originally charged with creating the database, immediately began to show signs of bureaucratic delay. Rather than take steps to begin implementation, NHTSA convened a task force of affected industries and recommended further legislation and an extension of the implementation deadline. Frustrated with NHTSA's inaction, Sen. Charles Schumer commissioned a GAO investigation into the delay. When the statutory deadline of January 31, 1996 came and went without implementation, Congress reacted promptly by passing additional legislation to "expedite implementation of the motor vehicle titling information system."<sup>3</sup> The legislation made two amendments to the 1992 legislation: (1) it transferred responsibility for NMVTIS from the Secretary of Transportation to the Attorney General, and (2) it extended the deadline for implementation of the system from January 31, 1996 to December 31, 1997. In passing the legislation, Congress reiterated the importance of prompt "implementation of the much-needed national titling information system, which would prevent thieves from obtaining legitimate vehicle ownership documentation and deter other serious consumer fraud related to transfer of motor vehicle ownership."<sup>4</sup> The accompanying report concluded that the

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<sup>3</sup> H.R. Rep. No. 104-618 (1996), at 2-3, reprinted in 1996 U.S.C.C.A.N. 1060, 1061-61. The legislation was known as the Anti- Car Theft Improvements Act of 1996, Pub. L. 104-152, § 2-3, 110 Stat. 1384.

<sup>4</sup> *Id.* at 3, 1996 U.S.C.C.A.N. at 1062.

“costs imposed on society” by such auto theft and fraud “remain unacceptably high, due in part to the failure to implement [NMVTIS].”<sup>5</sup>

Unfortunately, the government’s foot-dragging continued. In 1998, Missouri-based Carfax, a for-profit corporation that sells vehicle-history data and thus has “a commercial interest in stopping the program,” met with then-Senator John Ashcroft of Missouri. Subsequently, Ashcroft wrote to the GAO to request that it determine the need for an analysis of the system’s costs and benefits. Ashcroft, possibly at the behest of private industry opponents of NMVTIS, had characterized the system as a “Washington boondoggle.”<sup>6</sup> In response, the GAO issued a report in August 1999, concluding that a cost-benefit analysis of the system by DOJ was warranted.<sup>7</sup> The DOJ-commissioned cost-benefit analysis was released in 2001, by which time Ashcroft had become Attorney General, and concluded that NMVTIS was actually a huge bargain: With an initial annual investment in the range of \$10 million, the fully implemented system could “achieve benefits in the range of \$4 billion to \$11.3 billion annually,” including significant benefits to consumers of automobiles.”<sup>8</sup>

*Litigation by Consumer Groups Spurs Action.* In 2008—faced with continued delays in implementing the system, renewed interest in the problem of title washing, and a large number of fraudulently resold flood-damaged vehicles that were exported to other states following Hurricane Katrina—Public Citizen, joined by Consumers for

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<sup>5</sup> *Id.*

<sup>6</sup> Jeff Brady, “Holes in Monitoring System Let Lemons Get Resold,” National Public Radio, (Jan. 31, 2006).

<sup>7</sup> GAO, *Anti-Car Theft Act: Issues Concerning Additional Federal Funding Of Vehicle Title System*, (1999).

<sup>8</sup> Logistics Management Institute, *National Motor Vehicle Title Information System Cost Benefit Analysis* (2001).

Auto Reliability and Safety and Consumer Action, sued the Attorney General for unreasonable delay in implementing NMVTIS. The suit was successful and resulted in a September 2008 court order requiring implementation of the system. In accordance with that order, DOJ launched consumer access and issued final regulations on January 30, 2009.<sup>9</sup>

*Continuing Challenges.* Full implementation of the system is still hindered by incomplete participation by the states. Only 13 states are fully participating, 14 states are not participating at all, and some states are providing data, but not making inquiries of the system.<sup>10</sup> For the system to be effective, all the states must participate. Of particular concern is California, which accounts for a large share of the nation's vehicle population. California's DMV is reporting data to NMVTIS but is attempting to prevent consumers from accessing that data to protect the revenue it brings in from the sale of that data.<sup>11</sup> An additional concern is the current lack of participation by Tennessee, which accepted substantial federal grant money from the DOJ for its NMVTIS participation but has not been reporting data to the system since 2005.

Attorneys General from 42 U.S. jurisdictions submitted comments to the FTC regarding information to be provided to used car purchasers under its Used Car Rule. Focusing on the benefits of NMVTIS, these comments stated that "the [Used Car] Rule's value is limited by the fact that it does not provide notice about the most material information consumers need to consider . . . the vehicle's history and prior use,

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<sup>9</sup> 74 Fed. Reg. 5740 (Jan. 30, 2009).

<sup>10</sup> NMVTIS Participation Map, *available at* [www.nmvtis.gov](http://www.nmvtis.gov)

<sup>11</sup> Two states, New York and Pennsylvania, had adopted the same position but agreed to release the data just days before a court-ordered deadline of February 27, 2009.

including prior title status, damage history, and whether it was repurchased by the vehicle manufacturer pursuant to a state Lemon Law” –in other words, information that would be provided by NMVTIS.<sup>12</sup> Of the 42 signatories, 18 were Attorneys General from states that are partially or completely non-participants in the NMVTIS program.

To make NMVTIS a reality, as Congress intended in the Anti-Car Theft Act, and to make its benefits more easily available to consumers, we propose the following:

- The Subcommittee should conduct oversight of the level of NMVTIS participation by the states and DOJ’s role in implementing the system. The states should be asked to report on their plans to achieve full participation by next year, as required by DOJ’s regulations.
- Congress should make available additional funding for NMVTIS to help ensure that states achieve compliance with federal regulations.
- Congress should tie a small percentage of federal highway funding to full compliance with NMVTIS reporting requirements.
- As recommended by the state Attorneys General, the FTC should include in its Used Car Rule a requirement that information from NMVTIS be made available to consumers on the used car Buyers’ Guide in a prominent and easy-to-understand format.

## **II. Recent Misleading Claims by a Private Distributor of Title Information Underscore the Need for Credible Information.**

On February 20, 2009, Carfax circulated a press release claiming that “[a] new report from the National Highway Traffic Safety Administration (NHTSA) f[ound] that nearly one in five fatal accidents involve cars that have missing airbags.”<sup>13</sup> We investigated that claim and found that no such NHTSA report had been released, and

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<sup>12</sup> See Comments of National Association of Attorneys General to Federal Trade Commission proposed rules (73 Fed. Reg. 42285 (Jul. 21, 2008)).

<sup>13</sup> See Attachment 1: Carfax Press Release, “One in Five Fatal Car Accidents Involve Missing Airbags; Carfax Takes Action to Protect Public,” (Feb. 20, 2009).

that Carfax had based its statement on an analysis published in the *Kansas City Star*, which looked only at frontal-impact crashes.<sup>14</sup> The mistaken claim in the Carfax press release highlights (1) the legitimate concerns that used car purchasers have about their present inability to learn a vehicle's true history, and (2) the need for vehicle-history information to be gathered from all relevant parties (including states and insurance companies) and aggregated in a complete and credible database.

Consumers ought to have access to information about the prior history of used vehicles in order to make informed purchases and protect themselves from fraud. The usefulness of this information is predicated on its credibility and completeness. Congress asserted the need for public access to this information seventeen years ago, when it mandated the creation of the NMVTIS system. The concern felt by purchasers of used vehicles is real. Although Carfax misrepresented the results of the analysis published in the *Kansas City Star*, there is still a concern about missing or incorrectly replaced airbags, for which complete reporting of vehicle history is needed.

A second concern is the perception that Carfax reports obviate the need for the NMVTIS system. Carfax reports are based on an incomplete reporting of vehicle history, as the company does not have access to, for example, data from all insurers or accident reports from all jurisdictions. Carfax also lacks the authority to *require* information from insurance carriers, junk and salvage yards, and states—a unique advantage of the federally mandated system.

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<sup>14</sup> Mike Casey and Rick Montgomery, "Front airbags don't inflate in hundreds of head-on crashes." *Kansas City Star*. (Oct. 22, 2007).

### **III. The Federal Trade Commission Should Exercise Its Authority to Prohibit Binding Mandatory Arbitration, Which Poses a Major Obstacle to Consumer Protection in the Used Car Market.**

Binding mandatory arbitration (BMA) clauses are routinely included in used automobile sales contracts, finance contracts, and leases. Buried in the fine print of these non-negotiable contracts, BMA clauses require consumers to waive their right to a fair trial in public court and instead submit disputes to an arbitration system run by firms that view large corporations as their clients. Car dealers use BMA to avoid accountability to consumers under the law and secure easy judgments against individuals. Consumers purchasing or leasing vehicles are a captive audience with no choice but to enter into the sales/lease contract put before them. BMA clauses are so prevalent in used car sales contracts that it is difficult for consumers to purchase a used automobile without being forced into arbitration.<sup>15</sup>

Automotive dealers have acknowledged that BMA is harmful and unjust. In 2002, Congress enacted the Motor Vehicle Franchise Arbitration Act<sup>16</sup> to remove BMA clauses from “unfair auto dealer franchise agreements that are purposefully written in favor of the manufacturer.”<sup>17</sup> California auto dealer William Shack testified before the Senate Judiciary Committee that the arbitration process was “fundamentally unfair” to dealers because arbitrators have economic ties to the manufacturer.<sup>18</sup> Mr. Shack had been forced by a manufacturer into an arbitration process where he had “no state

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<sup>15</sup> See, e.g., Stephanie Mencimer, *Suckers Wanted: How Car Dealers and Other Businesses are Taking Away Your Right to Sue*, Mother Jones (Nov. 26, 2007).

<sup>16</sup> See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028 (2002).

<sup>17</sup> 146 Cong. Rec. H8688-01 (daily ed. Oct. 3, 2000) (statement of Rep. Bono).

<sup>18</sup> See S. Rep. No. 107-266, at 6 (2002).



remedies, no right to a hearing, no right to an unbiased decision-maker, and no real right to appeal on this issue.”<sup>19</sup> In the 110<sup>th</sup> Congress, Rep. Linda Sanchez introduced the Automobile Arbitration Fairness Act, which would have prohibited BMA in contracts between auto buyers and dealers.<sup>20</sup> In a 2000 letter to Rep. Jerrold Nadler, the National Automobile Dealers Association (NADA) stated that it “does not support or encourage the use of mandatory and binding arbitration in any contract of adhesion, whether a motor vehicle franchise contract between a manufacturer and dealer or a consumer contract” and “would not oppose other federal legislative efforts to preclude mandatory and binding arbitration as the sole dispute resolution mechanism in any contract of adhesion.”<sup>21</sup>

The FTC is aware of the problems for consumers created by consumer BMA in other contexts. The FTC’s recent report on the Fair Debt Collection Practices Act (FDCPA) states that there are serious problem with debt-collection arbitration.<sup>22</sup> The Commission promised to look more closely at the practice and “may take law enforcement action to address conduct related to debt collection litigation and arbitration to the extent that such conduct violates the FDCPA, the FTC Act, or other

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<sup>19</sup> *Id.* at 7.

<sup>20</sup> See H.R. 5312, 110th Cong. (2008).

<sup>21</sup> See Letter from the National Automobile Dealers Association to Representative Nadler (Jul. 12, 2000). Despite their previous experiences with the horrors of BMA, some dealer groups opposed Rep. Sanchez’s bill. See Harry Stoffer, *Congress May Ban Mandated Arbitration*, AUTO. NEWS (March 10, 2008) at 4 (“The American International Automobile Dealers Association, which represents import-brand dealers, opposes the bill. AIADA President Cody Lusk said the bill would further burden ‘our already-overwhelmed legal system.’”).

<sup>22</sup> FED. TRADE COMM’N, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE 66 (Feb. 26, 2009) at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

laws the Commission enforces.”<sup>23</sup> The FTC should use its authority under Section 5 of the FTC Act<sup>24</sup> to prohibit BMA clauses in auto sales contracts, finance contracts, and leases. The FTC should also consider prohibiting BMA in all consumer contracts, as provided in the Consumer Fairness Act sponsored by Rep. Luis Gutierrez<sup>25</sup> and the Arbitration Fairness Act sponsored by Rep. Hank Johnson.<sup>26</sup>

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Public Citizen thanks the Subcommittee and its members for conducting this important hearing to investigate the concerns of used car purchasers, opportunities for improving the information available to used car buyers, and the variety of ways in which used and subprime auto consumers are at a disadvantage in making purchasing decisions.

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<sup>23</sup> *Id.*

<sup>24</sup> 15 U.S.C. § 45(a).

<sup>25</sup> See H.R. 991, 111th Cong. (2009). The Consumer Fairness Act also declares the inclusion of BMA in consumer contracts an unfair and deceptive trade act or practice under federal or state law. *Id.*

<sup>26</sup> See H.R. 1020, 111th Cong. (2009). The Arbitration Fairness Act also prohibits BMA in non-union employment contracts and any disputes arising under a civil rights statute. *Id.*

## Attachment 1: Carfax Press Release

Press Releases

# One in Five Fatal Car Accidents Involve Missing Air Bags; Carfax Takes Action to Protect Public

To: Assignment Desks

(Logo: <http://www.newscom.com/cgi-bin/prnh/20080507/CARFAXLOGO> )

Contact: Christopher Basso of Carfax, 703-934-2664

News Advisory:

A new report from the National Highway Traffic Safety Administration (NHTSA) finds that nearly one in five fatal accidents involve cars that have missing air bags. This problem endangers the lives of used car buyers, current owners and innocent passengers. To help protect the public from this potentially fatal fraud, air bag deployment information reported to Carfax is available for free at [www.carfax.com/airbag](http://www.carfax.com/airbag).

Industry experts estimate that as many as 1 out of 25 previously deployed air bags are not properly replaced. Carfax urges drivers that have had their car's air bags replaced to make sure all air bags are functioning properly. In addition, anyone shopping for a used car should have an ASE-certified mechanic or body shop inspect the air bag system prior to purchase, along with a Carfax Vehicle History Report.

Carfax communications director Larry Gamache is available for interview to discuss the dangers of improperly repaired air bags and offer tips for avoiding the purchase of unsafe vehicles.

To schedule an interview, contact Christopher Basso of Carfax, 703-934-2664.

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<http://photoarchive.ap.org/>  
[photodesk@prnewswire.com](mailto:photodesk@prnewswire.com)

Source: Carfax