

TJAGLCS Practice Note

Consumer Law Note

Flood Damaged and Salvaged Automobiles Threaten Consumer Woes: Hurricanes Katrina and Rita & the \$40 Million State Farm Insurance Settlement

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A. Introduction

On the heels of Hurricanes Katrina and Rita flooding the market with water damaged and salvaged cars, State Farm Mutual Automobile Insurance Company (State Farm) is quietly attempting to settle tens of thousands of potential lawsuits related to its failure to properly title cars previously declared a total loss.¹ In September and October 2005, over 30,000 car owners in the United States received letters from their state attorney general informing them that State Farm, the largest automobile insurer in the United States,² had failed to obtain an appropriate title to their vehicle after declaring it a total loss.³ Under applicable law in nearly all fifty states, State Farm should have applied for a salvage title before reselling a totaled vehicle.⁴

State laws vary, but a salvage title is normally required for a damaged vehicle when the cost of repair exceeds the vehicle's fair market value, or when an insurer or government agency has declared the vehicle a total loss.⁵ Some states also use salvage titles to identify stolen vehicles that were recovered after the insurer compensated the owner for the loss of the vehicle.⁶ Once a vehicle has been issued a salvage title, state laws typically prohibit the vehicle from being registered and licensed for operation on the road.⁷ The legal consequences of changing a car's title from a "clean" or "clear" title to a salvage title are immense, including the possibilities that the vehicle cannot be insured or registered and that a lender may accelerate any outstanding loan balance.⁸ These legal consequences are in addition to an estimated fifty percent decline in

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¹ ConsumerAffairs.com, *State Farm's Wrecked Car Owners Feeling Slighted* (Oct. 26, 2005), available at http://www.consumeraffairs.com/news04/2005/state_farm_totaled.html [hereinafter *State Farm's Wrecked Car Owners*].

² State Farm Mutual Automobile Insurance Company insures approximately one-in-five drivers in the United States. Michael D. Sorkin, *State Farm Violated Agreement on Selling Totaled Cars*, ST. LOUIS POST-DISPATCH, Oct. 20, 2005. Of those vehicles insured by State Farm, approximately six million are wrecked each year, with 700,000 of those declared a total loss. *Id.*

³ *In the matter of State Farm Mutual Automobile Insurance Company, Assurance of Voluntary Compliance (AVC)* (Jan. 10, 2005), available at http://www.michigan.gov/ag/0,1607,7-164-17334_17362-128145--,00.html [hereinafter *State Farm AVC*]; see *State Farm's Wrecked Car Owners*, *supra* note 1.

⁴ When an insurance company declares a vehicle a total loss it must usually acquire a salvage, or other similarly named, title. See, e.g., ALA. CODE § 32-8-87 (2005) (defining a total loss to include circumstances when an insurance company compensates an insured for damage to a vehicle that is greater than seventy-five percent of the vehicle's pre-damage fair retail value; requiring an insurance company which pays compensation for a total loss to obtain the title and provide it to the state for replacement with a salvage certificate); LA. REV. STAT. § 32:702(11) (2005) (defining a "total loss" as a "motor vehicle which has sustained damages equivalent to seventy-five percent or more of the market value as determined by the most current National Automobile Dealers Association Handbook"); LA. REV. STAT. § 32:707I(1)(a) (requiring both insurance companies and vehicle owners to obtain a salvage title for any vehicle declared a total loss); MISS. CODE ANN. § 63-21-33 (2005) (requiring an insurance company which obtains title after paying a total loss claim to obtain a salvage title).

⁵ See CARFAX Vehicle History Reports, Glossary of Terms, <http://www.carfax.com/Definitions/Glossary.cfm> (last visited Dec. 7, 2005).

⁶ See *id.* (listing the following states that have such a law: Arizona, Florida, Georgia, Illinois, Minnesota, New Jersey, New Mexico, New York, Oklahoma, and Oregon)

⁷ See, e.g., ALA. CODE § 32-8-87 (stating that "[n]o motor vehicle for which a salvage or junk certificate has been issued by this state or any other state shall be driven or operated on the highways or public places of this state"); LA. REV. STAT. § 32:707I(b) (prohibiting operation of a salvage vehicle on "any public street, roadway, or highway until it is registered with the office of motor vehicles, and a reconstructed vehicle title is issued"); TEX. TRANSP. CODE § 501.098 (2005) (prohibiting an owner of a vehicle with a salvage or nonrepairable vehicle title from operating the vehicle on a public highway).

⁸ See Dani K. Liblang, *State Farm Salvage Title Settlement: Your Rights and Remedies* (Nov. 30, 2005), AUTOPEDIA, THE AUTOMOTIVE ENCYCLOPEDIA, available at http://autopedia.com/html/LemonLaw/Michigan_Lemon_Law_Consumer_Alert_State_Farm_Salvage_Title_Settlement.html.

the vehicle's value, along with the known safety risks of continuing to operate, or even repair, a flood damaged or salvaged vehicle.⁹

Given the large number of vehicles seriously damaged by Hurricane Katrina—estimates range as high as 571,000¹⁰—along with the real example of State Farm's widespread violation of state titling statutes, there is an urgent need for military legal assistance attorneys to understand the laws governing flood damaged and salvaged vehicles.¹¹ This article addresses these pressing issues, first exploring the law relevant to flood damaged and salvaged vehicles, followed by an explanation of the terms of the State Farm settlement, and concluding with a discussion of how legal assistance attorneys can educate servicemembers and their families to avoid purchasing a car damaged by the ravages of Hurricanes Katrina or Rita.

B. The Law

With the exception of South Dakota, all states have automobile titling statutes that require vehicles to be "branded,"¹² often with a salvage title, whenever damage exceeds a specified percentage of the vehicle's retail value.¹³ For example, Alabama law states that the total loss of a vehicle occurs whenever an insurance company compensates a vehicle owner for damage that is equal to or greater than seventy-five percent of the vehicle's retail value prior to the damage.¹⁴ Similarly, Louisiana defines a vehicle as a "total loss" whenever it has "sustained damages equivalent to seventy-five percent or more of the market value as determined by the most current National Automobile Dealers Association Handbook."¹⁵ Under both Alabama and Louisiana law, insurance companies and individual owners are required to obtain a salvage title for a "total loss" vehicle.¹⁶ Of the four states hardest hit by Hurricanes Katrina and Rita, including Louisiana, Mississippi, Alabama, and Texas, each requires the title of a "total loss" damaged vehicle to be branded following a damage settlement with an insurance company.¹⁷

In some circumstances, state titling statutes may require a "total loss" vehicle to receive a brand other than salvage. For example, Michigan law requires a damaged vehicle for which the estimated cost of repair exceeds ninety-one percent of the vehicles pre-damage retail value to be branded as "scrap" rather than "salvage."¹⁸ The primary difference between a "scrap" and a "salvage" vehicle is that the latter may be rebuilt, re-titled, and registered to operate on the state's highways.¹⁹ Texas has a similar statute that requires an insurance company to obtain a "nonrepairable" title rather than a "salvage" title²⁰ when the vehicle is "damaged, wrecked, or burned to the extent that the only residual value of the vehicle is as a source of parts or scrap metal."²¹ Although Texas does not allow a "nonrepairable" vehicle to be rebuilt, salvage vehicles may be rebuilt as long as the title bears the words "REBUILT SALVAGE" in red capital letters that "occupy at least 15 percent of the face of the certificate of title."²²

⁹ See Liblang, *supra* note 8; Chris Solomon, *Steer Clear of 'Flood Cars'*, MSN MONEY, <http://moneycentral.msn.com/content/Savinganddebt/Saveonacar/P129008.asp> (last visited Dec. 5, 2005); COORDINATING COMMITTEE FOR AUTOMOTIVE REPAIR (CCAR), SAFETY CONCERNS REGARDING HANDLING, DISPOSAL AND REPAIR OF FLOODED VEHICLES FOLLOWING HURRICANE KATRINA (ed. 1.2, 2005), available at <http://www.ccar-greenlink.org>.

¹⁰ See Solomon, *supra* note 9 (reporting that the National Automobile Dealers Association estimated that 571,000 cars and trucks may have been destroyed by Hurricane Katrina).

¹¹ Some consumer law advocates estimate that more than ten million vehicles on the road have either been salvaged or involved in a serious wreck. JONATHAN SHELDON & CAROLYN CARTER, NAT'L CONSUMER L. CENTER, AUTOMOBILE FRAUD: ODOMETER TAMPERING, LEMON LAUNDERING, AND CONCEALMENT OF SALVAGE OR OTHER ADVERSE HISTORY § 2.1.1 (2003 & Supp. 2005) [hereinafter NCLC AUTO FRAUD].

¹² "Branding" is the common term used in state titling statutes to indicate that the title has a special labeling of the vehicle's condition. Examples of typical brands include "salvage," "junk," "scrap," "flood," "water damage," "salt water," nonrepairable," and "rebuilt." See NCLC AUTO FRAUD, *supra* note 11, § 2.4.5.4.2 (listing thirty different title brands along with common abbreviations used on the certificate of title).

¹³ See *supra* note 4; State Farm AVC, *supra* note 3, para. 3.

¹⁴ ALA. CODE § 32-8-87(d) (2005). Cf. TEX. TRANSP. CODE § 501.091(15) (2005) (defining a "salvage motor vehicle" as a vehicle that "has damage . . . to the extent that the cost of repairs . . . exceeds the actual cash value of the motor vehicle immediately before the damage").

¹⁵ LA. REV. STAT. § 32:702(11) (2005).

¹⁶ ALA. CODE § 32-8-87(b); LA. REV. STAT. § 32:707(1)(a).

¹⁷ See *supra* note 4; TEX. TRANSP. CODE § 501.092(b).

¹⁸ MICH. COMP. LAWS § 257.217c (2005).

¹⁹ *Id.* § 257.217c(12), (13) (requiring a repaired salvage vehicle to be branded "rebuilt salvage" in the legend of the title).

²⁰ TEX. TRANSP. CODE § 501.092(b).

²¹ *Id.* § 501.091(9).

²² *Id.* § 501.100(c).

In the case of Hurricane Katrina, the Louisiana Office of Motor Vehicles has provided specific guidance for titling of damaged vehicles.²³ Following a damage settlement between an automobile insurance company and the insured, the insurance company must apply for a new title with one of the following brands: ST SK for Salvage/Katrina, WA SK for Water Damaged/Katrina, or ST WA SK for Salvage/Water Damaged Katrina.²⁴ If an insurance company allows the owner to retain title after entering into a damage settlement, the insurance company must file a report with the Office of Motor Vehicles that flags the title of the vehicle as “salvage retention” until the owner applies for an appropriately branded title.²⁵

A subsequent vehicle owner’s remedy for previous noncompliance with a state titling statute varies widely from state to state.²⁶ Most states will allow a claim for violation of the state’s consumer protection statute, which typically prohibits unfair or deceptive acts or practices.²⁷ In these claims, failure to acquire a branded title in accordance with the titling statute is characterized as a *per se* deceptive act or practice. In addition, noncompliance, especially by an insurance company, may support a claim of common law fraud.²⁸ A minority of states may even provide a specific damage remedy, rescission of the contract, or criminal penalties.²⁹

C. The State Farm Settlement

In January 2005, State Farm entered into an agreement (Assurance of Voluntary Compliance (VPC)) with the attorney’s general of forty-nine states³⁰ and the District of Columbia.³¹ Over a year earlier, in November 2003, State Farm had approached the Iowa Attorney General’s Office with the revelation that State Farm could not confirm whether it had obtained branded titles for tens of thousands of vehicles that it had declared a “total loss” after 1 June 1997.³² As part of the negotiations leading to the VPC, State Farm requested the assistance of the state attorneys general and the state departments of motor vehicles, or equivalent agency, to identify and locate the current owners of these questionably titled vehicles.³³

Under the terms of the VPC, each of the participating states agreed to release State Farm from liability for failing to comply with its titling statutes for vehicles acquired by State Farm between 1 January 1997, and 10 January 2005.³⁴ In return, State Farm agreed to make reasonable efforts to identify all vehicles not properly titled, to inform the vehicle’s current owner of the discrepancy, and to offer the vehicle’s owner financial compensation.³⁵ State Farm further agreed to provide a total of \$40 million to compensate current car owners who elect to release their legal claims against State Farm.³⁶ Finally, State Farm agreed to compensate the attorney’s general for their costs and attorney’s fees in the amount of one million dollars.³⁷

Although Iowa Attorney General Tom Miller, along with many of the other state attorney’s general, applauded State Farm for voluntarily disclosing and offering to remedy its failure to properly title over 30,000 vehicles,³⁸ others point out that

²³ Louisiana Office of Motor Vehicles, Hurricane Katrina Duplicate Title & Registration Process, <http://www.dps.state.la.us/omv/katrinavr.html> (last visited on Dec. 5, 2005).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See NCLC AUTO FRAUD, *supra* note 11, § 6.2.1.9.

²⁷ See *id.*

²⁸ See *id.*; see also *O’Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64 (Mo. 1989) (upholding a jury award of punitive and statutory damages based on fraud against an insurance company that failed to obtain a salvage title for a flood damaged vehicle).

²⁹ See NCLC AUTOFRAUD, *supra* note 11, § 6.2.1.9; see also Liblang, *supra* note 8 (listing potential causes of action against an automobile dealer or private seller arising out of State Farm’s failure to obtain branded titles for total loss vehicles).

³⁰ Indiana is the only state that did not enter into the agreement. State Farm AVC, *supra* note 3.

³¹ See *States Reach Agreement with State Farm Insurance that Will Result in \$40 Million to Consumers* (Jan. 10, 2005), available at http://www.state.ia.us/government/ag/latest_news/releases/jan_2005/State_Farm.html [hereinafter *States Reach Agreement with State Farm*].

³² See Sorkin, *supra* note 2.

³³ See State Farm AVC, *supra* note 3, para. 7.

³⁴ See *id.* para. 36; see also *States Reach Agreement with State Farm*, *supra* note 31.

³⁵ See State Farm AVC, *supra* note 3, paras. 25-33.

³⁶ See *id.* para. 27.

³⁷ See *id.* para. 44.

³⁸ See *States Reach Agreement with State Farm*, *supra* note 31.

State Farm has a history of failing to obtain salvage titles for totaled vehicles.³⁹ Following a two-year investigation of State Farm's compliance with Indiana titling laws, which culminated in a lawsuit, a judge ordered State Farm to buy back each consumer's misbranded automobile at the purchase price plus finance charges, taxes, insurance premiums, and repair costs.⁴⁰ For consumers who wished to keep their car, the minimum settlement amount was \$2,500.⁴¹

Unlike the Indiana residents who were essentially returned to the position they had been in prior to purchasing a "total loss" vehicle, State Farm is offering car owners in the rest of the United States only a fraction of their monetary loss. Based on estimates in the State Farm AVC, car owners are being offered approximately twenty-five to thirty-five percent of their car's retail value, with the amount varying based on the total value of the car.⁴² In addition, not all purchasers of the misbranded vehicles are included in the settlement. To be eligible for compensation, the car owner must satisfy four criteria: (1) be the current registered owner of the vehicle, (2) not be the person who was the registered owner at the time of the total loss, (3) be unaware at the time of purchase that the vehicle had been declared a total loss, and (4) complete a claim form that includes a release from all other claims against State Farm.⁴³ For owners of vehicles no longer registered, whether because they are inoperable or because they have been dismantled for parts, no compensation is available.⁴⁴ To make matters worse, the letters notifying consumers of the offered settlement are being signed by the state attorneys general, giving the offer the tacit endorsement of the states' primary consumer protection advocates.⁴⁵

Legal assistance attorneys advising a client who has received a State Farm settlement letter should be aware of the following terms of the AVC. First, the amount of compensation contained in the AVC distribution plan is only an estimate.⁴⁶ The agreement provides that the actual amount of compensation will be "increased or decreased proportionately based on the number of Current Vehicle Owners who elect to receive the compensation set forth" in the distribution plan.⁴⁷ If State Farm accepts Compensation Claim Forms from all 30,000 plus owners, the average compensation will only be \$1,333.33. As the number of participants decreases; the amount of compensation increases. Because the \$40 million fund does not depend on the actual number of current vehicle owners who elect to participate, individual compensation could theoretically exceed actual loss.

The details of the car owner's release are also significant. According to the terms of the Compensation Claim Form, the car owner's release of claims "is not binding until payment is made and the check has been negotiated."⁴⁸ The timing of when the release becomes binding is important because the mailing of State Farm settlement letters by the state attorneys general included a deadline of 18 November 2005, for return of the claim form.⁴⁹ Thus, car owners who returned their claim form without understanding the significance of the release of claims or without appreciating the paltry amount of estimated compensation will not be bound by the agreement until they cash the compensation check.

Because the amount of compensation under the AVC could theoretically exceed actual damages, car owners who returned their claim form prior to the deadline are now in a position to choose between accepting the compensation check or seeking greater damages in a lawsuit. For car owners who failed to submit the claim form prior to the deadline, State Farm is under no obligation to include them in the pool of current vehicle owners who will share the \$40 million.⁵⁰

The large financial impact of a car owner losing clean title to a vehicle makes it necessary for legal assistance attorneys to consider the following actions with regard to the State Farm settlement. First, elicit the assistance of the command in

³⁹ Sorkin, *supra* note 2.

⁴⁰ *See id.*; Liblang, *supra* note 8.

⁴¹ *See* Liblang, *supra* note 8.

⁴² *See* State Farm AVC, *supra* note 3.

⁴³ *Id.* Exhibits A and B.

⁴⁴ *Id.* para. 27. One of the ironies of this agreement is that vehicle owner's who stopped registering their totaled vehicle because it was beyond the limits of safe operation or economical repair are ineligible for compensation. In other words, those who were harmed the most will receive the least, unless they seek a remedy outside the terms of the State Farm AVC.

⁴⁵ *Id.* Exhibit A.

⁴⁶ *Id.* para. 27.

⁴⁷ *Id.*

⁴⁸ *Id.* Exhibit A.

⁴⁹ *See State Farm's Wrecked Car Owners*, *supra* note 1.

⁵⁰ *See* State Farm AVC, *supra* note 3, para. 33.

identifying all servicemembers or dependents who may have received a State Farm settlement letter, either in the past or possibly in the future—neither the attorneys general nor State Farm have indicated whether additional letters will be sent. Second, provide detailed information and personal legal advice to those who have received a settlement letter. Legal advice should include the option of rejecting the State Farm compensation offer and seeking a judicial remedy.⁵¹ And third, if a legal assistance client chooses to pursue a judicial remedy, the legal assistance attorney should provide an appropriate referral to an attorney with expertise in the area of automobile fraud.⁵²

D. Avoiding Flood Damaged or Salvage Vehicles from Hurricanes Katrina and Rita

Avoiding a flood damaged or salvaged vehicle is often easier said than done. The National Consumer Law Center estimates that over ten million automobiles on the nation's roads have been sold with "an undisclosed salvage or serious wreck history."⁵³ Such a troubling statistic can only suggest that unscrupulous individuals make widespread efforts to return severely damaged automobiles to the retail car market. Nonetheless, there are some simple steps that consumers may take to avoid purchasing a flood damaged or salvaged vehicle resulting from Hurricanes Katrina and Rita.⁵⁴

Step one is to search the National Insurance Crime Bureau's (NCIB) database, located at www.nicb.org, for a car's vehicle identification number (VIN).⁵⁵ In a cooperative effort between insurance companies,⁵⁶ salvage yards, and state and local authorities, the NCIB created a database of VINs (over 165,000 as of 4 November 2005) for vehicles damaged in Hurricanes Katrina and Rita.⁵⁷ Because the database does not include any information about the scope of damage to the vehicle, the NCIB recommends that any vehicle identified in the database be inspected by a competent mechanic before purchase or sale.⁵⁸

Step two is for prospective purchasers to conduct a thorough examination of the vehicle. Iowa Attorney General Tom Miller recommends that consumers look for the following signs of flood damage:

1. Check inside the trunk, including around the spare tire, for evidence of moisture, silt, or corrosion.
2. Check the engine for signs of moisture damage, such as rust or silt or grass.
3. Give the vehicle a smell test—inside and out—if it smells musty, it could have been flood-damaged.
4. Examine the underside of the vehicle for signs of excess moisture.
5. Check inside dome lights, glove boxes, and other places where water might have been trapped for signs of moisture, mold, rust, or silt.
6. Check the interior for signs of mismatched items such as carpeting or seat covers.
7. Test all electrical components, including lights, signals, switches, and audio systems.⁵⁹

⁵¹ See, e.g., *Pittsburgh Consumer Sues State Farm Insurance for Selling Salvage Cars Without Disclosure*, PRNEWswire (Nov. 17, 2005), available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/11-17-2005/0004218694&EDATE=> (describing a lawsuit filed in Pennsylvania by Robert Beaves who was offered \$2,700 by State Farm as compensation for his 2001 pre-certified Honda Civic LX).

⁵² Legal assistance attorneys who are unable to identify a local attorney with expertise in automobile fraud should consider contacting the National Association of Consumer Advocates (NACA), <http://www.naca.org>, for an appropriate referral. There are also numerous attorneys specializing in automobile fraud or Lemon Law litigation that advertise on the World Wide Web.

⁵³ See NCLC AUTO FRAUD, *supra* note 11, § 2.1.1.

⁵⁴ See Tom Miller, *Don't Buy Flood-Damaged Vehicles* (Nov. 4, 2005), available at http://www.state.ia.us/government/ag/latest_news/releases/nov_2005/flood_damaged_cars.htm.

⁵⁵ Prospective car buyers may also conduct a free search at www.carfax.com/flood and www.autocheck.com/storm.

⁵⁶ Insurance companies providing information to the NCIB include Allstate, Copart, Direct General, Farmers Insurance, GEICO, Insurance Auto Auctions, Imperial Fire & Casualty, Infinity Insurance Company, Liberty Mutual, MetLife, Nationwide, Progressive, Safe Auto, Safeway Insurance of Louisiana, Sentry, St. Paul Travelers, State Farm, The Hartford, The Republic Group, TM Claims Service, U.S. Agencies, USAA, and Universal Underwriters. See National Crime Insurance Bureau Homepage, <http://www.nicb.org> (last visited on Dec. 5, 2005).

⁵⁷ See Miller, *supra* note 54.

⁵⁸ See National Crime Insurance Bureau Homepage, <http://www.nicb.org> (last visited on Dec. 5, 2005).

⁵⁹ See Miller, *supra* note 54.

Step three is to conduct a thorough title search. Although services such as Carfax and Autocheck may be useful, buyers must be cautioned not to rely on either service as a comprehensive record of an automobile's title history.⁶⁰ When the information on a Carfax or Autocheck report appears incomplete or questionable, a buyer should seek additional information from the state departments of motor vehicles in which the car has been titled. Once a buyer has assembled a complete title history, he or she should examine the documents for specific indicators of prior damage. First, the buyer should look for any indication of a title brand, whether salvage, water damage, or any other indication of a nonstandard condition.⁶¹ Second, the buyer should look for evidence that the car has been owned or transferred by an insurance company, a body shop, a junk yard, or a rebuilder.⁶² When either indicator is present, the average consumer should avoid purchasing the vehicle.

Even after completing these three steps, potential car buyers should hesitate before signing on the dotted line. Auto experts point out a number of ways in which the current owners of flood damaged vehicles may attempt to defraud buyers.⁶³ For owners who do not have insurance, there may be a temptation to clean, repair, and sell a flood damaged car without acquiring a branded title, and possibly without disclosing the prior damage to a potential buyer.⁶⁴ A second way in which a potential buyer may be defrauded is by the seller's noncompliance with state titling laws.⁶⁵ Whether accomplished with the assistance of nefarious insurance companies, rebuilders, or auto auctions, one only needs to refer to the State Farm settlement to understand how easy it may be for a total loss vehicle to be sold without the required branded title.⁶⁶

When buying a car, consumers should not rely on the myriad of state consumer protection laws, titling statutes, and private information services like Carfax and Autocheck. If there is one thing that the State Farm settlement makes clear, it is that the rule in buying an automobile is still *caveat emptor*. Legal assistance attorneys must, therefore, educate the military community on the need to conduct a thorough investigation of any used car that they may consider buying, including a detailed title search, a thorough personal inspection, and a paid inspection by an expert mechanic.

⁶⁰ See NCLC AUTO FRAUD, *supra* note 11, § 2.3.

⁶¹ *Id.* § 2.4.5.4.1.

⁶² *Id.*

⁶³ See Solomon, *supra* note 9.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*