

Article from Dealer Magazine (http://www.imakenews.com/dealercomm1/e_article001370348.cfm?x=b11,0,w)

March 10, 2009

The lawsuits are bubbling up

by Gil Van Over

Lawsuits against automotive dealers continue to fill the court's dockets. While there are always seemingly new theories put forth by a few creative plaintiff attorneys, truth is that many of the lawyers suing car dealers don't seem to want to spend the time, energy or intellectual capital to prove new theories to judges and juries. Many of these lawyers stay with the proven cases that car dealers have been successfully sued for. Trouble is, some car dealers continue to provide the lawyers with reasons to stay in court. If you want to keep these lawyers at bay, make sure your staff is not guilty of the following practices.

Negative Equity – This occurs when a dealer increases the vehicle cash selling price and the trade allowance by an amount to eliminate a negative trade balance when the trade payoff is greater than the trade's actual cash value. This is a potential Truth in Lending Act disclosure violation that has been successfully litigated against dealers in many states. And because the cash price is increased to accommodate the negative equity, in some states it is also an overcharge of state taxes.

Some dealers will try to assert that the third party lender(s) who buy their contracts will not accept contracts with negative equity properly disclosed.

There are two ways negative equity can be disclosed, netting or non-netting. My advice is to call each lender to confirm the method that lender prefers and start properly disclosing negative equity.

Contract Date on Recontract – When a deal is recontracted, some dealers will date the contract the date of delivery instead of the date the new contract is signed. While the Truth in Lending Act is silent as to the definition of contract consummation, a judge in Virginia set the precedent used by some attorneys to litigate this theory. This judge ruled that the contract consummation date is the date that the final contract is signed and all prior contracts are null and void. He further ruled that if the contract was dated to a prior date (date of delivery), the dealer charged interest for a period of time when there was not a valid contract in place and therefore understated the Annual Percentage Rate on the Retail Installment Sales Contract, causing a Truth in Lending violation.

The issue is an old one. The manufacturers used the contract date to determine a transaction's incentive eligibility. The practice then crept into used deals and deals without any rebate or incentive.

Some manufacturers now appear to be cognizant of the dilemma dealers have when backdating a retail contract and will take recontracting into account during incentive audits.

My advice is to have a conversation with your factory representative and understand what documentation you will need to defend yourself in an incentive audit. Then incorporate the changes in your process.

Credit Application Manipulation

When a customer's vehicle is repossessed and the bank comes knocking on the door with a five figure deficiency balance, some consumers turn to attorneys to get out of paying the deficiency.

A favored tact of the plaintiff's bar is to allege that the credit application was manipulated or

falsified or both. They further allege that if the dealer had not engaged in the fraud, the consumer would not have qualified for the financing and would not have been put into the position to pay for a vehicle she could not afford.

Some of the allegations include: the credit application was blank when I signed it; that is not my signature on my credit application; or the information provided to the lender is different than what I provided on a signed credit application.

My advice is to have the consumer fill out the credit application in his or her handwriting and input this information exactly into Route One, Dealer Track or CUDL. Print a full credit application from one of these aggregators and have the customer sign the signature line.

Subsequent changes to the information on the credit application must be accompanied by documentation that is sent to the lender. Keep a copy for your file.

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