



F&I

Gil Van Over

Backdating Contracts Could Mean Mass Rescission

Way back when I was living with my parents, as the oldest child, I felt a certain responsibility. Dad was in the Air Force and mom managed one of the restaurants on base. They worked hard to provide for our family doing an outstanding job.

My job within our family was to watch the other Neanderthals who I now call my brothers and sisters. My toughest job was to protect the younger sisters from their older brothers. My brothers unmercifully picked on my sisters and my goal in life was to protect the girls.

One time, after one of my sisters came running to me with tears streaming down her face bellowing that her brother had hit her, I went looking for him. I couldn't find him anywhere.

Finally, I heard a mouse-like sound coming from the dryer next to the washer. Alas! I found him! So, as a demented 16-year-old, instead of opening the dryer door and pounding him with a fist, I simply turned the on button on.

He tumbled a few times before I opened the door and let him out. I'm still not sure if he learned his lesson, but this much I know. His previously perfectly straight hair turned curly that day.

Unintended consequences

This example of unintended consequences is similar to what dealers are faced with today. The factories are putting dealers in harm's way from litigation because of their archaic policies.

Since some of the factories do not trust dealers to properly report a vehicle sale for incentive reporting purposes, they use the date of the retail contract as the final determinate. If the contract date is outside of the incentive period, you are hit with a chargeback. Because of this, you might have gotten into the habit of backdating a contract to the date of delivery when you recontract a deal.

Not a legal review

I fully understand that this is *Dealer magazine*, not a legal review. That is why I usually do not quote lawsuits. However, it is necessary this time to help you deliver a message to your factory rep.

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The first lawsuit is *Rucker v. Sheehy*. In this lawsuit, Rucker was able to successfully argue that by backdating the retail contract, Sheehy was charging interest for a period of time when a contract was not in place. When the APR was recalculated using the effective contract date, the APR was understated by more than the allowable amount under the Truth In Lending Act (TILA), thus a TILA violation.

The second lawsuit is *Nelson v. Pearson*. Using the precedent from *Rucker*, Nelson asked for mass rescission based on applicable state statutes. The judge sided with Nelson, which now leaves Pearson with the prospect of rescinding 1,500 transactions that were backdated when recontracted.

The necessary process

In order to potentially defend yourself against this type of claim, you need to set up a process and then petition your factory for approval against chargebacks.

The first step is to void the previous transaction. This is done by gathering all of the customer's copies of documents, stamping them VOID and obtaining the customer's signature next to the VOID stamp.

The next step is to a rescission agreement. Then restart the process and reprint and execute every document from the menu to the buyer's order to the Risk Based Pricing Notice to the

contract and the product enrollment forms.

If you want to purport that the new transaction stands on its own, every document must be reprinted, executed and signed.

Word tracks with factories

You must have a conversation with your factory to ensure that it will not charge you back on an incentive audit. Feel free to print this article and use it to have this discussion.

The factory must understand the difference between selling the vehicle and arranging for the settlement for the vehicle.

If you legitimately sold and delivered the vehicle on a certain date, but the deal structure does not meet the underwriting standards of your third party lenders, you still sold and delivered the vehicle on that original date.

If you had to later restructure a transaction to induce a lender to purchase the contract, the customer still took delivery and told his neighbors he bought a car on an earlier date.

If your transaction contains an original contract, subsequently voided, supported by a rescission agreement and fax backs from lenders requiring a restructuring, and a valid contract with a date outside of the incentive period to obtain funding, why shouldn't the factory recognize the sale date as being within the incentive period?

Either the factory accepts this process and allows the incentive, or the factory provides you with a hold harmless in the event you are required by the court to rescind every contract written to meet the factory's archaic standards.

It's their choice. 

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