

BUSINESS LAW NOTES

Special To Our Automobile Dealer Friends

WHY YOU MUST REVIEW YOUR F&I BUSINESS PRACTICES

By: Shawn D. Mercer, Esq.

My hat is off to those dealerships who were represented at one of the NCADA-sponsored F&I seminars I put on in December. For those of you who could not attend, talk to a dealer who did and you will learn that no matter how good you believe your processes to be, there are legal pitfalls that you may have never dreamed of that could cost you dearly. Even though the seminars were designed only to provide an initial overview of certain areas of the law, I firmly believe every attendee learned one or more lessons that could save their dealerships huge sums of money by avoiding consumer lawsuits or governmental investigations.

I continue to read about more class actions that have been successfully prosecuted against both large and small dealers all across the country. The damage to an individual customer is usually relatively minuscule. However, multiplying that small amount of damage by a large number of customers can easily add up to a huge sum of money. With attorney fees, costs and potential punitive damages thrown in, the damage award can be large enough to put even the most financially successful dealer out of business.

To make matters worse, a single plaintiff can often represent the interests of a large number of customers who will usually have no idea there is even a lawsuit until the process is well underway. More often than not, these legal actions come about as a result of an honest mistake on the part of a dealership. However, the "we didn't mean to break that law" defense rarely works.

Trial could begin in the near future in New Jersey in what Law.com calls the "mother of all class actions." Approximately 500 New Jersey dealers have been named defendants in a class action that alleges the dealers unintentionally violated a state statute governing charges for registrations and titles. Another dealer recently settled a class action alleging the dealer inflated prices for title and tag fees and for other documents and services relating to the vehicle purchase. The approved payout amount - \$14,000,000.00.

How do you attempt to avoid such misfortune? You may wish to consider a third-party comprehensive review of your business practices. Such a review should include, at a minimum, an examination of the dealership's sales techniques, F&I procedures, documentation and signage. A more comprehensive review may also include an education program for dealership employees, as well as a review of advertising, employment practices and key dealership service provider contracts. Correction of a single deficiency can avoid costly litigation while at the same time increasing customer satisfaction and ultimately dealership profitability.

Are you confident that your F&I department does everything the right way? For example, do you have a written information security program that you routinely monitor and update? Did you know that you must disclose to every finance customer in writing the fact that the dealership may receive a fee for arranging financing? The penalty for failure to have an information security program is \$11,000.00 per day. The Attorney General's Office has indicated that it believes dealers could be forced to refund all fees received for arranging financing if the dealership fails to fully comply with the financing statute. These are just two examples. You are required by law to comply with all pertinent statutes and regulations.

Dealers are fast becoming a target of choice for plaintiff's lawyers. The most effective means of avoiding attack is to conduct a thorough examination of how you do business and to alter your business practices as necessary to comply with the law. A F&I procedures review cannot guarantee absolute compliance. However, minimizing exposure can certainly help a dealer principal sleep better at night. When will your dealership schedule a business review?

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AFTER-WARRANTY ADJUSTMENTS TAXABLE

By: Shawn D. Mercer, Esq.

An after-warranty adjustment is defined by the North Carolina Department of Revenue as being an arrangement between a customer, a dealer, and a manufacturer whereby the dealer and the manufacturer agree to replace or repair an item on a customer's vehicle for a percentage of the amount they would charge in the absence of the arrangement. The arrangement can apply to charges for labor as well as for parts and materials.

. . . The dealer . . . Is liable for sales or used tax on the dealer's cost . . .

The dealer typically supplies the replacement parts from the dealer's inventory and also performs the required labor needed to accomplish the repair. The manufacturer then reimburses the dealer for the agreed-upon portion of the total charges, and the dealer absorbs the remaining unpaid amounts the dealer incurred.

The Department of Revenue has determined that the dealer uses tangible personal property withdrawn from its inventory and is liable for sales or use tax on the dealer's cost of the tangible personal property consumed.

It is imperative that dealers remit sales or use tax on all parts consumed when making an after-warranty adjustment repair.

IS YOUR DEALERSHIP COMPLYING WITH OFAC REQUIREMENTS?

By: Shawn D. Mercer, Esq.

The Department of the Treasury has established a division dubbed The Office of Foreign Assets Control (AOFAC) as part of its efforts to counteract the establishment and maintenance of known and suspected terrorist organizations. OFAC has set forth minimum requirements financial institutions must comply with when ascertaining the identity of a new customer. Dealerships are considered to be financial institutions for the purpose of this law. The dealership must:

- (1) Verify the identity of any person seeking to open an account to the extent reasonable and practicable;
- (2) Maintain records of the information used to verify a person's identity, including name, address, and other identifying information; and
- (3) Consult lists of known or suspected terrorists and terrorist organizations provided to the dealership by any government agency to determine whether that person appears on any such list.

Dealerships are required by law to review the specially designated Nationals (ASDN) list as part of the customer identification process. The most efficient means of checking the SDN list is to log onto the U.S. Treasury website at <http://www.treas.gov/offices/eotffc/ofac/sdn/index.html> and select the Specially Designated Nationals List (SDN) in PDF format.

Sources such as Equifax will also complete the search for the dealership for a per transaction fee.

Please note that dealerships are ultimately responsible for compliance. Further, the dealership should be checking every customer against the SDN list – including service department customers.

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