Spot Delivery December 2004

Commentary

Legal Stuff You Think You Know - Or Not!

By Thomas B. Hudson

There are a lot of "truisms" floating around the car business that aren't true at all. Or aren't always true. Some examples:

True or false?

A customer has no right to rescind a car purchase and finance transaction.

True, if the sale is one that takes place in the dealership, but sometimes false, if the transaction is one that takes place off premises at such places as tent sales, or in customers' homes. There is a federal "Door-to-Door Sales Law," and many states have similar measures. If those measures are triggered, they might inject a three-day right of rescission into the transaction. The state laws vary in their coverage. Be careful when sales activities take place away from the dealership. And don't get me started on where Internet sales take place.

Your dealership's credit sales transactions are all subject to the federal Truth in Lending Act.

Probably most are. A surprising number aren't, though. If the amount financed exceeds $25,000, the federal Truth in Lending Act doesn't apply (unless your customer is going to live in the car). It's not just the amount financed that will exclude a deal from TILA coverage, though. If the sale of a truck is to a fellow who owns a small plumbing business, and the truck will be used primarily for business purposes, federal TILA doesn't apply. If the sale is to a business entity, federal TILA doesn't apply – and this is the case even when the car will be used for personal, family or household purposes, as when a businessman buys and titles a car his kids will be driving in the business name.

Federal law requires that you get your customer's signature before you can pull a credit bureau report.

Nope. Not true, even though you hear it all the time (actually, you can't kill this fable with a hammer). It is a very good business practice to have a rule like this at your dealership, but federal law does not require it. Think about all those credit card marketers who sign people up over the phone every day – no signed authorizations from those applicants! Watch state law on this one though – a few states require a signature.

The USA PATRIOT Act requires you to check the Specially Designated Persons List maintained by the Treasury Department's Office of Foreign Assets Control before engaging in a credit sale or lease transaction.

OK, I admit it. This is a trick question. You are required to check the OFAC Specially Designated Persons List before you do business (any business, by the way, not just credit sales or leases) with any person. Note that "doing business" also includes hiring people – you need to run your employees' and vendors' names through the OFAC screen too. The trick part of the question?

The OFAC requirement doesn't come from the USA PATRIOT Act. It has been around long before Congress, in response to the 9-11 attacks, passed the USA PATRIOT Act.

You cannot show a customer his or her own credit bureau report.

There is no federal prohibition against this practice. Ages ago, credit bureaus sometimes tried to prevent dealers from sharing credit reports with the subjects of the reports, but that practice (imposed by contract and not by law) has all but faded away.

Federal law prohibits you from quoting an exact payment to your customer until the customer signs the retail installment contract.

I actually saw a sign on a dealership wall that said "Federal Law Prohibits Us From Quoting You an Exact Payment." Federal law does nothing of the kind. Federal law also doesn't stop you from saying, for instance, that "your payment will be between $375 and $390, depending on the finance charge rate we can find for you."

continued on page 47

Spot Delivery Legal Stuff You Think You Know continued from page 14

If you spot deliver a car and then cannot find a sales finance company that is willing to buy the deal, you can unwind the deal the customer has signed and repossess the car.

You can, in most states, unwind a spot delivery deal provided you and the customer have agreed in writing that you have that right. If you don't have a written "unwind" agreement, you have no authority to unwind the deal. You will be obligated to collect the scheduled payments from the customer (i.e., you have created a "receivable"). The good news is that you aren't likely to have to hold the contract for long – you can repossess the car if the customer defaults, and sue the customer for a deficiency, if state law permits.

You can do do-it-yourself brain surgery too, but I don't recommend it. I've seen these cobbled-together safeguarding policies in dealerships, and they generally don't cut the mustard. They usually take a one-size-fits-all approach, and they will work only if they happen to accurately fit the dealership and the dealer correctly does the customizing. Even then, the FTC's Safeguarding Rule requires the dealership to actually go through the process of figuring out where private information comes from, where it is stored, who has access to it, how it is protected, and the like. After the program is adopted, it needs care and feeding – you are required to periodically audit the program and re-evaluate it as required to keep your customers' information safe. Simply adopting the words without doing the work doesn't work. With this one, you can't use baling wire and duct tape. You actually have to do it right.

So there's my list of things you know that aren't (or aren't always) so. If you have any of your own to add, write them in the margin of a $20 bill and send them to me, or email them to me at tbhudson@hudco.com.