

Stuff I Read in Depositions

by : *Gil Van Over*

I read somewhere (how appropriate) that I can live longer if I continue to stretch my mind. Now, I'm not the kind of guy who buys *Playboy* for the articles. But I like to read as one of the exercises to stretch my mind to stave off feebleness.

Some of my reading materials are the periodic depositions and complaints I read as part of helping to defend dealers in litigation.

Here are some of the lessons to be learned from recent cases I've worked on.

Sue me

Most of the cases I have been involved with as an expert witness allege some type of technical Truth in Lending violation. The types of violations that consumers just don't know about or feel any damage from. Yet, more than half of these cases start as a service or mechanical issue. This case is the textbook example.

A consumer purchased a used car from a franchised dealer in 2002. The following year, the consumer's mechanic noticed some indications that the vehicle may have been in an accident. The dealer did not disclose prior damage when the consumer purchased the vehicle.

The consumer went to the dealer to try and get some satisfaction. The dealer stood his ground. Finally, the consumer asked, "What do I have to do so that you will take care of this problem?" To which the dealer supposedly replied, "Sue me."

Guess what? The consumer sued in 2003. The creative attorney from the dark side also added 10 other unrelated complaints, including the dealer supposedly failing to provide the TILA disclosure prior to consummating the deal, failing to prominently disclose the Used Car Buyer's Guide, and failing to provide the Used Car Buyer's Guide.

Now, four years later, the case is still going on. The lawyers' bills continue to escalate. Solution – Settle mechanical and service issues before they escalate into lawsuits. And, by all means, do not suggest that a consumer's next course of action is to sue you.

What's a usury?

This case was settled, thankfully.

Exhibit A was the retail installment sales contract. The handwritten retail installment sales contract with plenty of blank lines.

Exhibit A disclosed a 29.9 percent APR, well in excess of the state maximum rate, thereby violating the usury law.

There was no way to help defend this blatant violation, and the dealer ended up settling.

The finance company, though, got off, even though it accepted and funded the contract.

Solution – Understand what the usury limit is in your state. Share this information with your F&I managers and establish the policy that no contract will be written in excess of usury.

I ain't paying no juice

I've worked on several cases in which the plaintiff complains that the dealer increased the cash selling price to cover a sub-prime acquisition fee. This practice is potentially a Truth in Lending violation known as a hidden finance charge if the fee is not included in the APR calculation.

One deal that we had to settle very quickly had this damaging exchange in the salesperson's deposition:

Plaintiff's attorney: Did you include the \$595 fee from XYZ Finance Company in the cash price?

Salesperson: Yes we did.

Plaintiff's attorney: Why did you do that?

Salesperson: The sales manager said he wasn't paying no juice. It is the customer's fault she has bad credit, let her pay the fee.

Solution – A sub-prime acquisition fee must be taken as a cost of goods sold, and cannot be passed along to the consumer.

What's a date, anyway?

Increasingly, the recent cases I've been retained in are to defend a dealer against a potential Truth in Lending violation that occurs when the dealer backdates a rewritten contract to the date of delivery, instead of the date the new contract is signed.

Recent decisions have held that backdating a contract in effect charges the consumer interest during a period of time that no contract exists. When the APR is calculated with the correct date, the APR is typically misstated by more than the one-eighth of one percent allowance as allowed by TILA.

Solution – Always use the current date when recontracting a deal, not the date of delivery.

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