

The Risks of Spot Delivery

by : Gil Van Over

I am sitting in Germany getting ready to head to France and am reminded of a childhood story.

Dad was in the Air Force. While in the upper stages of elementary school, we lived in Okinawa. One of my chores was to cut the grass. With an old-school lawn mower. The kind that had two wheels connected to three blades. The blades rotated as the wheels turned and cut the grass. The wheels only turned when I pushed the machine forward.

If the grass got too high, I had to push harder to get the blades through the grass. If I had an important kid's club meeting to get to, I could run and get through the grass faster. I chopped a few frogs' heads off in the process.

Today, Dad has a riding mower to cut his grass. He still has the old lawn mower, but strictly as a relic in his museum. He could cut the grass with the old relic, but has progressed with the times and technology.

Dealers that are still using spot delivery as their primary sales process are still working with relics and have not advanced with available technology.

The proliferation of Dealer Track, Route One and CUDL provide a dealer with the tools to obtain credit approvals before sending the customer down the road with the car, essentially eliminating spot delivery issues.

Spot delivery issues can be grouped into three categories: unwinds, deceptive practices and rewrites.

Unwind

Unwinding a deal when the customer has been in the vehicle for anywhere from three days to three weeks bring a host of potential issues and disclosure requirements, including:

- **Adverse action notice:** A sales manager makes a credit decision when he decides to spot deliver a vehicle. This makes the dealership a creditor in the Fed's eyes (Fair Credit Reporting Act, Equal Credit Opportunity Act). Both laws require that a creditor send an adverse action notice to a consumer if the creditor makes a credit decision that is adverse to the consumer's application for credit.

If the F&I manager is unable to secure financing with a third-party lender, and the sales manager decides to unwind the transaction, the sales manager is making an adverse decision. After all, the dealership could have carried the paper itself. The dealer is required to send an adverse action notice within 30 days of unwinding the deal.

- **Repossession:** As a creditor, when you repossess a vehicle as part of an unwind, you may become subject of post-repossession disclosure requirements. When was the last time you sent a post-repo notice when you unwound a deal?
- **Can't find customer or car.** Worse than repossessing a car is not repossessing a car in a timely manner. How often has a customer hid a car you have tried to get back? It is likely that the car has been

trashed if you do manage to recover your vehicle.

- Can't get trade back. Most dealers now wait until the deal is funded before selling the customer's trade, but cases still abound where the dealer forgot (?) to wait. Heaven forbid if the dealer had inflated the trade to cover negative equity. Now what value do you place on the lost trade to try and appease the consumer?
- Damage to car. For whatever reason, consumers whose credit history or falsified credit application information make it difficult to place the paper, do not necessarily take care of the car they don't own yet. When you get it back, it may have been trashed, diminishing the value of your inventory.
- CSI. Bringing a customer back three times to rewrite a deal under different terms stretches your credibility with the customer and can't possibly make the customer very pleased. Now try to explain to the customer about the upcoming CSI survey he will be receiving and ask for that "completely satisfied" rating.

Unfair and deceptive trade practices

As in all industries, our industry has a small segment of practitioners who will stretch the ethical bounds and run afoul of state and federal deceptive trade practice statutes. These trouble spots include:

- Encourages power booking. Some sales managers have fallen prey to the desperation of having a car out on the road with a deal structure that no finance company will approve. Seems that the loan to value ratio is out of line. Instead of restructuring the deal and getting the customer in to rewrite the contract, Sam, the sales manager, simply inflates the vehicle's value by adding non-existent options to book out sheet and sends the deal off to a different bank. Can you say bank fraud? Or suspicious activity report? Or criminal offense?
- Yo-yo transactions. A yo-yo transaction is the deal that is put out at terms a dealer knows will not be approved just to get the customer to fall in love with the car (puppy dog close). Then, a week or so later, the customer is called with the story that the financing got approved on different (usually more restrictive) terms that the customer may not have agreed to before she showed the car to all her friends, family and fellow employees. So she agrees to either a higher APR, more cash down, lower terms or higher payments – or a combination of the four.

The attorneys general have labeled this transaction as a yo-yo transaction and the plaintiff's bar have learned how to play with it.

Spinning the deal again

Unfortunately, rewriting a deal does not always increase a finance manager's paycheck. It is normally seen as a nuisance and many finance managers will do as little as they deem necessary to get the customer in and out. This attitude and resulting shortcut in the process creates a myriad of problems, including:

- Inconsistent product pricing. Let's assume for a minute that the credit union limits the amount it will finance for a service contract. If the F&I manager does not start the rewrite process with a new menu, or

does not reprint the service contract enrollment form, you now have inconsistent pricing between documents in your deal file. Try to explain that to the attorney general.

- **Rate for product.** Now, let's assume that your sales manager put the deal out at 13.0 percent and your F&I manager got the deal approved at a 9.0 percent buy rate with a two point cap. You have to get the customer back in and rewrite the deal at 11.0 percent. If the F&I manager does not start the process with a new menu, the documents in the file will show that you started the F&I negotiation at 13.0 percent and agreed to 11.0 percent if the customer agreed to purchase F&I products. This classic trading rate for product scenario is a potentially deceptive practice.
- **Product selected versus purchased.** This time, the finance company approves your deal with gap and service contract only. Problem is that you sold three other products and now must rewrite the deal without those products. If your F&I manager does not get the old documents from the customer, or does not start the rewrite process with a new menu, your paperwork will show that the customer agreed to purchase five products and now only has protection from two products.
- **Contract date.** We all know that the manufacturers are sometimes slow to react (some would suggest arrogance may play a role). They continue to put dealers at risk of violating federal law by using the contract date as the eligibility date for their incentive programs. Dealers have been forced to backdate contracts to comply with the manufacturers' wishes as most rewrites take place at least one day after the date of delivery.

While Truth In Lending and Regulation Z are silent as to contract consummation, the courts have ruled that the consummated contract is the last one signed. If that contract is backdated, the customer is being charged interest for a period when there was not a consummated contract, resulting in an understatement of the annual percentage rate. This understatement is a violation of federal law.

Gil Van Over is the president of gvo3 & Associates, a nationally recognized dealer compliance consulting firm. He assists dealers with F&I and sales compliance.