

## *Develop and Implement a Litigation Defense Strategy*

Football started this weekend and with it the numerous mind numbing hours of watching the pre and post game shows replete with experts' analysis. Although the experts did not always agree when picking winners, there did seem to be one principle that they all believed in.

Defense wins Championships.

This principle should be applied to your dealership today, because the F&I Offices in auto dealerships are under intense scrutiny and attack from four separate sources: The Federal Trade Commission (FTC); Federal Regulators; state Attorneys General and plaintiff attorneys seeking class action fees.

A dealer must have a Litigation Defense Strategy or potentially face dire consequences.

A closer look at the four sources.

The FTC is responsible for implementing most of the consumer protection laws that Congress passes. It takes the law as written by one of our elected Senators or Representatives, writes a rule or regulation to interpret the intent of the law and then enforces the rule (or regulation). The FTC is also not bashful about its authority to levy fines up to \$11,000 per violation. The Safeguards Rule, the Privacy Rule, the Used Car Rule and Regs B (Equal Credit Opportunity Act), M (Consumer Leasing Act) and Z (Truth In Lending Act) are examples of the areas the FTC will be watching a dealer's compliance with.

Although the FTC is responsible for a significant percentage of scrutiny arising from federal laws, other regulators can also knock on your door with fines from potential violations. For example, the FinCEN will not look kindly on your dealership failing to file a form 8300 when a drug dealer launders over \$10,000 through your business. Or the Office of Foreign Assets Control (OFAC) can seize your business and personal assets and levy fines up to \$30,000,000 if you sold the van to the terrorist who blew up a building.

Aspiring Governors (state AGs) have tired of rehabilitating the nursing homes in their states and are looking for another target that the public doesn't exactly trust who has deep pockets. Sounds like the definition of auto dealer to me. These state Attorneys General are bringing actions against dealers in an ever increasing number of states, usually leveraging the state's Unfair and Deceptive Trade Practices Acts.

Finally, plaintiff's attorneys are the classic example of the old supply-demand curve we all learned in Econ 101. Too many attorneys, not enough litigation. As a result, some attorneys are becoming very creative in developing conspiracy theories that attract thousands of consumers to a class and pursue auto dealers. Even if you haven't done anything wrong, a settlement is less painful than a trial. A familiar tact is to use technical

Truth In Lending Violations, state Unfair and Deceptive Trade Practices and Fair Credit Reporting Act violations.

A Litigation Defense Strategy has six key components:

1. Conduct a thorough review of all of the forms used in the sales and F&I processes. Ensure that the forms protect the dealer's interest, documents the transaction and requires the customer acknowledge the agreed upon terms. This forms review should also ensure that the dealership is using each of the 14 forms many dealers are using today.
2. Walk the walk that your customer goes through from the time she arrives on the lot until she leaves behind the wheel of one of your vehicle. Many dealers have a similar progression: Sales, then Aftermarket, then F&I. See how and when the 14 forms are completed and make sure the processes helps to create the deal jacket roadmap that 12 jurors can use to acquit you.
3. Publish a well written policies and procedures manual. Include pay plans, job descriptions and process maps. Provide training sessions with your Sales and F&I Managers. Obtain their written acknowledgement of the training provided and their commitment to adhere to the polices and procedures.
4. Establish an auditing process that regularly reviews selected deal files for compliance with your internal policies. The reviewer should look at deal jackets through the lenses of the 12 citizens in the jury box that probably will be looking to free your bank account of six figures.
5. Train and certify your Sales and F&I Managers in compliance and ethics training. Two excellent, complementary certification programs are available through the Association of Finance & Insurance Professionals and the Institute for Ethical Behavior ([www.instituteforethicalbehavior.com](http://www.instituteforethicalbehavior.com)).
6. Do it again.

The driving principles of a Litigation Defense Strategy are:

- Buying a vehicle consists of two transactions: buy the vehicle and pay for the vehicle
- Correct forms are critical, proper execution is mandatory
- Customer and Dealer must sign at least three times acknowledging the price of the vehicle and all aftermarket and F&I products
- Your deal jacket must be a roadmap for 12 citizens to acquit
- The Sales Department creates some F&I problems
- Establish reasonable maximum product pricing guidelines
- Quote the rate and term with every payment quote
- Disclose negative equity
- Inspect what you expect
- Train and certify your Sales and F&I Managers

Next month I will expand on how to conduct a thorough forms review and discuss the 14 forms that should be in every financed deal jacket.

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