

Defense Litigation Strategy – Forms Review
Jeff Sack's Dixon Odom Newsletter – October 2003

In last month's newsletter, we discussed developing and implementing an F&I Office litigation defense strategy. To recap, the 6 critical components to an overall litigation defense strategy are:

1. Conduct a thorough review of all of the forms used in the sales and F&I processes.
2. Walk the walk of your customer from the time she arrives on the lot until she leaves behind the wheel of one of your vehicles.
3. Publish a well written policies and procedures manual.
4. Establish an auditing process that regularly reviews selected deal files for compliance with your internal policies.
5. Train and certify your Sales and F&I Managers in compliance and ethics training.
6. Do it again.

This month, we will begin to expand on these 6 critical components, beginning with conducting a thorough forms review.

Forms are important to the process of selling and financing a vehicle and ancillary aftermarket and F&I products. Properly constructed forms must provide the safe harbor language and concepts to aid in the defense against litigation or regulatory inquiries. In addition, these forms must be properly completed each and every time. Many dealers use the following forms as part of documenting the sales and F&I process:

- Worksheet (4 Square)
- Buyer's Order
- F&I Menu
- Retail Installment Sales Contract
- F&I Enrollment Forms
- Recap Sheet
- Signed, Completed Credit Application
- Arbitration Agreement
- Spot Delivery Agreement
- Finance Reserve Disclosure
- OFAC Clearance
- Copy of customer and co-customer Government Issued Identification
- Customer and co-customer Privacy Notice

Worksheet (4 Square) – This commonly used form is the first used to negotiate and document the sale of the vehicle. With it, one attempts to obtain the customer's agreement to purchase price, trade value, cash down and monthly payments.

Buyer's Order – The Buyer's Order finalizes the sale. The agreed upon price of the vehicle should remain consistent from this document to the F&I Menu to the Retail Installment Sales Contract. Some dealers are now completing this form after the F&I Menu presentation and disclosing the purchase of all aftermarket and F&I products on the final Buyer's Order.

F&I Menu – A properly constructed F&I menu not only helps to increase product penetration and customer satisfaction, it can also help to defend a dealer against payment packing charges. The top of the menu must reflect the agreed upon vehicle sale transaction: purchase price, trade in value, trade in payoff, balance with fees and taxes, term in months, APR and base monthly payment. The customer should initial the top of the menu to confirm his agreement with the terms.

The bottom of the menu should provide for a same term to same term payment comparison, so that the customer can make an informed decision on the purchase of products. The customer must sign, confirming her agreement to purchase F&I products.

Retail Installment Sales Contract – These contracts are usually a generic contract that the dealer is able to use with most lenders or a contract provided by the manufacturer's captive. The appropriate Truth In Lending safe harbor language is provided. A dealer must ensure that the contract is properly completed and executed. For example, anytime a third party payment is financed (GAP, for example), the dealer is required to show who the premium was paid to and for what purpose. Some plaintiff's attorneys, looking to find a class action lawsuit in your files, will flyspeck your contract searching for Truth In Lending violations.

F&I Enrollment Forms – Every product that is sold in F&I or aftermarket should have an enrollment form documenting the product price and terms.

Recap Sheet – Even though this is an internal document, it is being used through discovery to provide a roadmap to class action lawsuits. Be certain that every product sold in F&I is separately accounted for on the Recap Sheet.

Signed, Completed Credit Application – Don't let any F&I Manager convince you of a reason why there should be a blank, signed credit application in the file. Or, that there is ever a legitimate reason to not have a signed credit application if your dealership pulled a credit bureau on the consumer.

Arbitration Agreement – This agreement is probably the most varied agreement I see in dealer's files. Some dealers don't utilize one, some dealers insert it into the Buyer's Order, while other dealers have a separate agreement. An arbitration agreement is intended to keep any disputes to arbitration instead of class action litigation. Many

industry experts agree that an arbitration agreement should have the following four points:

- Hasn't eliminated consumer right to claim punitive damages
- Arbitration organization choices
- Dealer picks up filing costs
- Arbitration proceeding convenient to consumer

Spot Delivery Agreement – This document should outline the dealer's rights under the spot delivery process. It should assert that the dealer will make best efforts to secure financing, but failing to do so will require the return of the vehicle. The agreement should set forth a time frame for the return of the vehicle, a provision to repossess, an understanding of the customer's down payment and trade in and provide for excess wear and tear and excess mileage charges.

Finance Reserve Disclosure – Some dealers are starting to use this form in response to the pending class action lawsuits against many major lenders alleging finance pricing discrimination. These disclosures essentially say that the dealer may be earning a commission for the service of obtaining financing on the customer's behalf.

OFAC Clearance – Every dealer is required by the Office of Foreign Asset Control (OFAC) to ensure that a vehicle is not sold to a person whose name appears on OFAC's list of suspected terrorists, drug dealers or money launderers. This check is available online either any of the three major credit bureaus or through independent websites, such as www.PatriotDealer.com. A copy of the report showing no match must be retained in the file as proof that the list has been checked.

Copy of customer and co-customer Government Issued Identification – Every indirect lender that a dealer sells contracts to has a provision in its Dealer-Lender Agreement that the dealer is responsible to positively identify the customer on the contract. A legible, current copy of a government issued identification is the best way to prove that the customer's identity was verified. There is also a provision in the USA Patriot Act (which does not yet affect auto dealers) that a customer's identity must be positively determined before entering into a financial transaction.

Customer and co-customer Privacy Notice – You have been giving your customer a copy of your privacy policy since the requirement was effective July 1, 2001, right? The best way to prove it is to have a signed, dated copy in your deal jacket.

By the way, recent news that the Federal Trade Commission is out to make an example of auto dealerships that have not implemented the Safeguards rule as required as of May 23, 2003 is frightening, to say the least. How will you fare if the FTC decides to call upon you? Start by having a thorough forms review.

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