

DOS AND DON'TS OF SPOT DELIVERY

In Wisconsin, dealers who spot a vehicle and can't secure financing are required by law to finance the purchase. **California law requires a specific form for recontracting. Find out what else you need to know about spot deliveries.**

BY JOE BARTOLONE

You might be considered an old timer in the car industry if you remember the 1970 release of "Sign Sign Everywhere a Sign" by the Five Man Electrical Band. The chorus goes like this (it helps if you get the tune in your mind first):



*Sign Sign everywhere a sign
Blocking out the scenery
breaking my mind
Do this, don't do that, can't you read the sign*

As a compliance consultant with gvo3 & Associates, it's interesting to watch newscasts or read articles about dealerships who could have avoided lawsuits, regulatory violations, or being a victim of identity theft had they read the "signs." Unfortunately, we are in a highly regulated and visible industry and dealers must decide if they are going to heed the warning signs or continue with an operating philosophy of business as usual.

One area that dealers are under attack includes spot delivery — the practice of contracting a customer prior to obtaining financing approval from a third-party lender. It also includes the resulting circumstances when a dealer is not able to arrange financing on the agreed upon terms. In most

cases, when the agreed upon financing terms change, the dealer and the customer enter into a new agreement — a process referred to as recontracting. In other cases, the dealer may not be able to find a lender who is willing to accept the agreed upon terms or credit worthiness of the customer. This situation is commonly referred to as an unwind. In both cases, dealers incur a variety of risks and exposures.

KNOWING YOUR STATE REQUIREMENTS

The first order of business is to know your state law. Let's take a look at how various states address spot delivery and the use of a spot delivery agreement.

In conjunction with its retail contract single document rule, California is very specific regarding its position on spot delivery. On the face of the "CA LAW 553 Retail Installment Sales Contract," there is a box labeled "Seller's Right to Cancel." It states:



"If Buyer and Co-Buyer sign here, the provisions of the Seller's Right to Cancel section on the back giving the Seller the right to cancel if Seller is unable to assign this contract to a financial institution will apply."

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On the reverse side, the Seller's Right to cancel is defined as:



"Seller agrees to deliver the vehicle to you on the date this contract is signed by Seller and you. You understand that it

may take a few days for Seller to verify your credit and assign the contract. You agree that if Seller is unable to assign the contract to any one of the financial institutions with whom Seller regularly does business under an assignment acceptable to Seller, Seller may cancel the contract."

Following this definition, the contract goes on to describe how and when the customer should be contacted, as well as the customer's responsibilities while the car is in his or her possession. If the seller decides to exercise his right to cancel, then the seller has to ensure that it has a well-defined legal process to exercise the right.

On the other end of the spectrum, states like Wisconsin and Massachusetts take a completely different approach to spot delivery. A "LAW 553 Retail Installment Sales Contract (RISC)" in these states will have language stating the following:



"HOWTHISCONTRACT CANBECHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to

this contract must be in writing and we must sign it. No oral changes are binding"

Although not illegal to spot deliver a vehicle in Wisconsin, it can be problematic if you can't secure third-party approval. For example, under Wisconsin law, if a dealer spots a vehicle and can't secure third-party financing, the dealer is required to finance the purchase. Now you've potentially entered into the world of "buy-here-pay-here" and are subject to a whole new set of regulations.

In the past, some dealers tried to skirt the law by not signing the RISC at delivery, or by having the customer sign a spot de-

livery agreement. Neither of these approaches is permitted in Wisconsin. In addition, the customer must be in default before you can start any repossession efforts. After the customer is at least two months past due, you must send a notice of right to cure default. If within 15 days, the customer fails to cure the default then you can move toward repossession. If the customer does not voluntarily return the vehicle, then you must secure a judicial order giving you the right to possession of the collateral. It's not surprising that dealers in

UNDERSTANDING RECONTRACTING

Recontracting a deal is a common result of a spot delivery. California requires a specific form be used when recontracting a deal. The form is titled "Acknowledgement of Rescinded Contract." The customer indicates that he or she is rescinding the original contract and voluntarily entering into a new contract. The form also requires the dealer to disclose the reason for the recontract (i.e., per lender approval, or lower rate).

Although your state may not require



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In Wisconsin, spot delivery is not illegal. However, if third-party financing cannot be secured once a dealer spots a vehicle, the dealer must finance the purchase.

these states don't spot deliver.

The state you operate in may support the use of a spot delivery agreement. However, be aware of a recent case in Ohio (Patton v. Jeff Wyler Eastgate, Inc.) where the courts ruled that the dealership violated the Truth in Lending Act (TILA) by using a spot delivery agreement to vitiate the terms of the retail installment sales contract. The court further stated that the purpose of TILA would be frustrated if automobile dealerships are permitted to rescind the terms of integrated automobile retail installment contracts by using a second, contradictory form.

this form, it could be a best practice to use a rescission form when recontracting. If you elect not to, then, at a minimum, you should always attempt to get all of the customer copies, and date and mark all copies VOID when recontracting. You should also fold and staple the forms and get the customer's acknowledgement.

Another area to watch is the date you use when recontracting a deal. There is only one date and that's the date of the recontract. Using the original delivery date may cause you to disclose an incorrect APR, which, of course, is a TILA violation and legal fodder for a plaintiff's attorney.

It is also a best practice to run a new menu when you recontract a deal so that the menu, the buyer's order and the RISC all disclose the same agreed-upon terms.

UNWINDS AND ADVERSE ACTION NOTICES

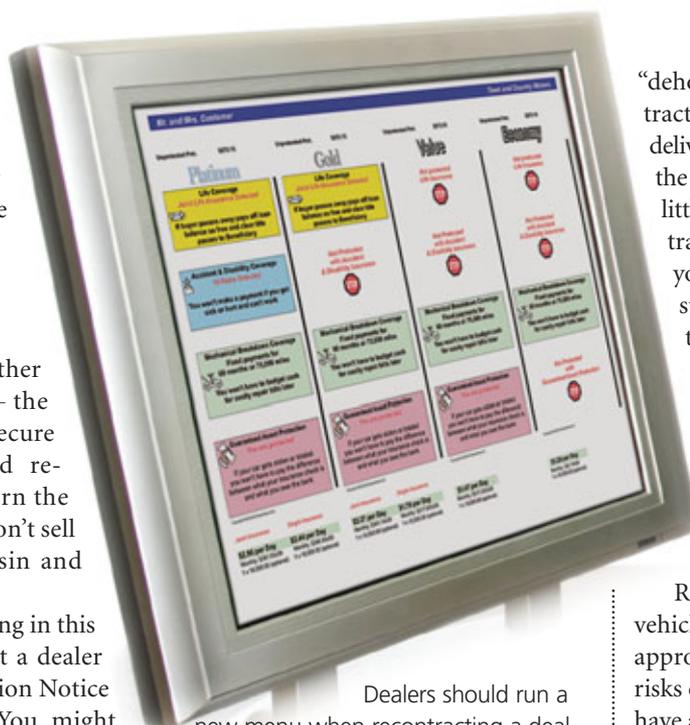
Unwinding a deal is another result of a spot delivery — the situation where you can't secure third-party financing and require the customer to return the vehicle. Let's assume you don't sell cars in states like Wisconsin and Massachusetts.

Many attorneys specializing in this area of the law suggest that a dealer should send an Adverse Action Notice when unwinding a deal. You might argue that the six lenders who rejected the deal probably have sent the notice, so why should you. The thinking here is that since the dealer is a creditor, you have the opportunity to finance the purchase. By unwinding the deal you are also taking an adverse action toward the customer. This may be an over simplification, but to really understand the dos and don'ts of adverse action notices, I would strongly recommend you get your hands on a copy of the new "NADA Management Guide — A Dealer Guide to Adverse Action Notices."

Just notifying the customer that his or her financing didn't go through is no guarantee that he or she is going to bring the car back. So what if you have to repossess the car? Are you familiar with post-repossession disclosure requirements? This is another good reason to visit with your attorney.

OTHER COMPLIANCE ISSUES

As the No. 1 criminal activity in the country, dealers who regularly spot deliver increase their chances of being victimized by an identity thief. One of the red flags of identity theft is that the customer is in a hurry to take delivery of the vehicle. So if both you and the thief are in a hurry, you're probably going to let your guard down. The thief's credit worthiness will most likely be much higher than your spotting guideline, and you may not catch a fraud alert on the credit report. Not much you can do when this



Dealers should run a new menu when recontracting a deal to ensure the correct agreed-upon terms.

Utilize today's technology and take the time to submit an application through DealerTrack, Route 1 or CUDL before you spot the vehicle. You may be surprised and get an approval and can eliminate the potential risks of spotting the vehicle.

horse is out of the barn.

Dealers also need to be aware of the pressures the F&I practitioner is under to get a spotted deal approved. This is where you can lapse into some unfair and deceptive trade practices. To start with, what terms did you put the customer out at? Were they realistic terms? Could this be viewed as a yo-yo transaction? Are you stuck on the call? You only need \$500 more value in the collateral — doesn't the car have a moon roof and premium sound?

What about "loaned vehicle agreements?" Some dealers use this as a means of

"dehorsing" the customer in lieu of contracting the customer and having a spot delivery agreement signed. In these cases, the most aggressive sales managers get a little squeamish and don't want to contract the customer and spot the car. If you're using this type of form, make sure you have your attorney's OK and that you have some legal recourse if the customer decides not to return the vehicle.

RECOMMENDED PRACTICES

Utilize today's technology and take the time to submit an application through DealerTrack,

Route 1 or CUDL before you spot the vehicle. You may be surprised and get an approval and can eliminate the potential risks of spotting the vehicle. You will also have a better understanding of the credit challenges you're facing and can take more appropriate actions.

Always sign the RISC as the "Seller" at the same time the customer signs the contract. If you don't, you risk a potential TILA violation and could compromise the enforcement of the contract.

Document a rescission process to ensure that all the legal requirements are met and the required documents are properly executed for both recontracted and unwound deals.

Develop a checklist specifically for recontracted and unwound deals and make the responsible employees accountable. Think about the last time you had a major customer complaint or the threat of a lawsuit and looked at the documentation in the deal file. Were there missing documents, unsigned documents, improperly executed documents?

We always tell our clients that our job is to help you identify risks and exposures and to assist you in making informed business decisions. Spot delivering a vehicle today is not the same as it used to be. Make sure you're familiar with the laws in your state, take the time to document your sales processes and conduct a legal review of your forms.

Can't you read the signs? ■

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