



Vital Signs

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My experience with dealers is that they tend to be, shall we say, frugal when it comes to spending money on F&I-related compliance. A full-blown review of all dealership F&I policies, procedures, documents, and related matters can quickly run into real money. While many dealers have come to the conclusion that such a review makes sense in light of the heat coming from the Federal Trade Commission, the Consumer Financial Protection Bureau, state attorneys general, and plaintiffs' lawyers, many others have not seen a threat large enough to justify the large expense.

For these dealers who haven't seen the light, I sometimes recommend a deal jacket review. The cost of plowing through a half-dozen or so representative deal jackets is substantially less than a full compliance review. A deal jacket review can be a useful first step in identifying compliance problems and in convincing a dealer to undertake a more comprehensive effort. I tell dealers that it's a bit like a doctor checking your pulse, blood pressure, temperature, and respiration. If something's amiss with one of those vitals, that's a symptom that something else – something more serious – might be going on.

What sorts of things do we find when we do these reviews? Here are a few examples.

- ***Rubbish Bin Files.*** Do the deal jackets look like miniature landfills, containing all sorts of extraneous stuff that shouldn't be there? Each deal jacket should have a table of contents and a checklist, and each document listed in the table of contents should appear, in order, in the deal jacket. Nothing that doesn't belong in the deal jacket should be there, and nothing that is required should be missing. Messy files that contain everything, including the kitchen sink, suggest that the dealership isn't organized, that there is no (lawyer-approved) document retention program, and that the quality control imposed by uniformly organized deal jackets is missing.
- ***Signatures Would be Nice.*** Many of the documents in the deal jacket constitute agreements of some sort between the dealership and the buyer. Usually, these documents have signature lines with a space for a date so that the parties can evidence that they have agreed to the terms of the document and when. It isn't unusual, in our experience, for these documents to lack a required signature. Even when the dealership representatives are diligent about having the buyer sign documents, dealership signatures sometimes will be omitted. Unsigned documents can have dire consequences – the court refuses to enforce an arbitration agreement because the dealer didn't sign it, so the dealer's attempt to thwart a class action lawsuit is unsuccessful. The table of

contents might highlight all deal jacket documents that need signatures, another form of quality control.

- ***Coloring Inside the Lines.*** Dealership computer systems are supposed to be programmed to print specific data entries in specific places on the forms that are used in the sales and financing transaction. You'd be surprised how often the strike points for printing are off enough to give the buyer's lawyer an argument that the disclosures are incorrect. "Close" doesn't cut it.
- ***Contracts So Old They Are Written on Parchment.*** Buyers orders, retail installment sales contracts, and leases are not cast in stone. The companies that provide these forms to dealers frequently change the forms and alert dealers when they do. Invariably, some dealers don't get the word or choose to ignore the news in order to exhaust the supply of old forms on hand. That can lead to disclosure or substantive violations for every deal in which those forms are used. It's usually easy to determine if a particular form is a vendor's latest iteration. Checking online or making a phone call can get you the form's most recent revision date.
- ***Safe Harbor? What Safe Harbor?*** Some laws are complicated, and the regulators who enforce those laws are considerate enough to provide "safe harbor" versions of legal forms required by those laws. As an example, the FTC has published a safe harbor version of the privacy notice required by the FTC's privacy regulations. If I open a deal jacket and see a privacy notice that isn't in the safe harbor format, I know the dealership's F&I forms and processes are not receiving a lawyer's attention.
- ***One Form Too Many?*** One arbitration agreement is enough. Some dealers use a form of retail installment sale agreement that contains an arbitration clause, a buyers order with a different arbitration clause, and one or more documents evidencing the sale of ancillary products with still different arbitration clauses. A judge looking at that sort of hodgepodge will likely throw up his hands and refuse to enforce any of the arbitration clauses, leaving the dealership without protection from class actions when it is most needed.
- ***Small Tricks and Traps.*** An outdoorsman tracking game can sometimes track an animal from the smallest hints – crushed grass here, a broken twig there. Likewise, a quick scan through the dealer's forms can tell you if a good lawyer has laid hands on them. Does the buyers order contain the notice required by the FTC Used Car Rule? Is the notice conspicuous? If the dealer negotiates deals in Spanish, does the notice also appear in Spanish? Is the dealer's disclaimer of implied warranties in an "as-is" sale conspicuous? Is the notice required by the FTC's Preservation of Consumer Claims and Defenses Trade Regulation Rule printed in 10-point, bold-faced type?

These are just a few examples of the sorts of clues a deal jacket review will pick up. I'm sure others could be added to this list.

Does the patient have a fever? Pulse rate high? Shallow breathing? Blood pressure off the charts? Maybe it's just a reaction to something the patient ate ... or perhaps these are signs of much more serious health problems.

And if a dealer's deal jackets can't pass common-sense tests like the ones discussed above, you can be pretty sure there are deeper F&I compliance problems that need to be addressed.

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