

CHARAPP & WEISS, LLP

DRIVING YOUR SUCCESS

Credit Cards: Read Your Agreements

The passage of the Dodd-Frank financial regulation bill last year, as well as a recent campaign by Ally Bank to encourage use of credit cards in vehicle sales transactions, has led to some misconceptions about credit card use in dealerships. Here are some frequently asked questions and answers about credit cards in a dealership.

Q: Do I have to accept credit cards for sale transactions?

A: No. Most credit card agreements permit dealers to accept credit cards in their service and parts departments without having to also accept them in their sales departments.

Q: Didn't a federal law passed last year allow my business to offer cash discounts?

A: Yes. Section 1075 of the Dodd Frank Act provides that a merchant may offer discounts and incentives to customers to pay by cash or check provided that the merchant offers that right for all types of credit cards it accepts and the discounts or incentives are available to all prospective card users and disclosed conspicuously.

Q: By that logic, do I have the right to impose a surcharge for someone to use a credit card?

A: Not exactly. There is no federal law that makes surcharges illegal in merchant transactions. However, the agreements between merchants and credit card issuers generally prohibit surcharges. There was nothing in the Dodd Frank Act that required credit card issuers to allow surcharges for the use of credit cards, so that prohibition may still be in your agreement. In addition, the laws in a number of states prohibit surcharges to customers who pay by credit card.

Q: If I have to take the card without a surcharge, can't I impose a maximum?

A: Probably not for transactions in your dealership based on your merchant agreement. The Dodd Frank Act did regulate merchant agreements by specifically permitting merchants to set minimum amounts for which a credit card may be used to no more than \$10.00. It also provided for regulation of merchant agreements to permit maximum amounts which may be charged, but only for government agencies and educational institutions. Most merchant agreements for car

Continued on page 4, left column

INSIDE THIS EDITION

CREDIT CARDS: READ YOUR AGREEMENTS

Page 1

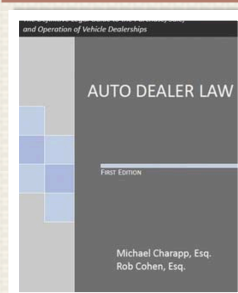
EMPLOYEES ARE ALSO LIABLE FOR TORTS

Page 2

RBP AND AA NOTICES: THE CONFUSION

Page 3

NEW HAPPENINGS..... ON PAGE 2



**BOOK
LAUNCHING**



**OFFICE
OPENING**



BLOGGING

EMPLOYEES ARE ALSO LIABLE FOR TORTS

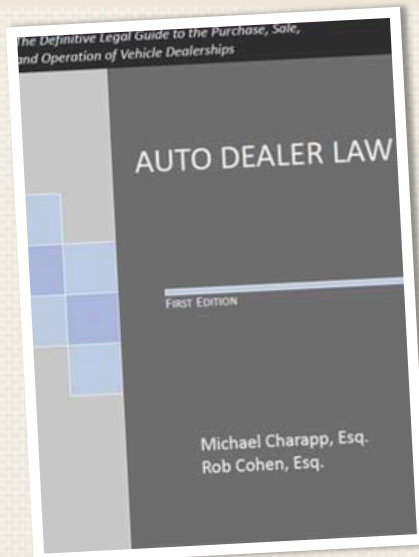
We don't want to get too law-schoolish, so we will describe a tort simply: it is a civil claim that is not based on a contract or a statute.

Contractual claims are generally between the parties to a contract. In the case of a car dealership a contractual claim would be between a customer and the dealership. There are many claims based on statutes that can be brought against a dealership whether it is by a customer for an alleged violation of the Truth in Lending Act or the Fair Credit Reporting Act or by an employee for an alleged violation of the Fair Labor Standards Act. Torts claims, however, are different. Under tort law, in a dealership context, not only can the employing dealership be liable for an employee's wrongful activity, but the employee can also be liable.

The best example is a car crash. Not only can the owner of the vehicle be sued for the acts of the permissible driver, but the driver can also be sued.

This brings us to improper sales activities. Salespeople generally don't view overly aggressive tactics as problems for themselves. However, a claim of fraud is a common claim made by a plaintiff who feels wronged. And fraud is a tort. A fraud claim can be brought against a dealership and a salesperson.

Consequently, the next time you are talking to employees about your compliance requirements, you might want to let them know that you are not just worried about liability for the dealership. You are also talking about preventing liability for the salespeople themselves.



BOOK: AUTO DEALER LAW

Written by Michael Charapp and Rob Cohen, *Auto Dealer Law: The Definitive Legal Guide to the Purchase, Sale, and Operation of Vehicle Dealerships* is a reference guide that provides over 350 pages and 35 chapters that addresses everything from buy/sells to antitrust, emergency preparedness to manufacturer relations, and so much more. Order your subscription today at www.autodealerlaw.com.



FLORIDA OFFICE

Charapp & Weiss has opened an office in Florida. We are located at:

20801 Biscayne Boulevard,
Suite 403,
Aventura, Florida 33180

Telephone: (305) 705-9991



DRIVING YOUR SUCCESS BLOG

If you want to know why vehicle manufacturers are learning the wrong lessons from the Apple experience, read the Driving Your Success blog at <http://www.cwattorneys.com/blogs/auto-dealer-law/>.

RBP and AA Notices: The Confusion

There is confusion over the issue of whether a dealer should provide a risk based pricing notice, followed by an adverse action notice if credit is declined. You have probably read that: (1) the notice that most dealers have chosen to provide under the Risk Based Pricing Rule to consumers who apply for credit must be given to all who apply for credit, and an adverse action notice must be sent to customers when credit is declined. That is true. You have also probably read that: (2) a creditor must either give a risk based pricing notice if credit is granted on less advantageous terms or an adverse action notice if credit is declined, but not both. That is also true. Wait, how can both of those statements be true?

The answer lies in the difference between the risk based pricing exception notice that most dealers give to customers and the risk based pricing notice itself. To best understand that difference, let's go back to the inception of the Risk Based Pricing Rule.

The requirement to promulgate the Risk Based Pricing Rule was originally included in the Fair and Accurate Credit Transactions Act of 2003. Basically it required notice to a consumer if credit was offered on terms that are "materially less favorable than the most favorable terms available to a substantial proportion of consumers." If you

are confused by that language, you are not alone. It took years for the FTC to sort out what it should do in the final regulation. Finally, when it issued the Risk Based Pricing Rule, it recognized the arguments from the auto dealer industry that the process contemplated by Congress was just not feasible for dealers. Consequently, the FTC agreed to provide an exception. It allows dealers and others who offer credit the chance to avoid giving an actual risk based pricing notice to those who obtain credit on less advantageous terms. Instead they can provide to all customers who apply for credit a notice that includes the customer's credit score and related information in a risk based pricing exception notice.



Most dealers now use the risk based pricing exception notice. Consequently, dealers must provide this notice to every customer who applies for credit.

Let's now discuss the adverse action notice

requirements. Under the Equal Opportunity Act and the Fair Credit Reporting Act, a consumer whose application for credit is not approved must be given notice of the reason why. The finance source to whom the credit application was sent provides (or should provide) an adverse action notice when turning down a consumer's credit application. For a number of years,

dealers (who are the initial creditors under retail installment sale contracts in most states) have been advised to comply separately and issue adverse action notices in addition to those provided by proposed assignees of credit.

All of this became the subject of substantial discussion in July because of a government change to the risk based pricing notice and the adverse action notice forms effective July 21. The risk based pricing exception notice always required disclosure to the applicant of his or her credit score and related information. As of July 21, the risk based pricing notice and the adverse action notice were both changed to require similar credit score disclosures as the risk based pricing exception notice. Against that background, let's examine the two statements in the first paragraph of this article to show why they are both true.

If the dealer decides to deliver the risk based pricing exception notice instead of the risk based pricing notice, that must be delivered to all customers who apply for credit. To those customers whose application for credit is denied, an adverse action notice should be delivered. Because of that, both a risk based pricing exception notice and an adverse action notice should be delivered to customers whose credit is denied.

The risk based pricing notice which advises a customer why less advantageous credit is granted must only be delivered to those who receive approval for less advantageous credit. An adverse

dealers prohibit a dealer from establishing maximum amounts for which the card may be used.

Q: If Ally is encouraging the use of credit cards for down payments, does that mean it's allowed generally?

A: It depends what your indirect lending agreement provides with the lender to whom you intend to assign the customer's retail installment sale contract. Some lending agreements prohibit down payments by credit card. In the event of a default, the finance source can look to a dealer who accepted a credit card down payment contrary to the agreement to repurchase the customer's defaulted loan.

Q: If I accept the down payment on a credit card, and I am permitted to do so under my indirect lending agreement with the finance source, isn't that a problem under the Truth in Lending Act?

A: No. While some generally believe that it is a problem under TILA to take a credit card for a down payment, the amount on the credit card is subject to its own set of disclosures by a different creditor.

Use of a credit card should not affect the disclosures made under the Truth in Lending Act.

Q: Isn't accepting a credit card a problem if a customer is unhappy with the purchase of the vehicle?

A: That is the most difficult issue with credit card sales. Credit card users have substantial rights to challenge the transaction and to seek a refund of the amount paid. When a customer does that, a merchant who receives a notice of dispute has a very tight and inflexible time period to respond and to justify the amount charged to the customer's credit card. It is easy for the notice to come in and to escape attention in the office. If you miss the response date, the chargeback will be imposed. This is always a very painful lesson for any dealer who has suffered a loss because of a credit card challenge.

If you are determining how you will deal with credit cards in your sales department, read your agreements. Consult the master agreement with each of your finance sources to determine what each says about accepting credit cards for down payments.

Review your merchant agreements with credit card issuers to determine what restrictions are imposed.

action notice goes to customers whose applications for credit are denied. Since one lender cannot both grant credit and deny credit, a customer should not get both the risk based pricing notice and the adverse action notice from the same creditor. What does all this mean?

1. If you are one of the majority of dealers who has chosen to comply with the Risk Based Pricing Rule through delivery of risk based pricing exception notice, then that notice must be provided to all customers who apply for credit.
2. If a customer is denied credit, then provide an adverse action notice to that customer.
3. A risk based pricing exception notice will not suffice as an adverse action notice. An adverse action notice will not suffice as a risk based pricing exception notice. To those posing the frequently asked question of whether a dealer must provide both a risk based pricing exception notice to a customer who applies for credit and then an adverse action notice if credit is denied, the answer is yes. Both notices must be provided in those circumstances.
4. Statement number 2 in the first paragraph that both a risk based pricing notice and an adverse action notice need not be delivered to a customer probably does not apply to you. That only applies to creditors who deliver an actual risk based pricing notice that explains why credit has been granted on a less advantageous basis.

CHARAPP & WEISS, LLP

8300 GREENSBORO DR. SUITE 200

MCLEAN, VA 22102

TEL: 703.564.0220

FAX: 703.564.0221

WWW.CWATTORNEYS.COM

*Contents©2011 Charapp & Weiss, LLP.
Articles are for information only and
do not constitute legal advice.*