

The Lender Agreement Your Dealership Signed Said What?

At the recent ATD Convention at NADA in Las Vegas I had the opportunity to talk with a number of Dealers, F&I product providers and Agents on a wide variety of compliance and industry related topics. I was not surprised that compliance issues related to the use of technology and electronic menus in F&I Departments and the challenges related to properly integrating this activity into the documents of the physical truck deal were at the forefront of everyone's mind (and rightfully so given the consequences), but the fact that dealership compliance with lender Dealer Agreements was again on so many people's radar screen was interesting.

When selling a truck, in most cases we need three things: trucks, customers and credit. Dealerships have various ways and lots of tools and training program opportunities to help find the trucks and customers, the challenge is often finding lenders willing to extend credit across the entire credit spectrum. With many lender's recently revising their Dealer Agreements as a result of activities by the Federal Trade Commission, knowing how to review a lender's Dealer Agreement is a must. As with many of the compliance issues that arise in the motor vehicle industry, reviewing a lender's Dealer Agreement can seem like an overwhelming task, but it is not as difficult as you think if you understand a few basic principles.



Most of the standard Dealer Agreements used by lenders (don't forget the assignment language included in Retail Installment Sales Contract documents) are, on the surface, non-recourse. While under the traditional concept of a "non-recourse" deal this may be so, most of these Agreements contain other language which can negate the non-recourse concept and may obligate a dealership to repurchase various loans in a portfolio, an event which the dealership thought could not occur. Virtually all lender's Dealer Agreements contain sections where the dealership provides various representations and warranties to the lender. Within these sections are warranties from the dealership for everything ranging from the purchaser having no claims or defenses against the contract (whether or not these claims or defenses are valid), to all documents being used in a transaction complying with all federal and state laws (when was the last time your dealership reviewed and updated its car deal documents to ensure legal compliance?). Many of these lender Dealer Agreements also extend the warranties to the accuracy of information far beyond the dealership's knowledge. Therefore, when the agreement includes a warranty that all statements contained on any document are true, a dealership (ever been misled by a customer?) may become obligated to repurchase the loan.



In addition to these legal issues, lender Dealer Agreements raise a whole host of business related issues that should be carefully considered by the dealership. Often times these Agreements have one-sided indemnity provisions, i.e. if something goes wrong due to a dealership error, the dealership holds the lender harmless for all damages, costs and expenses, including attorneys' fees. There may not be, however, a reciprocal provision if the problem arises because of an error on the part of the lender. Choice of law and forum (location) selection clauses for dispute resolution can also be an issue, although clauses like this are common in business-to-business contracts. In addition, the following provisions can have a significant impact on your business relationship with the lender:

- The method of payment accepted for a down payment;
- The time period within which the dealership is required to file a lien and perfect the security interest;
- Limitations on the dealership's ability to accept a deferred down payment;
- Overly broad or vague default provisions;
- The time period within which the dealership has to deliver the loan documents;
- One-sided attorney fee and damage waiver provisions; and
- Clauses that hold the dealership liable for "any claims or defenses", even those asserted against third parties over which the dealership has no control.

Unfortunately, in a number of real life examples, the breach of the representations and warranties by a dealership in a non-recourse lender Dealer Agreement has led to the dealership being required to repurchase some, if not the entire portfolio, of loans with a lender. Experience has shown that if these Agreements are carefully reviewed prior to signing, the dealership can minimize its risk of potential liability and increase its profitability by considering various legal, business, and financial issues raised in the Agreement and taking steps to insure compliance. Reviewing lender Dealer Agreements will not only help to ensure your dealership's future financial health and keep you from experiencing a variety of problems that could have been easily avoided, but will also form a solid foundation for your business relationship with the lender.

This information is provided by Keith Whann, founder of The Whann Group, LLC with over 37 years of legal and compliance experience on issues affecting the industry and is for general information purposes only. You should contact counsel for specific application. © 2021 Keith Whann, all rights reserved.