

Use Care in Buying Sales-Finance Forms

By Michael W. Dunagan

The business of financing motor vehicles is one of the most highly regulated businesses there is. Various state, federal, and in some cases, local, laws and regulations come into play when a motor vehicle is sold and financed. There are provisions in the mountains of paper work used to close sales that are for the benefit of the consumer and are mandated by law. Some, however, are there to protect the seller-creditor. State and federal laws often limit what can be included in retail installment contracts for the creditor's benefit. Some provisions that are legal in some states are often prohibited in other states.

Field investigators and auditors for TXDOT's Motor Vehicle Division, the state Comptroller, the Division of Vehicle Titles and Registration, and Consumer Credit Commissioner's Office have reported that many of the dealers they audit are using outdated, improper, inadequate, or illegal forms. My own experience is that far too many dealers are using forms that don't meet current compliance requirements.

In an industry that is as over-regulated and as ever-changing as the vehicle finance business, one of the most important ways to stay legal is to be a member of a trade association and regularly read its publications and attend its educational events. In Texas, however, less than ten per cent of licensed dealers belong to the Texas Independent Automobile Dealers Association (TIADA). That means that over 90 per cent don't read the reminders and warnings that appear in the monthly magazine. An even smaller percentage ever attend an educational seminar or training session.

In an effort to provide the best and most up-to-date materials for its members, TIADA has established a relationship with Burrell Printing Company. In addition to motor vehicle installment contracts, Burrell offers a number of government-mandated as well as dealer convenience forms. Each form is prepared by an attorney well versed in consumer finance law and reviewed by attorneys for industry trade groups as well as state agencies.

When new laws and regulations are enacted, the process repeats itself. Court cases are also scrutinized to determine if changes need to be made. This process, while providing the best possible product for dealers, is also expensive. The higher price, however, brings additional peace of mind to the user.

Some of the installment contract forms I've seen being used by dealers include stationary-store promissory notes, cash sale write-up sheets, and some completely homemade concoctions that contain only provisions stolen from other forms that the dealer felt were to his liking. The problem with these documents is that they don't meet the minimum disclosure standards of Federal Truth-In-Lending or the Texas Finance Code, and often violate minimum type-size requirements. Also, most don't create a security interest in the collateral that would allow the creditor to repossess if a default occurs.

The severe consequences of using incorrect forms have been brought home in a number of instances since the OCCC began performing field investigations of dealers who are licensed and those who should be but aren't. It was discovered that a number of dealers were using some type of promissory note in place of retail installment contract forms. Others were using buyer's orders or front sheets and were writing in payment

schedules in the margins. Because these documents were not intended for retail installment sales, they didn't contain language that is necessary to create security interests in the vehicles being sold. Without security interests, these dealers did not have the legal right to repossess collateral in the event of default.

The OCCC took the position that these dealers were obligated to sign off their liens on title certificates and send the certificates – free of any liens -- to the retail buyers. Furthermore, the OCCC forced those dealers to refund the value of vehicles to buyers whose vehicles had been repossessed in the past four years. We know of some dealers who shut down their businesses and some who paid out substantial sums of money to comply with the OCCC sanctions.

As might be expected, those dealers found using inadequate sales-financing paperwork were not TIADA members. Their excuses for not using proper forms varied from “this is the same form I've used for 30 years” to “I don't like using those contract forms that are too long.”

Some enterprising printers and forms sales people at least recognize the value of the work that goes on in producing a legally correct contract form and simply copy the Burrell and other contract forms without permission and sell clones. Buying these forms, in addition to promoting the theft of someone else's investment, creates the risk of being behind the curve on necessary changes. The suppliers who reprint and sell copyrighted forms are not legally trained and are not reading the legislative reports and court case reporters. (I often receive calls from dealers who are seeking to verify a form salesman's claims that I have approved or sanctioned forms that are being offered for sale. I usually

inform the dealers that (1) I have not approved the forms; and (2) some of the terms in the forms are improper and could create legal liability.)

We've recently seen some pre-printed forms sold by dealer supply salesmen that contain illegal provisions (as well as misspellings and improper grammar). The most prevalent of these are forms designed to be used at closing to warn debtors of certain obligations. Some are titled simply "Agreement", and contain provisions about repossession and the return of debtors' property. The OCCC has correctly determined that the provisions that purport to waive buyers' defenses that are established in the Uniform Commercial Code are improper and are forbidden by the Texas Finance Code. Several years ago the Texas Supreme Court ruled that a similar provision was illegal and upheld the award of substantial damages to the consumer.

There are other provisions in some of these "agreements" that are contradictory to the terms of the Retail Installment Contract. We occasionally have copies of this and similar forms provided by plaintiff's attorneys representing consumers who are threatening lawsuits. One attorney pointed out the illegal provision of the form as the basis for suit. While the other didn't specifically refer to the offending provision in his demand, we urged the dealer to settle the dispute for fear that the bad form could overshadow the dealer's legitimate defense to the original dispute.

The law provides that simply having the offending provisions in a contract or other form used at closing is a violation that gives rise to damages, including attorneys fees. Whether the creditor acts upon the illegal terms is irrelevant. Larger dealers and finance companies might be subject to class action suits representing all customers who signed improper forms.

We have recently seen an increase in claims brought for forms and disclosure violations against dealers. Several national and regional legal journals have carried articles, and national seminars for plaintiffs' attorney have touted the high number of potential violations in car finance transactions and the ease with which damages can be collected. By their very nature these violations fall into the "gotcha" category. The smoking gun is the document the dealer used, and it's very difficult to deny what's there in black and white.

In addition to belonging to TIADA and reading the information provided, every dealer should periodically review the forms and documents being used, asking the following questions: Am I confident that I am using the correct forms? And, are the few dollars I might save buying discount forms worth the risk of losing thousands?