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APRIL FOOLS' DAY QUICK HITTER: AVOID THE BAD SURPRISES

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Don't Be Fooled By The Title Of A Finance Contract

Choosing between recourse and non-recourse platforms should be treated like an investment decision. Do you want the security of the mutual fund (non-recourse arrangement) or do you want to take on additional due diligence obligations with higher risk/higher reward opportunities (i.e. recourse arrangements)? The initial analysis should be that simple—with no surprises on the back end.

Retailers/dealers that work with indirect lenders and sign agreements labeled "non-recourse" believe the financing company is assuming the risk that a customer might stop making payments. This is a reasonable expectation—the very first paragraph (or even the title) of such financing contracts says "non-recourse." However, financing companies have increasingly attempted to point to provisions buried in their contracts to justify pushing liability back onto retailers. For instance, the financing company will argue that the retailer should have known the customer lied on their credit application, there was a mistake or error in documentation, or otherwise allege a retailer should be left holding the bag when the customer does not make their payments.

Although banks have always had an incentive to push losses onto retailers, that incentive has never been greater. The regulations from the Consumer Financial Protection Bureau have increased the pressure to maintain profits and squeeze additional revenue out of their relationships with retailers. They are making many dealers pay for the financing forms, reducing the interest rate "spread", and as mentioned above, trying to make retailers eat the lender's losses for unpaid loans.

Fortunately, there are a few steps retailers can take to help prevent financing companies from treating you like a "fool." First, retailers should review their financing contracts to make sure they are in-fact non-recourse. If they are recourse, they should ensure they are

at least getting compensated with higher interest rates for assuming additional risk. Second, retailers should encourage all of their managers to communicate with each other and ownership about financing companies who are attempting to make the retailer responsible for delinquent customers. Management can then make an informed decision about which financing companies to avoid. Finally, retailers should make sure they pushback against financing companies trying to unload bad transactions. Even if the amount is small, you do not want to establish a precedent that you are willing to turn non-recourse loans into recourse loans.

Reminders That Shouldn't Be Surprises

Lot Damage. Dealers are often surprised to learn Massachusetts has no set dollar or percentage threshold for lot damage disclosures—damage must be disclosed if it would impact a customer's decision to purchase the vehicle. The standard (or lack thereof) is both good and bad. The dealer is not held to a strict rule, but a customer could legitimately complain that damage (however minor) would have impacted their decision. Therefore, dealerships should establish their own reasonable dollar or percentage threshold for disclosing lot damage, and include a lot damage waiver in their motor vehicle purchase contract.

Storage Fees. Dealers leave money on the table every day by not charging storage fees on vehicles left by customers for unreasonable time periods. Dealers can charge a daily storage fee for vehicles left at the dealership as long as the fee is disclosed in the contract and/or in the dealership lobby. This can also provide critical leverage in some tough consumer disputes.

Protest Rights v. Assigned Territory. Dealers often mistake their assigned territory for their relevant market area (RMA) under the franchise law. Unless otherwise agreed, a dealer has no exclusive right to its AOR/PMA/APR—it is nothing more than the territory the manufacturer assigns for purposes of measuring your performance. The RMA, in contrast, is a circle drawn around a dealership, which determines whether you have notification or protest rights under the Franchise Law.