

Class Actions

Avoidance and Defense

By Marvin J. Brauth, Esq.

Over the past decade, the number of class action lawsuits filed yearly in the United States has increased tenfold. While, originally, the justification for the class action was to provide a mechanism for individuals with relatively small claims to obtain redress in cases in which each individual would not have the practical means of pursuing his or her own lawsuit, they have become the weapon of choice for plaintiffs' attorneys seeking to reap windfall legal fees.

While, nominally, class actions continue to be brought on behalf of consumers or other "injured" parties, the benefits derived by the class members are often secondary to and pale in comparison to the legal fees earned by the lawyers.

Automotive retailers have not by any means been immune from class action lawsuits. From finance spreads to markups on extended service contracts, from etch to packing to motor vehicle and documentary fees, automotive retailers across the country, in ever-increasing numbers, have been hit with class actions purportedly on behalf of their customers. While, typically, these lawsuits have been filed against a single dealership or dealership group, the class action filed in Bergen County, New Jersey last year with respect to motor vehicle and documentary fees names the vast majority of automotive retailers in the State. This type

of industry wide class action may become the trend of the future.

Consumer class actions in state courts, including those against automotive retailers, often find a receptive audience because of ambiguous and overly broad consumer legislation and regulations. For example, the New Jersey Consumer Fraud Act can be violated by anything that amounts to an "unconscionable commercial practice". What constitutes an "unconscionable commercial practice" is, of course, found only in the eye of the beholder.

How can automotive retailers guard against class actions?

No set of internal procedures can guarantee that some practice or charge you deem reasonable, or even one that is deemed reasonable by the vast majority of your customers, will not be the subject of a complaint by some customer or

■ **class action lawsuits**
| continued on following page



Class Action Lawsuits

— continued from page 28

grist for the class action mill of some plaintiffs' attorney. For example, in the Bergen County class action, retailers were sued indiscriminately over their documentary fees regardless of how much or how little any given retailer actually charged. Nor can implementation of new procedures prevent class action lawsuits based on your past practices, as a class action may be filed even with respect to practices that were corrected before the lawsuit is filed. In New Jersey, a class action can be based on practices that go as far back as six years before the date on which the lawsuit is filed in court.

There are some "best practices", however, that can be followed which may reduce the likelihood of facing a class action in the future or the likelihood that such class action will be successful if filed. While no list of best practices can be comprehensive, they include:

- Being familiar with the State and federal rules and regulations that govern your dealership and establishing procedures to insure that those rules and regulations are complied with at your dealership.
- Establishing sales and service policies that promote honesty and fair dealing with your customers.
- Putting the policies and procedures, both for compliance with governmental rules and regulations and for customer treatment, in writing and distributing them to all your employees.
- Training your employees to comply with the policies and procedures that are established and holding each employee accountable for his or her compliance.
- Becoming personally invested in the dealership's compliance with best practices by taking an active role in promoting, implementing and enforcing the policies and procedures, and by having your managers take a similar role.
- Updating policies and procedures periodically to reflect changes in governmental rules and regulations and your experience with the implementation of best practices.
- Informing customers that the dealership utilizes best practices and of what they can expect in their dealings with your dealership.

■ class action lawsuits | continued on page 30

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Class Action Lawsuits

— continued from page 29

- Vesting an employee of the dealership with the responsibility and the authority to address and rectify customer concerns before they escalate into lawsuits and class actions.

While best practices should be implemented by all automotive retailers, perhaps the simplest and most effective way of avoiding class action lawsuits by future customers is by requiring all of your customers to agree in writing to arbitrate disputes with your dealership and by having those written arbitration agreements contain prohibitions against class actions. Automotive retailers, like other businesses that deal with consumers, can require their customers to agree to arbitrate disputes. Almost all types of disputes, including Consumer Fraud Act claims, can be arbitrated. The only caveat is that the arbitration requirement should be a conspicuous part of your sales or service documentation. To this end, it may be beneficial to have a separate arbitration agreement or, at least, to require a separate signature for the arbitration provision if it is incorporated into a sales or service order form.

To prevent class actions, the arbitration agreement must expressly state that class actions are not permitted. Absent such language, even an arbitrator may have the authority to hear a consumer claim as a class action. At the same time, the arbitration agreement can exclude certain types of relief, such as punitive damages, or attorney fees, which can reduce the likelihood that unmeritorious or inconsequential claims will be filed by plaintiffs' attorneys.

Implementation of best practices and inclusion of arbitration provisions in sales and service documentation may eliminate or at least reduce the likeli-

hood of a future class action. However, if a class action is filed, what can a retailer do to best protect their dealership's interests? While this article cannot address specific claims and the legal strategies to defeat them, there are a few measures that can be taken in all cases.

As soon as possible after your dealership is served with the complaint starting the lawsuit, a copy should be sent to the dealership's insurance carrier. Many policies provide at least some coverage for legal defense and, despite what the insurers would have you believe, they may also provide coverage for the claim itself. You and your dealership's attorney should review your insurance policies in detail to assess whether coverage is available.

If your insurance carrier does not insist that you use one of its pre-selected attorneys, engage an attorney with experience representing automotive retailers in consumer disputes, who has knowledge of class action proceedings and the staff and resources to protect your dealership's interests. As fine a lawyer as your estate or real estate attorney may be, he or she may not be the right person to represent the dealership against experienced plaintiffs' class action counsel.

Be proactive and assess the merits of the case early on. Plaintiffs' attorneys justify exorbitant legal fee awards by the amount of work they do battling defendants prior to settlements or adjudications. Fighting a case that cannot be won, therefore, just plays into the hands of the plaintiffs' attorney – and needlessly increases your dealership's legal bill as well. At the same time, settling cases that are without merit because decisionmaking is done in a vacuum is an equal waste of dealership resources. Thus, at the outset of a class action lawsuit, a realistic assessment of the merits should be made. This may require a detailed examination of the evidence, particularly the practices of your dealership or the paperwork at issue. While this requires effort and will have costs associated with it,

the information you gain and the decisionmaking it enables you to engage in will be more than worth it.

Few class action lawsuits go to trial on the merits. Most settle or are dismissed in the "class certification" stage. This is the part of the class action lawsuit in which the court addresses whether the lawsuit should be heard as a class action and whether the individual plaintiff who brought the lawsuit and his or her attorney are the appropriate persons to litigate the claim on behalf of all members of the class. Since most class actions are resolved or dismissed during or shortly after class certification, it can be the most important stage of a class action lawsuit. Do not give short shrift to class certification even if you think you can win the lawsuit on its merits. In this regard, the dealership personnel who dealt with the plaintiff and your dealership records can provide invaluable information to enable you and your counsel to contest class certification by demonstrating that a class action is not appropriate to the type of claim involved or that the plaintiff or his or her attorney are not the appropriate movants of a class action.

Unless and until laws are passed limiting the use of class actions, they must be considered a fact of business life for automotive retailers. The volume of motor vehicle sales each year and the emotion that goes into a vehicle purchase, make automotive retailers prime targets for class action lawsuits. Given this climate, retailers are well advised to implement best practices and include arbitration provisions barring class actions in their sales and service forms. At the same time, retailers should be prepared for class actions that may be filed and ready to take the course of action best suited to protect their dealerships under the circumstances of a given case. **nj car**

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