

Is the Price Right?

April 15, 2017 | [Thomas B. Hudson](#) and [Eric L. Johnson](#)

I sometimes tease my friends who run car dealerships about the oppressive regulatory environment in which they do business. RV dealerships operate in that same highly-regulated environment. I suggest to my dealership friends that if matters get any worse, they should consider closing the dealership and opening a bait shop.

After all, with a bait shop, pretty much all you need to do is keep the worms fed, the live bait live and the frozen bait frozen. Compared to a car or RV dealership, your regulatory landscape is pretty much uncluttered. No one tells you how much you can charge for those worms, right?

"But," say my dealer friends, "No one can tell me what I can charge for my cars!"

There was a time when there was some truth to that statement, but several recent developments indicate that car pricing, and the dealer's pricing of all of the other things dealers sell when they sell cars, is becoming a legal hot spot. Because those developments deal with federal and state laws that govern credit sale transactions, they apply equally to RV dealerships.

In the last couple of years we have had two Consumer Financial Protection Bureau enforcement actions, a joint Justice Department and North Carolina enforcement action and a U.S. District Court case that all spell danger on the dealer pricing issue. The enforcement actions have focused, in part, on the failure by the dealers to disclose finance charges accurately.

These actions are not based on novel legal theories. The law and regulation that the authorities relied on are decades old. This isn't new law. It is, instead, a ramped-up enforcement effort that uses law that has been around since Snoopy was a puppy.

Finance Charges "Hidden" in the Cash Price. One of the legal attacks asserts that some part of the cash price of goods sold in a credit transaction is in reality a finance charge. Two types of dealerships are at risk here. Dealerships who sell cars or RVs on at big markups and on credit and then hold and collect payments from buyers (so-called "buy-here, pay-here" dealers) and dealerships who sell their contracts to finance companies who charge an acquisition fee or who pay less for the contracts than the amount financed.

When these dealers sell goods on credit and charge prices for those goods that the

dealers do not charge when selling like goods for cash, they are hiding part of the finance charge in the goods' cash price.

"But," say my dealer friends, "What does it matter? The buyer would pay the same amount over the term of the contract whether the amount the goods' price is inflated goes into the cash price or is included the finance charge."

Well, that puts the finger on the problem. Federal law, specifically the federal Truth in Lending Act, requires that dealers selling goods on credit disclose the finance charge as a finance charge. Including the finance charge in the cash price violates the TILA disclosure requirements.

"But," say my dealer friends, "That's just a technical violation - how much can that cost me?"

A Colorado buy-here, pay-here car dealer can answer that question. He ended up paying the Consumer Financial Protection Bureau \$700,000 to settle charges like this.

And, this pricing problem might well be more than a technical problem. A regulator or a plaintiff's attorney could expand on this argument in ways that allege substantive violations. Here are three examples.

Many states impose a maximum finance charge rate on credit sale transactions by dealers. If the "hidden" finance charge is added to the disclosed finance charge and the sum of those two numbers exceeds the state maximum, state law penalties come into play.

Some state laws prohibit the imposition of finance charges in credit sales transactions by any method other than the application of a rate to a declining balance. The hidden finance charge is not computed in that manner, again bring state law penalties into play.

Because the "hidden" finance charge is included in the goods' cash price upon which the "disclosed" finance charges are imposed, finance charges are being imposed on finance charges. Such "compounding" is prohibited by the laws of many states. Again, here come the state law penalties.

Finance Charges "Hidden" Elsewhere. The cash price is not the only number that can be manipulated to include additional finance charges. Other charges, such as those for so-called "ancillary products," are candidates for this treatment, as well. Assume that a dealer sells a retail installment contract to a finance company that imposes a \$500 acquisition fee because the buyer is credit-challenged. The dealer, in an effort to recoup the \$500 acquisition fee, charges the buyer \$1,495 for a service contract that is priced at \$995 for buyers financed with companies that do not charge an acquisition fee. Such a practice converts the additional \$500 charged for the VSC into a finance charge.

A variation on this practice occurs when the buyer is told by the dealer that "We can't get you financed unless you buy a service contract." The retail installment contract that the buyer signs will state that the purchase of the service contract is voluntary, but the dealer's oral representations have made the purchase of the service contract a condition

of financing - in effect, the retail installment contract misrepresents the deal between the dealer and the buyer, and now contains federal disclosure violations.

We experienced a spate of hidden finance charge cases against car dealers in the early 90's. The lawyers for car buyers brought several class action lawsuits, alleging that dealers were hiding finance charges in the prices of their cars. The cases fizzled out, however, largely because of the difficulty that the courts perceived in examining the prices of identically-equipped used cars of the same make and model, the lack of consumer credit sophistication of the plaintiffs' lawyers and because they were private lawsuits in which the efforts to prosecute the suits were limited by the financial wherewithal of the plaintiffs and their counsel.

The world is different today. The Consumer Financial Protection Bureau and the Federal Trade Commission have bottomless war chests and won't drop cases because they run low on money. They also have the power of investigatory subpoenas to gather all a dealer's pricing information and statisticians and economists on board to slice and dice the data to prove their allegations. The agencies know what they are doing, and they are good at it.

How can the agencies tell that you have a problem? I can think of several ways.

Do you advertise your RVs with one price for cash sales and another price for financed sales? Do you advertise a price that is qualified for those "with good credit," or "with approved credit"? Those ads are a giveaway that you are engaging in prohibited pricing hijinks.

Are your buyers complaining about your practices to the CFPB? That agency's online complaint portal has gotten a lot of publicity, and is beginning to get some traction as a go-to place for consumer beefs. You need to be checking it regularly to make sure you aren't the topic of complaints.

Fired anyone lately? Disgruntled ex-employees can be a treasure trove for investigators looking for dealer hanky-panky.

Mystery shopping, anyone? The Consumer Financial Protection Bureau was hiring mystery shoppers at one point, and state Attorneys General frequently employ this tactic. And that RV shopper who just drove into your lot might also just be someone sent by an investigative reporter from your local TV station.

What's a Dealer to Do? To avoid legal challenges to pricing practices, dealers should develop a written pricing policy for their RVs and for ancillary products such as GAP and service contracts. That policy should state that the dealership's pricing does not depend on and is not related to whether the RV is financed. Once a RV is priced, that price should not be changed for a particular transaction (all prices could be subject to periodic review and change, of course). The pricing policy should be part of the dealership's compliance management system and should be reviewed by counsel.

Does all of this seem like too much legalistic red tape for your operation? Maybe a bait shop is in your future.

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