

# BAD HEART OR Empty Head



BY JAMES S. GANTHER, ESQ.

## AT A GLANCE

Don't be held liable for an avoidable mistake. Use these tips to get the education process started:

- Read your contracts and know what you're selling
- Provide consistent, ongoing training
- Stay current on legal trends and learn from other dealers' mistakes

*Well-meaning dealers who violate a regulation can be held just as responsible as someone who is ethically challenged. The time and effort required to keep informed is worth the avoided penalties.*

**H**ere is a trio of statistics to get your heart beating faster than would a double espresso in the morning:

- In the last year, 40,000 consumer lawsuits were filed against car dealers in the United States.

- The National Association of Attorneys General notes that among consumers, "Auto-related complaints have been the top complaint for nine out of the past 10 years."

- In a recent poll of American adults to rank their perception of service profes-

sions for honesty and ethics, car salesmen ranked 21 out of 21 professions listed. (Nurses and grade school teachers came in 1 and 2 respectively; lawyers ranked 19.)

How did car dealers achieve such dubious distinctions? From the above snippets, one would think car dealers, as a class, are lower than worm droppings, more lawsuit-prone than Michael Jackson, and yes, even less ethical than lawyers.

That's the perception. So, what's the reality?

I follow court decisions involving car dealers for a living, and have come to divide those decisions into two categories: those where the dealer did intentional wrong and got what he richly deserved; and those where the dealer behaved in what he thought — mistakenly — was a proper manner, and paid dearly for the error.

In other words, dealers lose lawsuits and pay settlements for two reasons: bad hearts and empty heads. We can't do much about the former (one article, or a series, won't change the ways of a dealer who underwent an ethical bypass at birth). However, we can do something about empty heads. But first, a little context.

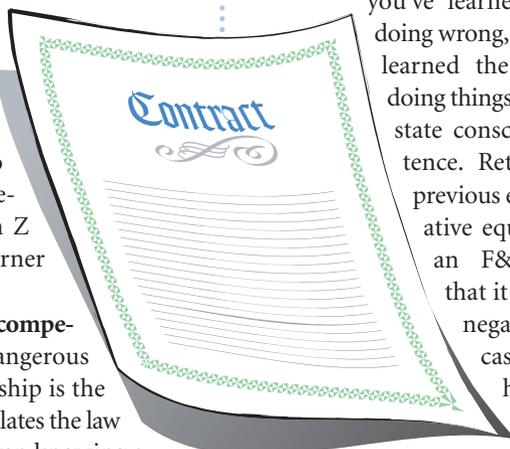
### THE EDUCATION PROGRESSION

Learning any new trick — from computer-based menus to the disclosure requirements of Regulation Z — takes the learner through four stages.

**1. Unconscious Incompetence.** The most dangerous person in any dealership is the one who blissfully violates the law every day without even knowing a law was being broken. To break the law in the course of a car sale is incompetence. To do so without even being aware of a violation is unconscious incompetence.

A classic example of unconscious incompetence is rolling the value of negative equity into the cash price of a vehicle. Recent lawsuits have made it clear that this is a violation of Regulation Z. And yet many dealer personnel think it is perfectly OK, often citing "lender preference."

**2. Conscious Incompetence.** The first



Jim Ganther addresses attendees at the F&I Conference in November. He says the road to "unconscious competence" takes work, but the diminished exposure to lawsuits makes it all worthwhile.

step in overcoming overpowering stupidity is to learn what it is you're doing wrong. This necessarily happens before a change of behavior can begin. In other words, you've learned what you're doing wrong, but you haven't learned the right way of doing things yet. We call this state conscious incompetence. Returning to the previous example of negative equity, informing an F&I practitioner that it is illegal to roll negative equity into cash price makes him conscious of the error, but does little to cure the problem. But becoming aware that there is a problem is the first step toward curing it, and that's progress.

**3. Conscious Competence.** Once someone has learned what he's been doing wrong, and while he is learning the right way of doing things, he is in the state of conscious competence. I recently taught my 15-year-old son how to tie a tie. For a week, I stood behind him (reaching up — he's well past six feet tall and climbing) and slowly tied his tie, explaining the process.

Now he ties his own tie, but slowly and deliberately. He's becoming competent in the art of the tie, but it is with a conscious effort. It's not second nature yet, but it gets the job done. That's conscious competence, and it's a good thing. It's just that there's a better thing still to come.

**4. Unconscious Competence.** Doing it right, every time, without even thinking about it — that's the Promised Land, that's unconscious competence. Think about tying your shoelaces. I bet you do it right every time, and without a second thought. That's where my son will be when, like his old man, he's tied a necktie so often he can literally do it with his eyes closed and the knot will be perfect and the tie will fall to precisely the correct length. That's where dealers want their personnel to be when it comes to F&I.

### VIRTUE IS PROFITABLE

So then, how does a dealer go from unconscious incompetence to unconscious competence? The obvious first step is to decide to make the trip. If doing the right thing is not reason enough to make that decision, consider the words of Sir Thomas More, Lord High Chancellor of England under Henry VIII (and a canonized Saint): "If virtue were profitable, com-

Before any employees are let loose in the F&I office, they should be required to read all of the contracts underlying the products they will be expected to sell, and prove they have done so.

mon sense would make us good and greed would make us saintly.”

I believe virtue is profitable, for several reasons. First, it builds trust with a customer, and people are more likely to buy, and buy more, from someone they trust.

Second, virtue has fewer chargebacks. In other words, you get to keep more of what you’ve earned.

And finally, virtue keeps you out of court. Again, think of it as reducing chargebacks, as lawsuits can be characterized as the ultimate chargeback.

Once that decision is made to move from unconscious incompetence to unconscious competence, the second step is to start filling those empty heads. Fortunately, it is easier than you think. Here’s how:

**1. Read your contracts.** If you sell, say, GAP without having read the underlying contract, you are unconsciously incompetent. The following story should illustrate why.

Once upon a time, a dealer sold a customer a GAP waiver in connection with the sale of a new car. That GAP waiver limited coverage to 120 percent of the new car’s MSRP. The customer rolled a large amount of negative equity into the deal, such that the amount financed was actually 160 percent of MSRP.

Naturally, the new car got totaled, and the primary insurance carrier properly paid out the actual cash value of the vehicle, leaving a substantial gap between the ACV and the outstanding loan balance. The GAP underwriter — also properly — paid the difference between the ACV and the amount financed, less the amount by which the amount financed exceeded 120 percent of the car’s original MSRP, leaving a deficiency of several thousand dollars. The unhappy customer sued the dealer for failing to disclose that the GAP waiver he had purchased would not, in fact, cover the entire

gap. Result: one surprised dealer and a class-action lawsuit.

Had the F&I manager who closed the deal known about the limitation, he could have disclosed it or, in the alternative, not offered GAP on a deal that exceeded its limit. And the simplest way to learn about the limit is to read the contract. Before any employees are let loose in the F&I office, they should be required to read all of the

contracts underlying the products they will be expected to sell, and prove they have done so.

**2. Know the law.** The sale of an automobile to a private consumer is the most highly regulated activity I can think of that does not require a license and continuing education. Dealership employees are subject to Regulation Z, Regulation M, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the FTC Privacy Rule, the FTC Safeguards Rule, the Used Car Rule, the Cash Reporting Rule, the USA Patriot Act, the FTC Telemarketing Rule and literally dozens of other laws.

How can you obey what you do not know? The requirements of the laws listed above are not intuitive. In other words, the best intentioned dealer can violate them without malicious intent. So how do you learn the lay of the legal landscape without sending dealership employees to law school?

The simplest way to instill a basic understanding of the laws that govern the F&I transaction is to require membership in the Association of Finance & Insurance Professionals. In order to become a member, a candidate must study the AFIP Basic Certification Course manual, which covers the major laws that apply to F&I, then pass a 150-question exam on the material. It is not easy, but it is affordable and thorough.

Another means of instilling basic legal knowledge is to provide consistent ongoing training in digestible doses. One 30-minute meeting per month, for example, could be dedicated to a legal topic. And management does not need to become legal compliance experts to pull this off — high quality, pre-packaged video programs are available to provide content. The Compliance Thursday program, available from AFIP, contains a year’s worth of legal training material in half-hour video segments.

**3. Stay current on legal trends affecting dealers.**

One good way to avoid becoming the next class-action defendant is to read about the misfortunes of other dealers and learn from their bad fortune. The best resource available for this purpose is CARLAW®, an online subscription-based service available from CounselorLibrary.com. CARLAW® is an outstanding resource, but one geared primarily for lawyers. Another publication from CounselorLibrary.com is Spot Delivery®, which is written in simple English and is therefore intelligible to non-lawyers and other real people.

Finally, you are holding a fine and affordable legal training resource in your hands right now. Over the next several issues, *F&I Management & Technology* will feature articles on emerging legal trends that threaten even the best-intentioned dealer. So keep your eyes open and watch this space. The dealership you save could be your own. ■

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