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### Open Safety Recalls By ADR Staff

Independent Dealers have three primary choices when faced with selling a vehicle subject to an open safety recall:

- 1) Do not disclose the open recall to the customer;
- 2) Disclose the open recall to the customer;
- 3) Satisfy the recall before selling the vehicle.

Following are points a dealer might consider when determining an appropriate approach to handling open recalls.

#### Non-disclosure

Non-disclosure could place a dealer in violation of federal and state Unfair and Deceptive Acts or Practices (UDAP) laws. Currently, there is no law that specifically requires a used dealer to disclose recall information or to ensure that a recall has been accomplished on a vehicle. However, UDAP laws broadly prohibit unfair and deceptive trade practices. For example, failure to disclose certain known damage to a vehicle is considered unfair and deceptive under UDAP standards. It could be reasonably argued that failure to disclose an open safety recall would also be considered unfair and deceptive, i.e. the dealer would be knowingly placing an uninformed customer in an unsafe vehicle.

Non-disclosure makes dealers vulnerable to civil lawsuits. Auto fraud attorneys openly state that when they receive a call from a consumer who was sold a car with an open safety recall, they dig in and look at all the paperwork in the transaction. They want to see the sales contract, the warranty, and the financing information in an attempt to discover larger "auto fraud violations" that are not related to the recall. At a minimum, auto fraud attorneys will argue that, if the dealership sold the car knowing about the open recall, then they overcharged for the vehicle because they knew it required repairs. Charges of deceptive advertising are also possible. For instance, CarMax is currently under attack from consumer groups claiming deception for advertising Certified Pre-Owned vehicles with 125 point checks – but without disclosing that an issue as important as safety recall information is not addressed in their check.

#### Disclosure

Disclosure of the existence of or potential for an open recall rightfully alerts the customer to the possibility of a safety issue related to the vehicle. Autoblog.com suggests, however, that such disclosure could actually expose dealerships to greater liability for failure to repair the safety defect. A July 31, 2014, Autoblog.com article discusses manufacturer Honda's practice of requiring consumers to acknowledge notification of airbag safety recalls on used vehicles purchased at their dealerships. In the article, Eric Chase, a lawyer who often represents car dealers, says that the document, called the Airbag Inflator Recall Disclosure and Acknowledgement, is a big problem. "If a dealer called me and said, 'We're talking about something that is under recall but we can't repair it and it's dangerous to the point we'd have to warn them about death,' I'd say, 'you've got to do everything you legally can to make sure a consumer does not get behind that wheel.'"

#### Satisfy the recall

Satisfying the recall may have an immediate negative financial impact on the dealership. Even though recall repairs are accomplished at authorized repair centers without cost, employee resources may be expended researching and processing recalled vehicles and a delay may be experienced before a recalled vehicle is available for sale. Nevertheless, dealers may need to be prepared to do so. Washington is listening to consumers groups' demands that dealers be required to have repairs completed before selling vehicles subject to recall. In June 2014, the New York Times reported that the Transportation Department has included provisions in their budget plan that would require car dealers and rental agencies to idle vehicles under recall until they are fixed. The proposed legislation has been sent to both houses of Congress, and the Senate Commerce Committee has taken it up. The major rental car companies have already pledged to idle vehicles until safety defects are repaired even though the legislation imposing such action has not yet passed Congress.

#### Researching Recalls

Used dealers have access to a number of cost-free sources that may be useful when researching vehicle recalls.

- As of August 14, 2014, all major vehicle manufacturers are required to provide online lookup by VIN of vehicles subject to recall. A link to the lookup screen is required to be prominently placed on each manufacturer's home page.
- Beginning August 20, 2014, the National Highway Transportation Safety Administration (NHTSA) is offering a safety recall search by VIN on their website at <http://www-odi.nhtsa.dot.gov/owners/SearchSafetyIssues>. That website also offers lookup by year, make, and model.
- NHTSA posts a summary of recent recall announcements at <http://www.nhtsa.gov/Vehicle+Safety/Recalls+&+Defects>.
- A comprehensive listing of motor vehicle, trailer, and equipment safety recalls is available for download from the NHTSA website at <http://www-odi.nhtsa.dot.gov/downloads/flatfiles.cfm>. The recalls are in the compressed file named FLAT\_RCL.zip. Instructions for downloading and unzipping are in the file named Import\_Instructions\_Recalls.pdf. The data can be imported into a Microsoft Access database or it can be imported into a Microsoft Excel Spreadsheet. An example of the data available in Excel spreadsheet format is available on the OIADA website. The data has been sorted by recall type ('V' is vehicle), make, model, model year, and recall date.

#### Summary

In summary, dealers should carefully consider the pros and cons of non-disclosure, disclosure, and repair when establishing dealership policy for handling vehicle safety recalls. Liability may attach to both non-disclosure and disclosure. Immediate negative financial impact attaches to repairing the safety defect. However, in the long run, absorbing the costs of satisfying the recall could prove to be inexpensive insurance to avoid the potential liability of placing a consumer in an unsafe vehicle – regardless of whether the consumer is informed or uninformed.

NOTE: OIADA Staff are not attorneys. This article is provided for informational purpose only. It is NOT legal advice. For its application to you and your situation, consult an attorney.