

## ***You AUTO KNOW***<sup>®</sup>

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## **POWERS OF ATTORNEY?**

Previous issues of *You Auto Know*<sup>®</sup> have addressed Powers of Attorney and it is still an issue that is confronted by each and every dealership on an almost daily basis. In fact, this author and his law firm have been involved in numerous lawsuits involving the use of a power of attorney and the challenge of the use by another family member. Generally, the powers of attorney are used to protect an elderly or incompetent member of the family. Further, on a daily basis, powers of attorney are utilized in various scenarios in order for one individual to protect the interests of and/or act for the benefit and in the place of another individual. For example, your customer signs a power of attorney to enable the dealership to apply for and obtain a title for the vehicle that the customer has just purchased.

The problem occurs when there is an abuse of that power by the individual utilizing the power of attorney. For example, this law firm was involved in litigation where a grandson was utilizing a power of attorney executed by his grandfather to purchase a sports car. That litigation was ultimately resolved by the grandson paying a deficiency balance to the bank after he defaulted on the loan. However, the bank filed suit against the dealership alleging that the dealership breached the Dealer Bank Agreement because the purchase of the vehicle by a power of attorney was not specifically indicated on the credit application and/or the Retail Installment Contract. In that litigation, the bank did not have any specific policy reflected on any of its own internal documents to indicate that there were special loan provisions for powers of attorney. In fact, the bank's own internal documents indicated that the power of attorney was valid and the grandfather should be responsible for the loan. In another piece of litigation, a daughter utilized her father's power of attorney to purchase a vehicle which was allegedly for her father, when in fact, the vehicle was for her. When her father insisted on another vehicle, she filed a lawsuit indicating he was not competent to purchase the subject vehicle and that she had full power of attorney to conduct all of his affairs including the purchase of a vehicle. In that litigation, it was evident that the daughter was merely abusing the power of attorney to obtain a vehicle for her own purposes and not those of her father.

You must remember that, in your Dealer Bank Agreements, it is the dealer's responsibility to produce any and all necessary documents to the bank in order for the bank to approve the loan. This would include submitting the power of attorney to the bank at the time the deal is submitted for financing approval. The Dealer Bank Agreements are extremely one-sided and the bank can utilize the contract to recourse a deal for almost any reason whatsoever if a deal is defaulted upon. Generally, there is a catch-all phrase in the Dealer Bank Agreement which makes the dealership responsible for any and all information provided to the bank whether or not the dealership knew the information was false.

Recently, a dealership called with a situation where a woman traded in a vehicle titled to a deceased individual, who she represented was her husband. The customer had a durable power of attorney that, on its face, appeared to have given her power to trade in the vehicle under the deceased person's name. The Title Bureau rejected the power of attorney indicating that it was not sufficient for trade in purposes. Naturally, the deal had to be unwound.

Obviously, the dealership's F & I managers are not attorneys and do not have the ability to interpret the enforceability of the power of attorney regarding an incompetent individual and/or the use of a power of attorney to purchase a vehicle even though the person may be mentally competent. There is no magic answer to this scenario. As indicated, the Dealer Bank Agreements are generally very standard in nature and the dealership is responsible for any and all representations to the bank. If any of the representations are wrong, it allows the bank to seek indemnification from the dealership. Remember, there is always a catch-all clause regarding the dealership's obligations to the bank. It is strongly recommended that the dealership review its Dealer Bank Agreements to see if there is any special section regarding the treatment of a power of attorney in connection with the financing of automobiles. If there is, it is the dealership's responsibility to strictly comply with the bank's requirements. Further, it is strongly suggested that the power of attorney be submitted along with the credit application. This will place the financial institution on notice that a power of attorney is being utilized by the purchaser. Also, the nomenclature power of attorney should be written after the attorney in-fact executes their name and the principal's signature on the loan documents. I would further suggest that, on the Buyers Agreement, the dealership write and the customer and the attorney in-fact execute terminology indicating that the deal is contingent upon the validity of the power of attorney. However, even this will not fully protect the dealership against a consumer lawsuit by another relative. In this CSPA scenario, the relative would indicate that the individual utilizing the power of attorney was in fact utilizing it for his or her own selfish purposes and not for the benefit of the principal and that the dealership knew or should have known this fact.

Obviously, you cannot avoid transactions where a power of attorney is utilized, however, be aware that no matter what course of action the dealership takes that there may always be a downside to the transaction. Again, it is recommended that the dealership review the Dealer Bank Agreement and provide the power of attorney with the credit application. Further, if a third-party family member calls the dealership and indicates that the dealership should not sell the vehicle because there is an issue with the power of attorney, then the dealership should immediately stop the transaction and get clarification from the family attorney. Obviously, this should prevent the filing of a Consumer Sales Practices Act lawsuit against the dealership.



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As always, these are highlights of the law and are not to be construed as containing the entire law. This is not to be construed or relied upon as a legal opinion. If you are presented with this problem, contact your legal counsel for advice.

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Having been a Chevrolet dealer, Robert A. Poklar's business background and experience in the automotive industry aid him in his representation of numerous Ohio automotive dealerships. He also represents after-market service companies, trade organizations, dealers, advertising associations and corporations. Pursuant to certain ethical standards, this may be construed as advertising.