



Recall Recap

March 15, 2019

We have been receiving requests from dealers for a recap of a presentation done during our spring workshops on vehicle recalls. The following contains that information plus some updates to bring things current.

It appears that there is much misinformation in the dealer community, a good bit of which is fostered by inaccurate or deliberate misleading statements made by various manufacturers, as to what is and is not legal under federal recall legislation. Attached is a chart published by the NADA that outlines current federal law with regard to recalls. Indiana does not have any statute involving recalls, therefore no state law applies.

- As you can see from the attached chart, the topic is broken up between new and used vehicles. With regard to new vehicles it is relatively simple. If a vehicle is under an open recall you may sell or lease the vehicle but cannot deliver the vehicle until the recall is remedied. Under federal law the manufacturer is supposed to provide financial assistance but some manufacturers have refused to do that even taking a position that if we give you any financial assistance we will take away interest credits so that the dollars will be the same. I believe that that approach is illegal under Indiana law, but in any event that position has not been challenged to this point.
- Most of the confusion deals with used cars and the position of some manufacturers that a dealer for that manufacturer may not sell a used car from the dealer's inventory if there is an open recall. There is nothing in federal law that prohibits the sale of that vehicle with notice to the consumer. This is true despite manufacturer publications to the contrary. Some manufacturers are under consent orders with the Federal Trade Commission and as part of their consent order settling other kinds of cases have agreed with the Federal Trade Commission to try to force dealers from selling any vehicle that is under recall. Obviously you should check each vehicle, preferably before taking the vehicle in trade, to see if it is under any sort of recall, stop sale or stop drive. Of these, stop drive is the most severe meaning that the vehicle should be parked or bull penned until the defect is remedied. If the recall is a stop sale recall then new vehicles may not be sold period. If it is a stop sale recall involving used cars it would be prudent to the dealer not to sell that vehicle even with notice to the customer.
- At least one manufacturer is taking the position that sale of a used vehicle subject to recall somehow violates the franchise agreement and would subject the dealer to punishment. We do not believe that that would stand under Indiana law. What is disturbing is that there is at least one reported case of a recalled vehicle that was involved in an accident after being sold. The dealer's insurance company has initially refused to cover the injuries sustained by the occupants of the vehicle thus leaving the dealer exposed. Another Texas case has found that a dealer has an affirmative obligation to check for recalls even when a vehicle is in for routine service. This is not the case in Indiana but it may be a harbinger of things to come.
- At the very least a dealer should disclose an existing recall to a buyer by attaching a copy of the open recall to a suggested form of notice to the customer of a recall. That form is reproduced here and may be utilized by the dealership.
- Unfortunately there is substantial confusion about the Takata air bag recall occasioned by the fact that there are too many airbags to ultimately be replaced. The National Highway Traffic and Safety Administration has determined that the airbags are most likely to malfunction in warm humid climates. Therefore, they are requiring a staged recall based upon the number of years the vehicle has been in service and the area of the country in which the vehicle is located. If that is the case then the dealer may decide to sell the used vehicle with notice particularly if the vehicle is a different make than the dealer's franchise.
- At least one manufacturer is taking a position that if a new or used vehicle of that make is sold that the dealer will assume all responsibility for any damage or injury occasioned by the manufacturer's negligence under product liability law. Again, we believe that that is contrary to Indiana franchise which specifically states the manufacturer must indemnify the dealer for any liability due to defective products.
- Some dealers have asked if they can have a customer release the dealer in advance from liability or waive any claim they would have against the dealer for the sale of a vehicle under recall. We sincerely doubt that any such waiver would stand up in court and would suggest that the dealer comply with the information contained in this memorandum.
- It should be kept in mind that a dealer may be the target of any law suit by selling a vehicle with an open recall of any sort. Inventive plaintiff's attorneys would try to link the recall into the case as an element of an accident case potentially claiming some negligence in the sale of the vehicle particularly if the recalled part was a factor in the accident. The sale of used vehicles with minor recall issues is a business risk decision that dealer's will need to make on a vehicle by vehicle basis.

For further information you may contact Ron Smith or Joel Nagle at 317.464.1591.

CUSTOMER ACKNOWLEDGMENT AND AGREEMENT

To our Valued Customers:

We at _____ (insert name of dealership) thank you for your purchase of that _____ (insert year) _____ (insert make), _____ (insert model), _____ (insert VIN) from Us. We appreciate your business.

As You may be aware, many vehicle manufacturers, regardless of make, have been issuing a number of safety recalls mandated by the National Highway Safety Transportation Administration (NHTSA). These recalls include those related to airbag systems manufactured by Takata Corporation for which replacement parts are not readily available.

To determine if the vehicle has an active recall visit <https://www.nhtsa.gov> or <https://vinrcl.safercar.gov/vin/> (“Governmental Websites”) and enter your Vehicle Identification Number (VIN) into the appropriate box when prompted to do so. If your vehicle is in fact subject to a recall, You will be able to confirm this on this website if the manufacturer has released the data. You must check the site periodically because the information changes often. However, these sites may be the most up to date information available.

With this information in mind, You acknowledge that in connection with your purchase of a vehicle from Us, that You received a vehicle history report from a third-party service provider, such as Carfax®, AutoCheck® or any other similar service provider (“Provider”).

You understand and agree that any report from a Provider is a service of the Provider which is a wholly independent company, not owned or controlled by Us, and that the Provider and/or Governmental Website is/are SOLELY responsible for the accuracy of any information on the vehicle history report.

- You understand and agree that We have not verified, nor are We responsible for any information on the vehicle history report, nor have We verified whether a recall exists on this particular vehicle, nor have We verified any inaccuracies or omissions in the report or recall history. The obligation to inspect the vehicle for defects and recalls is your responsibility. Specifically, We have found that there is often a delay in the Providers’ reporting systems and/or on the Governmental Websites so that the vehicle history report or recall information may not identify and report accident, recall, or repair information until long after the date of purchase and delivery of the vehicle. You agree that You are accepting the risk that the vehicle history report or recall information might be incomplete or inaccurate and that defects and recalls may exist on the purchased vehicle.

- That receipt of the vehicle history report or recall information does not change any duties that We may have to You. You agree and understand that:

- You are buying your used vehicle and AS IS, WITH ALL FAULTS;
- That We have disclaimed any other warranty of any kind in connection with such purchase.

- To the extent allowable by applicable law, You hereby release Us, our officers, employees, stockholders, members, agents and affiliated entities, from any damages, claims or liability, of any kind whatsoever, arising or resulting from, or connected to, any inaccuracy, omission, active recall, or error in the vehicle history report, or for failure to inform you of a recall or the failure to repair a recall prior to sale, including but not limited to, any diminished value of the vehicle purchased by You and/or the presentation of this Acknowledgement and Agreement to You for Your signature.

Customer Signature

Print Name

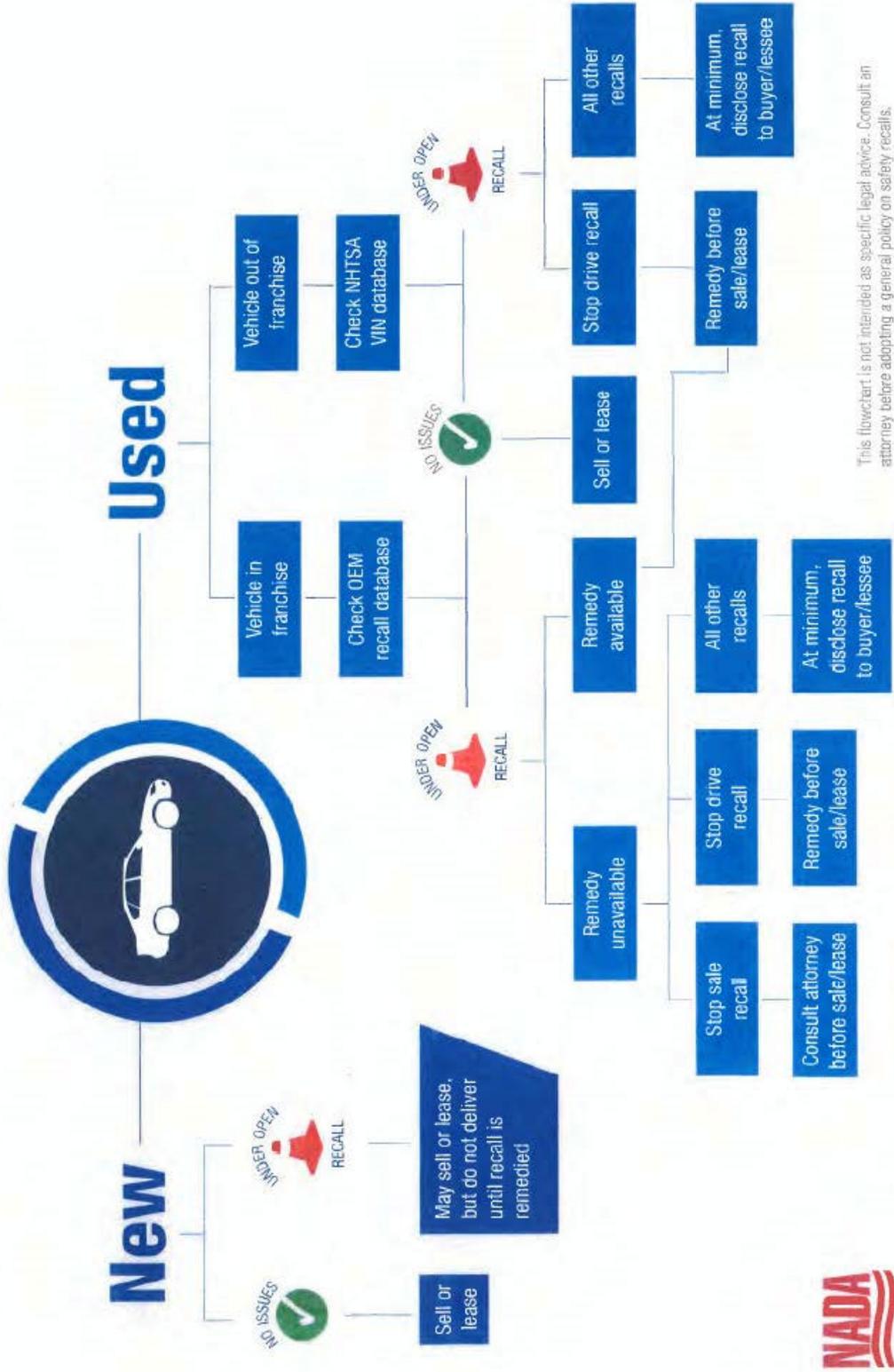
Customer Signature

Print Name

Date

Vehicle Recalls

What you need to know



This flowchart is not intended as specific legal advice. Consult an attorney before adopting a general policy on safety recalls.

