Successful Challenges to Auto Dealer Yo-Yo Abuses*

Consumers are now making significant headway in challenging "yo-yo" or spot delivery abuses. Consumers sign paperwork and drive a vehicle home, only to be told days later that the financing has fallen through and the deal has to be re-written or the vehicle returned. Consumers are coerced into signing a second contract with a higher total of payments, or alternatively face repossession or even arrest for "stealing" the vehicle.

Courts are ruling that yo-yo sales violate TILA, ECOA, UDAP, installment sales, and other laws, and consumer attorneys report routinely settling individual cases for $20,000 to $40,000, or more. Yo-yo cases though are not easy, because judges have to be educated why standard industry practices violate various consumer laws. Nevertheless, an increasing number of courts are demonstrating that they understand how fraudulent these standard industry practices are.[1]

This article examines current trends in yo-yo litigation. It is *imperative* that readers review this article in conjunction with NCLC's *Unfair and Deceptive Acts and Practices* § 5.4.5 (2d ed. 2001 and 2002 Supp.), which goes into far more detail and covers additional issues.

Does the Dealer Have the Right to Cancel a Sale? Is a Contingency Clause Valid?

When a dealer obligates itself to an installment sale, it cannot renege just because it cannot re-sell the contract. Cancellation of the contract must be based on a clause making the sale contingent on a third party approving financing. A dealer cannot cancel a sale even if it did not sign the paperwork.[2] Also, not only is fraud in the credit application not the reason for financing being turned down, but the fraud is typically engaged in by the dealer's personnel, not the consumer.[3]

Even when the dealer includes a contingency clause, the clause may be invalid for a number of reasons. For example, a state's installment sales statute may not allow such conditional sales.[4] Cases also consider whether a contingency clause giving the dealer 3 or 10 days to find financing allows dealers to back out of the deal weeks later, claiming that no financing was found during the 3- or 10-day period that financing fell through.[5] A court will also invalidate a clause requiring the consumer to agree in advance that, if financing falls through, the dealer can rewrite the deal at a higher interest rate without disclosing that rate in advance.[6]

Industry's Extensive Use of Financing Kickbacks Means Contingency Clauses Should Not be Triggered

Recent litigation indicates that virtually every auto installment sale involves a kickback from the financer, often several percentage points *a year* in the typical yo-yo sale. Where a installment sale is written at 15%, the financer may actually purchase the contract at 12%, the dealer pocketing most of the difference.

A dealer seeking financing approval for a 15% contract may actually offer it to assignees only at 12%, even though the assignees would purchase it at 15%. If the deal is

rewritten at a higher rate (e.g. 18%), the assignee may in fact purchase that loan for 15%! Consequently the claim that financing has fallen through is deceptive because assignees were never offered the contract with its face interest rate.

Yo-Yo Dealers Systematically Withhold Credit Papers

An extremely common (and illegal) yo-yo scenario is the consumer signs an installment sales agreement with TILA disclosures, and then goes home with the car, but not the paperwork.[7] If the deal is later rewritten with new terms, the dealer does not want consumers to have more than one set of disclosures that would allow them to see how much worse the second deal is. Dealers also want room to tinker with the terms even after the contract is signed.

Failing to provide consumer with their copy of TILA disclosures when they become obligated is a TILA violation.[8] Dealers argue that the yo-yo sale is conditional, and has not been consummated; disclosures need not be provided until the financing goes through. But TILA looks at the transaction from the consumer's perspective; the consumer is obligated, subject to the dealer canceling, so the consumer must receive the disclosures at the time the agreement is signed.[9]

Nevertheless, courts take a number of different positions as the consumer's remedy for this TILA violation, on one extreme awarding consumers double the finance charge with no cap, plus attorney fees, to the other extreme of no recovery at all.[10] Statutory or actual damages may be available under a state installment sales act or UDAP statute.[11]

Dealers Typically Back-Date Second Contracts

When a yo-yo bounces back, and the dealer rewrites the contract at a later date, dealers typically back-date the second contract to the date of the first contract. One dealer defended this practice, saying it was standard in the industry and that financers require it.[12] But where a state installment sales law requires contracts to be dated, using the wrong date should be a violation. Reg. Z also requires the term of a loan to begin at consummation, and an APR computed based on a term beginning before consummation will be inaccurate.[13] It should also be a UDAP and other state law violation to charge a consumer interest, insurance, service contracts and other charges for a period before the consumer became obligated on the contract.

Dealer Refusal to Return the Consumer's Trade-In

Dealers often refuse to return the consumer's trade-in or down payment after the dealer cancels the sale, even though courts reject dealers' right to seek liquidated damages or rent for the consumer's use of the vehicle.[14] Dealers may also claim that the trade-in has already been sold, and cannot be returned, but this claim is usually false. Review the dealer's inventory (updated at least monthly) or demand a copy of the trade-in's title transfer, which federal law requires dealers to retain. Several cases liberally interpret an Illinois statute requiring dealers to return trade-ins and down payments when a deal is cancelled. Consumers have a claim even where the dealer is just slow in returning a down payment,[15] and even when the consumer does not allege that the dealer refused to return the trade-in, only that the trade-in was not returned.[16]

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UDAP Violations Are Pervasive in Yo-Yo Sales

A yo-yo sale, by its very nature, is filled with deceptive oral statements and failures to disclose.[17] While a few courts resist UDAP claims where oral misrepresentations are corrected in the credit documents, this defense is less persuasive where the dealer refuses to let consumers take those papers home. Also, a misrepresentation that financing is approved is not inconsistent with the document stating that a contract is not final until financing is approved.[18] The dealer has represented that financing has been approved, so the deal is final.

Dealers argue that a cancelled yo-yo sale means there is no sale, and that UDAP statutes do not apply where there is no sale. While a UDAP statute's language will be determinative, this defense is groundless where the UDAP statute applies to practices in trade or commerce, or to "solicitations to supply products" or where the consumer "seeks" to purchase goods. Ohio's UDAP statute applies to an "other transfer…of goods," which includes a cancelled yo-yo.[19]

Moreover, the typical yo-yo involves a sale converted by a UDAP statute, even if that sale is later cancelled. But even if no sale occurred, and a UDAP statute's literal language only applies to sales, courts liberally interpret UDAP scope to extend it to non-sale transactions.[20] Another option is a common law fraud claim.[21]

Most Cancelled Yo-Yo Sales Violate the ECOA and FCRA

Cancelled yo-yo sales rarely comply with adverse action notice requirements under the Equal Credit Opportunity and Fair Credit Reporting Acts,[22] but courts seem confused as to whether the dealer or the potential assignee should be held liable for the lack of notice.[23] Dealers claim they are not lenders, and assignees claim they are just investors. We strongly urge you to name both parties, and if a number of financers decline financing, that they all be sued. Also important for an FCRA claim is to show that a credit report was used in the evaluation.[24] ECOA claims are complicated if the consumer eventually obtained financing at a higher rate.

Dealers Illegally Confuse Sales With Bailments

Dealers can transfer a vehicle's ownership on condition that it be transferred back if financing falls through. Or a dealer can retain ownership, but let the consumer borrow the car until financing is approved. Dealers legally cannot (but typically do anyway) act half one way and half the other, always to the dealer's benefit.

If ownership is transferred, the dealer must sign over a title document. If, after a deal is cancelled, the title does not show ownership going to the consumer and back to the dealer, this is "title skipping," which is a serious title violation and a fraud on subsequent purchases. If ownership is transferred, the dealer's recovery of the vehicle must also comply with UCC Article 9.[25]

If ownership is not transferred, then insurance should not yet be in effect in the consumer's name, and the APR should be disclosed as an estimate because, while the due dates are known, it is not yet determined when interest begins to accrue.[26] Nor can a dealer sell the consumer's trade-in if there had not yet been a final transaction.

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[1] *See* Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003); Knapp v. Americredit Financial Services, Inc., 2003 WL 359310 (S.D. W. Va. Feb. 18, 2003).
[2] Cannon v. Metro Ford, Inc., 242 F. Supp. 2d 1322(S.D. Fla. 2002).
[3] *See* Knapp v. Americredit Financial Services, Inc., 2003 WL 359310 (S.D. W. Va. Feb. 18, 2003); Gelco Corp. v. Major Chevrolet, Inc., 2002 WL 31427027 (N.D. Ill. Oct. 30, 2002).
[4] *See* NCLC's Unfair and Deceptive Acts and Practices § 5.4.5.2.4.
[5] *Cf.* Fox v. The Montell Corp., 2001 WL 193632 (N.D. Ill. March 19, 2001); Williams v. Thomas Pontiac-GMC-Nissan-Hyundai, 1999 WL 787488(N.D. Ill. Sept. 24, 1999).
[6] Couture v. G.W.M., Inc., 2002 WL 31962752 (N.H. Super. Ct. Dec 3, 2002).
[7] Daenzer v. Wayland Ford, Inc., 193 F. Supp. 2d 1030 (W.D. Mich. 2002), *and later opinion*, 2002 WL 1050209 (E.D. Mich. May 7, 2002); *see also* Knapp v. Americredit Financial Services, Inc., 2003 WL 359310 (S.D. W. Va. Feb. 18, 2003).
[8] The FBR has recently amended its Commentary to state that the disclosure requirement is stratified if "the consumer receives a copy to keep at the time the consumer becomes obligated." Reg. Z Commentary 226.17(b)-3, 67 Fed. Reg. 16982 (Apr. 9, 2002). The FBR's explains "Some industry commenters…suggest that creditors are required only to give consumers a copy to keep within a reasonable time after consummation…Under the final comment as adopted, consumers must receive a copy to keep at the time they become obligated." *Id.* at Time of Disclosures. This Commentary provision does not involve new requirements on creditors, and thus its application is not just prospective. *Id.* at Background.
[9] Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003). *But see* Bragg v. Bill Heard Chevrolet, Inc., 245 F. Supp. 2d 1235 (M.D. Fla. 2003).
[10] *See* NCLC, Truth in Lending Ch. 8 (4thed. 1999 & 2002 Supp.). *See also* Daenzer v. Wayland Ford, Inc., 193 F. Supp. 2d 1030 (W.D. Mich. 2002); Wojcik v. Courtesy Auto Sales, Inc., 2002 WL 31663298 (D. Neb. Nov. 25, 2002); Graham v. RRR, LLC, 202 F. Supp. 2d 483 (E.D. Va. 2002).
[11] *See* Daenzer v. Wayland Ford, Inc., 2002 WL 1050209 (E.D. Mich. May 7,2002) *and earlier opinion* at 193 F. Supp. 2d 1030 (W.D. Mich. 2002).
[12] *See* Rucker v. Sheehy Alexandria, Inc., 228 F. Supp. 2d. 711 (E.D. Va. 2002), reconsideration denied 244 F. Supp. 2d 618(E.D. Va. 2003).
[13] *Id. citing* 12 C.F.R. § 226 app. J(b). Make sure both the discrepancy in the first payment period and the APR are outside TIL-allowed tolerances.
[14] Rucker v. Sheehy Alexandria, Inc., 244 F. Supp 2d 618 (E.D. Va. 2003); Violette v. P.A. Days, Inc., 2002 U.S. Dist. LEXIS 23246 (S.D. Ohio Oct. 18, 2002); Castro v. Union Nissan, Inc., 2002 WL 1466810 (N.D. Ill. July 8, 2002); Bates v. William Chevrolet/Geo, Inc., 2003 WL 136093 (Ill. Ct. App. 2003).
[15] Jones v. William Buick, Inc., 785 N.E.2d 910 (Ill. Ct. App. 2003).
[16] Fox v. Montell Corp., 2001 WL 293632 (N.D. Ill. Mar. 19, 2001).
[17] *See, e.g.,* Daenzer v. Wayland Ford, Inc., 2002 WL 1050209 (E.D. Mich. May 7,2002); Braucher v. Mariemont Auto, 2002 WL 1393570 (Ohio Ct. App. June 28, 2002).
[18] Mayberry v. Ememessay, Inc., 201 F. Supp. 2d 687 (W.D. Va. 2002).
[19] Braucher v. Mariemont Auto, 2002 WL 1393570 (Ohio Ct. App. June 28, 2002).
[20] NCLC's Unfair and Deceptive Acts and Practices Ch. 2, note 327 (5thed. 2001 & 2002 Supp.).
[21] *See* Bates v. Williams Chevrolet/Geo, Inc., 2003 WL 136093 (Ill. Ct. App. 2003).
[22] *See* Cannon v. Metro Ford, Inc., 242 F. Supp. 2d 1322 (S.D. Fla. 2002); Davis v. Regional Acceptance Corp., 2002 U.S. Dist. LEXIS 16775 (E.D. Va. Sept. 5, 2002); Fox v. The Montell Corp., 2001 WL 293632 (N.D. Ill. Mar. 19, 2001); Williams v. Thomas Pontiac-GMC-Nissan-Hyundai, 1999 WL 787488 (N.D. Ill. Sept. 24, 1999).
[23] *Compare* Najieb v. Chrysler-Plymouth, 2002 WL 31906466 (N.D. Ill. Dec. 31, 2002) *with* Castro v. Union Nissan, Inc., 2002 WL 1466810 (N.D. Ill. July 8, 2002); Fox v. The Montell Corp., 2001 WL 293632 (N.D. Ill. Mar. 19, 2001).
[24] It is important to show that a credit report was used in the adverse action, or the FCRA claim will fail. *See* Castro v. Union Nissan, Inc., 2002 WL 1466810 (N.D. Ill. July 8, 2002); Najieb v. Chrysler-Plymouth, 2002 WL 31906466 (N.D. Ill. Dec. 31, 2002); Mayberry v. Ememessay, Inc., 201 F. Supp. 2d 687 (W.D. Va. 2002).
[25] *See* N.C. Gen. Stat. § 20-75.1.
[26] *See* Davis v. Regional Acceptance Corp., 2002 U.S. Dist. LEXIS 16775 (E.D. Va. Sept. 5, 2002).
But see Bragg v. Bill Heard Chevrolet, Inc., 2003 WL 4316333 (M.D. Fla. Feb. 14, 2003).