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American Bar Association
Standing Committee on Legal Assistance for Military Personnel

AUTO FRAUD

ANALYZING THE PURCHASE AGREEMENT AND REMEDYING COMMON FRAUDS

by

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I.

INTRODUCTION

Given the nearly universal need for transportation, almost all people end up purchasing cars at several times in their lives. Most people’s lack of knowledge about cars coupled with this need to purchase a car makes ordinary people prime targets for several types of predatory practices. This risk is significantly increased when the sale is financed by the dealer or a related finance company. Young enlisted people and their families are some of the easiest targets for unscrupulous dealers to abuse. Their relative lack of sophistication combined with a steady income make them prey for economic predators.

For car cases, a knowledge of what to look for in the transaction is important because in many cases the legally relevant problems will not be what the consumer complains about. In many cases, the predatory practice will also not be shown on the face of the documents in the consumer’s possession.

To fully advise clients about their legal remedies requires understanding the whole process by which car dealers sell and finance cars. That understanding first requires a basic knowledge of your state’s motor vehicle titling procedures and statutes, several federal consumer protection statutes, and the relationships between car dealers and the finance companies that back them. Depending on the dealer and finance companies involved, these relationships can vary from state to state and transaction to transaction.

In addition to the basic regulation of a car sale for cash, when a car dealer decides to finance a car sale, the credit side of the transaction is then subject to the ordinary credit regulations. Consequently in the credit sale of a car, the federal laws that are usually involved include the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Truth in Lending Act, the federal Odometer Act, the Magnuson-Moss Warranty Act, the Buyer’s Guide Regulation, and the FTC Preservation of Claims and Defenses Rule. After deciding to become a banker, many car dealers also decide to be insurance salesmen. This brings even more law into the transaction. Most states specifically regulate the sale of cars, the sale of insurance, the way in which interest rates can be charged, and consumer sales. Finally, the general requirements of the UCC on sale of goods, remedies, and enforcing security interests need to be followed. Lastly, for servicemembers, the SCRA also applies.

Consumers need to protect themselves in any car sale and can do so in a few easy ways:
1. All consumers must leave themselves time to shop for a car.
2. If the car is not a new car, then an independent mechanic should be paid to do an inspection and identify any problems.
3. Before looking at any car, first determine the dollar price of a car that can be afforded by looking at savings, or determining how much a bank or credit union will lend you.
4. The first time on a car lot, only discuss the total cash price that includes all fees, charges, and taxes of any kind to purchase the car.
5. Without agreeing to the dealer’s total cash price, leave with that information and check out at least one other dealer to see what that dealer will give you as a total cash price on a similar car.
6. From any lender, all credit consumers should leave with a copy of the Truth in Lending Act disclosures prior to signing any agreement of any kind and comparison shop the credit terms with at least one other lender before agreeing to any purchase.
7. Fourth, consumers should demand to observe the dealer signing the title or certificate of origin to the car over to the consumer; although the dealer can be the one to deliver that signed title to the state’s Department of Motor Vehicles or title agency, the key event is the dealer signing on that title as seller to make the buyer the new owner.

An indispensable tool for any law office that sees autofraud cases is the National Consumer Law Center’s Automobile Fraud book. This manual is updated annually with supplements and available from the Center’s website at www.consumerlaw.org. Any office providing legal assistance to servicemembers should have access to this invaluable resource.
II.
SOME SPECIFIC FRAUDULENT PRACTICES

The yo-yo: In the classic yo-yo sale, the consumer signs a credit contract, is given a temporary registration, temporary license plates, and thinks the transaction is complete because the salesman or finance manager told them it was approved. The consumer is only waiting for the permanent DMV documents and anticipates making the payments pursuant to the schedule on the credit contract. The dealer does not notify the DMV about the sale. Instead, days or weeks later, the dealer informs the consumer that the first credit transaction is canceled and the consumer must either return the car or a new credit contract on different terms must be signed. Sometimes the consumer ends up with a different car, the same car on different terms, or no car at all. Some important questions are what are the terms of the credit contract, do other documents contradict the credit contract, how did the dealer process the title to each car involved. The most important facts are what the consumer was told about the credit terms.

For the yo-yo sale, you will want to know exactly how the dealer handled the title to the car and what the state’s requirements are. Like most states, Virginia’s titling laws are strict and specific. For instance, under 46.2-628, 629, and 631, the dealer is required to sign and deliver the old title to the consumer at the time of delivering the car. The only way to sell a car is for the owner to sign the old title over to the buyer. Allstate Insurance Co. v. Atlanta Casualty Co., 260 Va. 148 (2000). These title statutes are strictly construed and dealers must comply with them. Thomas v. Mullins, 153 Va. 383 (1927); Rawls Auto Auction v. Dick Herriman Ford, 690 F.2d 422, 427 (4th Cir. 1982). These statutes are enacted for the protection of the public and their provisions are mandatory. Thomas v. Mullins, 153 Va. 383, 391 (Va. 1929). Virginia also provides dealers with a Dealer Manual that instructs them on how to process titles, and if the dealer has signed a contract to process title information electronically with the DMV, then a very particular contract specifies the dealer’s duties. The individual state practices and policies need to be known so that you can identify when the dealer is not following them. A violation of the statutes designed to protect the public makes the contract unenforceable against the buyer. See Eure v. Jefferson National Bank, 248 Va. 245 (1994)(applying the common-law doctrine of unenforceability when a seller violates a statute designed to protect the public). Some states will have a specific statute that applies. In McFarland v. Bob Saks Toyota, Inc., 466 F.Supp.2d 855 (E.D. Mich., 2006), a 1983 claim against police officers regarded their involvement in a repossession after a spot delivery, and footnote 8 the court stated “certain materials placed into the record by Plaintiff suggest that a dealer would violate Michigan law if it engaged in the practice of "spot delivery" that Defendants posit as having occurred in this case. In particular, Plaintiff has produced a 1989 opinion letter from the Michigan Department of Commerce, Financial Institutions' Bureau, stating the Bureau's opinion that a motor vehicle sales contract conditioned upon the seller's ability to assign the contract to a financial institution would violate Michigan law. (See Plaintiff's Response, Ex. 9, 5/22/1989 Opinion Letter; see also Plaintiff's Response, Ex. 10, Michigan Secretary of State Dealer Manual, § 3-3.4 (also opining that "[i]t is a violation of state law to attempt 'repossession' of a vehicle after delivery or to change the terms of a finance contract if a finance company refuses the contract after a spot delivery").

The basic fraud in a yo-yo sale is making the consumer think the sale was a done deal, while at the same time the dealer sets it up so that the dealer could call it off, seize the car, and sell it to another purchaser. See Pescia v. Auburn Ford Lincoln, 68 F. Supp.2d 1269 (M.D. Ala. 1999)(upholding fraud
claim for failure to inform consumer that dealer was treating the sale as contingent). To make the consumer misunderstand the transaction, the dealer will tell the consumer the deal is final and deceive the consumer into thinking the dealer signed title over at the time of sale. Many claims will flow from the dealer trying to claim that the credit contract prepared by it was cancelled when the dealer could not sell it to a third party. Unless the dealer used a properly conditional credit contract, and treats the title, insurance, and date of interest accrual according to that condition, then dealer is stuck accepting the stream of payments agreed to in the first credit contract. See Walker v. Walker Mobile Homes, 965 S.W.2d 271 (Mo. App. 1998). In addition to the NCLC Autofraud Manual, discussion of this practice can also be found in section 7.3.9 of its NCLC’s Unfair, Deceptive Acts and Practices Manual, Seventh Edition, and is discussed in its Truth in Lending Act Manual, Sixth Edition, sections 4.4.5 and 4.4.6.

One federal opinion detailing this practice is found at Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003)(reversed by the U.S. Supreme Court on only the measure of TILA damages issue). This opinion in conjunction with Rucker v. Sheehy Alexandria, Inc., 228 F. Supp.2d 712 (E.D. Va. 2002), will provide good insight into the yo-yo practice and what type of claims might be raised about it. To see just hard the industry will fight its practices being challenged, see the reconsideration of the Rucker decision at Rucker v. Sheehy Alexandria, Inc., 2003 U.S. Dist. LEXIS 2237 (E.D. Va. Feb 13, 2003).

Also, the opinion in Bragg v. Bill Heard, 374 F.3d 106 (11th Cir. 2004) describes the problem further. The 11th Circuit found that in a yo-yo sale, the credit contract was consummated for Truth in Lending Act purposes, even if it was a conditional credit contract. For a good state law decision that explains the unlawful repossesson aspect of yo-yo sales, see Singleton v. Stokes Motors, Inc., 595 S.E.2d 461 (SC 2004). In an analogous situation involving the failure to return a deposit in mobile home transaction, the Fifth Circuit allowed $150,000 in punitive damages. See Watson v. Johnson Mobile Homes, 284 F.2d 568 (5th Cir. 2002)(reducing jury award of $700,000 in punitives). These cases can be quite complex with many different statutes the Court will need to understand. See Cannon v. Metro Ford, 242 F. Supp.2d 1322 (Fla. 2002) and Miranda v. Autonation USA Corp., 789 So.2d 1188 (Fla. App. 2001) for other examples.

A yo-yo case can bring in substantial damages if the jury understands just how much distress such conduct can cause a person. The Whitaker v. MT Automotive case from Ohio upholds the right to recover general distress damages under consumer protection statutes. 111 Ohio St.3d 177 (2006). In Hobbs Automotive, Inc. v. Dorsey, 914 So.2d 148 (Miss. 2005) the Mississippi upheld a $100,000 judgment as a result of a yo-yo sale. The Court upheld the trial court’s refusal to allow the dealer to put on evidence that the contract was conditional after the court found an unconditional contract for sale had been formed.

The fraud in the yo-yo sale can allow for a wide variety of claims. Patton v. Jeff Wyler Eastgate, Inc., 608 F.Supp2d 907 (S.D. Ohio 2007), is a class action based on the inherent misrepresentation about the credit terms in violation of the Truth in Lending Act. Muro v. Hermanos Auto Wholesalers, Inc., 514 F. Supp. 2d 1343 (S.D. Fla. 2007) is another TILA claim. Finally, the Kentucky Supreme Court case of Craig & Bishop Inc. v. Piles, 247 S.W.3d 897 (Ky. 2008) shows how state law claims can provide powerful remedies for this type of fraud.

A yo-yo sale can also violate the FCRA, if the dealer does not send an adverse action notice. Barnette v. Brook Rd., Inc., 429 F. Supp.2d 741 (ED Va. 2006). These cases should be approached cautiously though because some courts have ruled that FACTA has eliminated a private right of action under 15 USC § 1681m.

All yo-yo sales are based on some sort of claimed ability for the dealer to cancel the sale. The
contractual basis for that claim must be analyzed to determine if it is merely giving the dealer the ability to pick and choose whether to enforce the contract. “To be lawful consideration supporting such a contract, the promises must be valid — that is, they must promise something detrimental to the promisor or beneficial to the promissee. See 3 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 7:14 (4th ed. 1993 & Supp.2005). If one of the parties is free to choose whether or not to perform its promise, there is no binding contract. See *Busman v. Beeren & Barry Invs.*, LLC, No.2005-002650, 2005 WL 3476681, at *2-3 (Va. Cir. Ct. Dec.12, 2005) (finding similar real estate contract unenforceable).” *BCBE Properties, LLC v. Land-O-Sun Dairies, LLC*, 433 F.Supp.2d 723, 726, fn 3 (W.D. Va. 2006). If all parties have actually agreed to subject a credit contract to a condition, some courts will uphold that arrangement. See *Dauti v. Hartford Auto Plaza, Ltd.*, 213 F.Supp.2d 116 (D. Conn., 2002) (finding a separate agreement caused a retail lease contract to be subject to a valid condition precedent by rejecting plaintiff’s testimony that they were told the lease was approved and accepting the dealer’s testimony that the conditional terms were reviewed with the plaintiff). In cases like *Dauti* and *Janikowski v. Lynch Ford*, 210 F.3d 765 (7th Cir. 2000), and *Castellana v. Conyers Toyota, Inc.*, 200 Ga.App. 161, 407 S.E.2d 64 (Ga. App., 1991) where the court upholds the application of a condition to a signed credit contract, you will normally find that the court does not analyze whether the dealer has treated all parts of the transaction as truly subject to that condition and whether the condition was really in the dealer’s control.

The truth is that a dealer can always sell a credit contract to a buyer on the financial market if the dealer is willing to sell for the price the top bidder is willing to pay. For instance, in *Madrigal v. Kline Oldsmobile, Inc.*, 423 F.3d 819, 821 (8th Cir. 2005), the Eighth Circuit described the following facts: “Kline began to search for alternate financing, but could not find a lender willing to extend Madrigal credit at a 5.49% APR. Affinity Plus Credit Union (Affinity Plus) advised Kline that it would extend Madrigal credit at a 6.5% APR. In order to obtain the rate that Madrigal desired, Kline arranged to pay Affinity Plus to reduce the finance rate to 5.49% APR.” Although this Court’s language is not as precise as it should be (Kline Auto is extending credit to the consumer and Affinity Plus is agreeing to accept assignment of the credit contract), it does show that dealers can and will negotiate a different set of terms with the assignee than is shown on the credit contract. The dealer chooses whether to buy-down a credit contract and how much to do so. Thus, a credit contract can always be sold and the dealer is merely choosing not to sell it.

The yo-yo sale gets even more complicated if a bankruptcy is filed shortly after the transaction. For instance, in *In Re Johnson*, 230 BR 466 (Bankr. D.C. 1999) and *In re Joyner*, 326 BR 334 (Bankr. S.C. 2004) the trustee was able to assert ownership over the car because of the failure for it to be titled promptly after the sale. In *re Eccles-Walker*, 366 B.R. 797 (Bankr.S.D.Ohio, 2007) similarly found that a security interest filed more than 20 days after consumer received car could be set aside as a preferential transfer. On the contrary was *In re McFarland*, 131 B.R. 627 (E.D. Tenn., 1990) that found a retail installment sale contract was a condition precedent transaction because a purchase price option documents stated a condition and the parties all understood that the retail installment sale contract had not yet been approved.

A simple question in any yo-yo sale is who owned the car when the consumer drove it off the lot. The answer should be easily knowable and not require a lawsuit and judicial determination. Otherwise, transactions that should be easily resolved end up in years of litigation. See *Field v. Transcontinental Ins.*, 219 BR 115 (ED. Va. 1998)(finding that dealer’s insurance company responsible for accident caused by consumer driving car pending dealer deciding that financing was final). The core wrongdoing in a yo-yo sale is the dealer trying to have this answer depend on the future event of the dealer deciding
whether or not it wants to be bound by the financing terms it presented to the consumer. Although some of the legal theories can get complex, the dealer is not allowed to have it both ways, and must tell the truth to a consumer. That car dealers now routinely set up credit transactions so that they can call the credit off if they decide not to sell the credit contract is not how other creditors treat customers, and the fact that a dealer may only call back five to ten percent of its customers is no justification to tell all those customers the deal is approved when it is not yet.

This deceptive sales practice evolved from “spot deliveries” where a consumer was allowed to take home a car even though the consumer did not have the whole downpayment that day. See Shoals Ford, Inc. v. Clardy, 588 So.2d 879 (Ala. 1991). As currently practiced, the misrepresentation to the consumer about the deal being approved keeps the market from functioning properly because it destroys the competitive advantage for those car dealers who do deliver a complete and binding credit approval to the consumer when the consumer signs the credit documents. Those better dealer-creditors are not given the market advantage their business model has earned.

**Odometer Act violations:** Odometer Act violations are not limited just to misstatements about the car’s odometer. Unknown to most people the Odometer Act does not merely require an accurate disclosure. It requires the disclosure to be in a particular place after a car has been titled: on the title document being used to assign ownership of the car. Thus, all used car sales should use the title document for the odometer disclosure. This is best shown in Yazzie v. Amigo Chevrolet, 189 F. Supp.2d 1245 (D.N.M. 2001). In Yazzie, damages were awarded as a matter of law because the dealer failed to use the title to make the odometer disclosure, and the title would have disclosed information that contradicted the misrepresentations made by the car dealer. Similarly, in Salmeron v. Highlands Ford Sales, Inc., 223 F. Supp.2d 1238 (D.N.M. 2002), the failure to disclose the mileage on the proper document could support a claim under the Act without any allegation of false disclosure of the mileage. The rehearing decision at 2003 U.S. Dist. LEXIS 3456 further explains these issues. Unfortunately, right now a split exists in the Circuit Court of Appeals. Although the Seventh Circuit issued an opinion that improperly limits when Odometer Act claims may be brought, see Ioffe v. Skokie Motor Sales, Inc., 414 F.3d 708; (7th Cir. 2005), the proper analysis is given by the 11th Circuit Court opinion of Owens v. Samkle Auto. Inc., 425 F.3d 1318 (11th Cir. 2005). Unfortunately a more recent opinion from the 9th Circuit rejected the Owens analysis. Bodine v. Graco, Inc., 533 F.3d 1145 (9th Cir. 2008).

**Prior-wreck:** Selling prior wrecks without proper disclosure is a problem in the industry. Insurance companies like State Farm has previously admitted to having had an established practices of putting prior wrecks back out in the stream of commerce without proper disclosure. Some dealers seem to be intentionally selling distressed cars because they can be expected to break down. By selling a car that the dealer knows will quickly develop problems, or be brought back by the consumer, the dealer can obtain down payments from consumers and threaten the consumers with deficiency judgments on unpaid loans. Although a title history will not always disclose that a car was salvage (because of insurance companies violations of law, many title histories are not accurate) it will tell you if one car has been repeatedly sold by one dealer, and that is an indication of this practice. Prior-wreck cases can generate large damage awards. In Virginia, a prior wreck case settled for $97,500.00. In another where the prior damage was only cosmetic damage to two doors, the settlement was $67,500.00. In both cases, the dealer’s affirmative misrepresentations created the risk of punitive damages and resulted in these settlements. A third case went to trial and the jury awarded $100,000.00 on actual damages of about
$4,000.00. These are all cases in a state which is a notoriously low damage award state and where punitive damages are rarely awarded. In other jurisdictions, because of the danger that prior-wrecks pose, these cases can generate significant settlements and jury awards. To understand the scope of the prior-wreck problem, consider that State Farm agreed to pay $40 million dollars and to property retitle cars as part of a consent decree with the Offices of the Attorney General for 49 jurisdictions for violating the law on putting wrecked cars back out in the stream of commerce without proper title disclosures. Indiana did not participate in that consent process because it already had State Farm under a prior consent decree that State Farm continued to violate, and it pursued its own relief. Put “State Farm salvage settlement” into a web search engine and many different websites will show the extent of the problems caused by this one company. Cases such as Bird v. John Chezik Homerun, Inc., 152 F.3d 1014 (8th Cir. 1998) and Parrot v. Carr Chevrolet, Inc. 331 Or. 537, 17 P.3d 473 (2001) provide examples of the type of punitive damages that can be expected in other jurisdictions. Cases like Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565 (8th Cir. 1998) and its followup, Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024 (8th Cir. 2000) show just how big the legal battle can become about such dangerous practices. A South Carolina Supreme Court opinion shows that in addition to punitive damages of $216,600, attorneys’ fees can also be recovered in such cases. Austin v. Stokes-Craven Holding Corp., Opinion No. 26784 (S.C. 3/8/2010) (S.C., 2010)

**Used as new:** Like the prior wreck, selling a used car as new is both a normal fraud and one that is sometimes related to financing. Jordan v. Suave, 219 Va. 448 (1978) is a good common law fraud case example almost thirty years old. More recently look at Tuckish v. Pompano Motor Co., 337 F. Supp.2d 1313 (S.D. Fla. 2004) to see that this practice is still around. But remember, the dealer needs to sell the credit contract to a finance company, and the funding criteria of that institution will determine the allowable loan balance. Thus, a dealer may misrepresent the status of the car because more money can be loaned on a new car rather than a used car. For Virginia, the definition of a new car is found in Va. Code 42.6-1500, and each state will usually have its own definition. Pursuant to regulations adopted by the Federal Trade Commission, a used car that must display the FTC Used Motor Vehicle Buyer’s Guide, is any car driven more than the limited use necessary for moving or road testing prior to delivery to a consumer. 16 C.F.R. 455.1 The used-as-new scheme has become more sophisticated because manufacturers are willing to provide substitute Certificates of Origin to some dealers. In these cases, a car that has once been sold and had that sale recorded on the Certificate of Origin will get a new clean Certificate of Origin. It thus will appear to be a new car because the old Certificate of Origin will not have been processed into a title yet. Under federal rule, any car with more miles on it than necessary to moving or road testing is not a new car so the mileage is always the starting point to determine whether it can even qualify as a new car.

**Bait and Switch:** Bait and Switch takes many forms, and the yo-yo sale mentioned above is actually one type of bait and switch financing. Many consumers will have responded to a specific advertisement but will not then get the car on the credit terms that were advertised. Locating the ad is the quickest way to develop the case and show the bait and switch. Be sure to check to see whether your state has a False Advertising statute. This will supplement other claims and usually allows for statutory damages.

Other times the bait and switch may be on the price of the trade-in, a practice called lowballing. After the deal is struck, the dealer suddenly claims to realize that the trade-in was overvalued and needs more money to close the deal. See Peacock Buick v. Durkin, 221 Va. 1133 (1981); for an extensive list
of other deceptive practices, see In re Peacock, 86 FTC 1532 (1975).

Another type of bait and switch occurs when the consumer thinks a deal has been negotiated and then is turned over to the finance manager. The finance managers are trained salespeople whose job is to sell additional products in addition to the car. These sales techniques are designed to sell finance-related products whether the consumer wants them or not. If the consumer is not offered a contract on the terms agreed to with the salesman than a bait and switch occurred. Furthermore, this industry practice of “menu-selling” is itself a subtle form of bait and switch. The dealer promises to sell a car on the price discussed with the consumer, but in actuality will only sell the car if the consumer agrees to sit in a room with professional high-pressure salesman who will then try to sell a variety of other unnecessary items. At least when a consumer accepts a free weekend from a time-share place, the consumer has agreed to give up their time to be subject to a sales pitch. If the dealer will require the consumer to say “No” repeatedly to a number of other consumer items before it will sell a car to the consumer, the consumer should be given this information along with the price.

Another type of bait and switch is where the consumer thinks they are entering into a legitimate transaction, but the dealer is instead falsifying information about the credit side of the transaction. The dealer does this so that the dealer can fraudulently sell the credit contract for more money than it is worth. Sometimes, the first assignee will be involved in the falsifications because the first assignee is also intending to sell the contract for more than it is worth. An enlightening discussion case on this issue is Knapp v. Americredit Fin. Servs., 245 F. Supp.2d 841(S.D. W.Va. 2003). This summary judgment opinion details how the finance company was helping the dealer to falsify documents to make the consumer appear more creditworthy.

**Disclosure of credit terms:** The Truth in Lending Act, 15 U.S.C. 1601 et seq., is familiar to most lawyers, but most clients do not understand their rights or what Congress wants them to do with the TILA disclosures. The key to TILA is that it is to be used to credit shop so that our financial industry is subject to market forces before credit transactions are signed. The theory is that if knowledgeable buyers with truthful information shop for the best credit terms available, the market will cause the finance industry to function effectively because good credit transactions will result. As the meltdown of the financial markets has shown, when the market forces come into play long after bad credit transactions are created, the results are devastating. To help the market function, the TILA requires that the consumer receive the TILA disclosures in a form that can be kept prior to the consumer signing them. Polk v. Crown Auto, 221 F.3d 691 (4th Cir. 2000); Lozada v. Dale Baker Olds, 91 F. Supp.2d 1087 (W.D. Mich 2000); Terry v. Whitlock, 102 F. Supp.2d 661 (W.D. Va. 2000). Ask the clients if they received a copy to keep, to put in their pocket, to walk out with, prior to signing. Consumers need to know they are entitled to leave with this document before agreeing to any credit terms, but whether they try to or not, the dealer still has to given them physical possession of the disclosures prior to the signing of a credit contract.

If items are included and labeled as options, ask the consumer why they purchased that item. Although checking the basic validity of the APR should be a standard practice, most dealers have programs so that their disclosures initially look accurate. Among other sources, the National Consumer Law Center has a program available as part of its TILA Manual to allow you to check the APR yourself. After checking the amounts as disclosed, check to see if the tax amount is proper, if the downpayment and trade-in amounts are accurate, and if the consumer really provided the full downpayment. The numbers should not just be internally consistent; they should properly reflect reality.

The TILA allows for recovery of statutory damages and attorneys fees under 15 U.S.C. 1640(a).
As an affirmative statute with mandatory duties, it is to be construed strictly against the creditor; the dealer cannot avoid liability by claiming that the consumer also engaged in some wrongdoing. Purtle v. Eldridge, 91 F.3d 797 (5th Cir. 1996). Furthermore, under TILA, the Supreme Court has declared that it “reflects a transition in congressional policy from a philosophy of ‘Let the buyer beware’ to one of “Let the seller disclose.” Mourning v. Family Publications Service, 411 U.S. 356, 377 (1973). The yo-yo sale discussed above can be raised as a TILA claim, Janikowski v. Lynch Ford, 1999 U.S. Dist. Lexis 3524 (overruling motion to dismiss), but the facts have to support the allegations, Janikowski v. Lynch Ford, 210 F.3d 765 (7th Cir. 2000) (granting summary judgment motion to defendant). For why a dealer would withhold the disclosures in a yo-yo transaction (where the dealer is not sure yet if the paper can be sold) see Knapp v. Americredit Fin. Servs., 245 F. Supp.2d 841(S.D. W.Va. 2003). The dealer may withhold disclosure of the terms until after the sale or simply cover them up during the sale. See Martinez v. Rick Case Cars, 278 F. Supp.2d 1371 (S.D. Fla. 2003) and Cannon v. Metro Ford, 242 F. Supp.2d 1322 (S.D. Fla. 2002)(discussing five finger spread). Other good opinions on car sales and credit disclosures are Patton v. Jeff Wyler Eastgate, Inc., 608 F.Supp2d 907 (S.D. Ohio 2007), and Muro v. Hermanos Auto Wholesalers, Inc., 514 F. Supp. 2d 1343 (S.D. Fla. 2007).

Credit contracts that are backdated raise TILA issues about the accuracy of the APR disclosure. This is detailed in Rucker v. Sheehy Alexandria, Inc., 228 F. Supp.2d 712 (E.D. Va. 2002), an individual case. If a car dealer has backdated one document, it has probably backdated several and could be subject to a class action. See Nelson v. Pearson Ford Co., 186 Cal.App.4th 983, 112 Cal.Rptr.3d 607 (Cal. App. 2010).

Many dealers still do not understand that they are the creditor when they write a Retail Installment Sale Contract. They are required to give the TILA disclosures because they have entered into a credit contract with the consumer. Dealers who write such credit contracts need to understand and follow their duties as creditors. In some states, the failure to follow this simple TILA procedure will also allow for a state law claim. See Gillom v. Ralph Thayer Automotive Livonia, Inc., 444 F.Supp.2d 763 (E.D. Mich. 2006)(failure to deliver TILA disclosures also resulted in failure to follow Michigan retail installment act and summary judgment granted to plaintiff on that claim).

**Notices about credit decisions:** When dealers do not understand their role as creditors, they end up violating more than just the TILA. The Equal Credit Opportunity Act and the Fair Credit Reporting Act require notices to consumers when adverse action is taken on a credit application. New regulations under the FACTA amendments to the FCRA also require a notice about how the credit score relates to the cost of credit. Some decisions regarding fact situations prior to the FACTA Amendments of 2003 to the FCRA include Cannon v. Metro Ford, Inc., 242 F. Supp. 2d 1322, (S.D. Fl. 2002) and Davis v. Reg'l Acceptance Corp., 2002 U.S. Dist. LEXIS 16775 (E.D. Va. 2002). Post FACTA cases need to be analyzed under the statute as modified because not all notices under the FCRA are subject to a private right of action.

The main issue under these cases will be whether adverse action notices were required and whether they were sent. A notice is required if the dealer, as the creditor who prepares a RISC, takes an adverse action as long as the consumer does not accept a counter-offer of credit from that creditor. The leading appellate decision is Treadway v. Gateway Chevrolet Oldsmobile, 362 F.3d 971 (7th Cir. 2004), finding the dealer was a creditor for purposes of the ECOA. In Nevarez v. O'Connor Chevrolet, Inc., 303 F.Supp.2d 927 (N.D. Ill., 2004), that trial court properly rejected the dealer’s claim that it was not a creditor regulated by the ECOA notice requirements. Similarly, Kirk v. Kelley Buick of Atlanta, 2004 US Dist. Lexis 19528 (ND Ga. 2004), explains how both the dealer and its potential assignee are
creditors under the ECOA that are required to provide the proper notice. Unfortunately, that court’s FCRA analysis is not correct because it wrongly holds that a plaintiff must show a nexus between the information on the credit report and the creditor’s decision.

The NADA has issued guidelines to car dealers regarding the ECOA adverse action notices and tells the dealer it should issue a notice in the following circumstances.

- When a customer’s credit is so bad that you don’t send the deal to any finance company
- When you send a deal out to one or more finance companies and no one extends credit to the customer
- When you send a deal out, the finance company wants to extend credit with different terms and the customer refuses the new terms.

Any discussion of the car dealer’s obligations under ECOA should include pointing out this industry standard.

**Insurance issues:** When a car dealer also decides to start selling insurance, many other issues arise. States have different disclosures that are required for insurance products, and sometimes it is difficult to determine what disclosures were made to the consumer. For example, in Virginia, for credit insurance to be excluded from the finance charge, the dealer or creditor must disclose the monthly payment and amount financed if no credit insurance is purchased, Va. Code 38.2-3735, but the consumer may no longer have that separate document. The insurance issues can be a fruitful area of discovery to find out exactly what type of insurance is being purchased and whether it really qualifies as the insurance it purports to be. See Adams v. Plaza Finance Company, 168 F.3d 932 (7th Cir. 1999); Edwards v. Your Credit Inc., 148 F.3d 427 (5th Cir. 1998). A new development is the sale of credit insurance inside an Automobile Club plan. Such a sale should still be considered the sale of credit insurance and the disclosures should still be required.

**The price of the car:** The dealer may inflate the price of the car to a credit customer for many different reasons, but a dealer may not charge a credit customer a higher price for the car than would charge a cash purchaser. See Walker v. Wallace Auto Sales, 155 F.3d 927 (7th Cir. 1998). If you can, determine what the price would have been if the credit customer had paid cash and had no trade-in. It may also not inflate the cash price to cover any alleged negative equity in a trade-in. Negative equity transactions are common in the industry, and hiding the negative equity is equally common. The consumer will be harmed by this if the consumer paid taxes on that inflated sales price; no consumer should have to pay sales tax on a direct loan from the dealer. Hiding the negative equity is also a fraud on the parties downstream of the transaction who will purchase or invest in the credit contract (usually by way of pools of securitized contracts). A very lengthy decision on negative equity came out of the California Court of Appeals in 2005, Thompson v. 10,000 RV Sales Inc., 130 Cal.App.4th 950 (2005), and further discussed in cases like Graciano v. Robinson Ford Sales, Inc., 144 Cal.App.4th 140 (2006), and Lewis v. Robinson Ford Sales, 156 Cal.App.4th 359 (2007).

**Fee-shifting statutes:** Every car fraud case should allow for a private lawyer to seek and recover fees when the case is successful. The time must be carefully and properly documented as it is expended. The fee decision in the Rucker case provides a good discussion of what must be done. Rucker v. Sheehy Alexandria, Inc., 2003 U.S. Dist. LEXIS 4294. Probably the most important fee-shifting statute of general applicability is the Magnuson-Moss Warranty Trade Improvement Act, 15 USC § 2301 et seq. Under 15 USC § 2310(d) the failure of any supplier, warrantor, or contractor to comply with a written warranty, implied warranty, or service contract allows the aggrieved party to recover damages and
attorneys’ fees. For credit transactions, the TILA and ECOA allow for attorneys’ fees. A state UDAP or credit statute may also provide for shifting the attorneys’ fees. The attorneys’ fees must be calculated based on actual time expended and expert fees are usually included in awarded costs. This powerful remedy allows lawyers to provide legal representation to people who are victims of predatory practices, and keeps the courthouse doors open to those without the ability to afford to pay the tremendous costs associated with seeking justice.

**Arbitration clauses:** The most dangerous new area for car cases is the exponential growth of arbitration clauses. Bad actors in the economy are using binding mandatory arbitration clauses to perpetuate illegal business practices. A good websites on this is www.fairarbitrationnow.org. In court, defeating this attack on the American justice system usually ends up being state specific under contract law principles. The NCLC has an excellent manual “Consumer Arbitration Agreements” that should be consulted. On this issue, legislation is currently pending in Congress that would seek to ban binding mandatory arbitration agreements in car contracts. This proposed legislation builds upon the fact that car dealers have already persuaded Congress that mandatory binding arbitration clauses are unfair when forced upon the dealers by manufacturers. More importantly, certain military lawyers can bypass the civil justice system entirely and instead bring criminal actions in federal court based on the same type of claims normally brought in the statutory based civil claims.

**Important federal developments:** The SCRA has been amended to allow for lawyers to recover fees to enforce its protections. This will be especially useful for repossessions. The Consumer Financial Protection Bureau has an Office of Servicemembers Affairs. Complaints about predatory practices should also be forwarded to this office so that it can address systemic problems.