The Yo-Yo Problem

The core problem is that many dealers want to remove a consumer from the market, and thus deprive other dealers and creditors of potential business, by making it appear to the consumer that a credit offer has been made to the consumer that consumer accepted. They do this by giving consumers a credit contract with TILA disclosures that on their face appear to be offering a credit deal when the dealer has not yet decided whether it will be extending credit to the consumer. Whether or not a dealer actually pulls the string on the yo-yo sale and tells the consumer the credit has not really been offered is not relevant to the harm in the marketplace. The harm to the marketplace occurs when the consumer believes a credit sale has been completed and stops shopping for a car on credit. Therefore, even if a dealer only pulls the string on 10% of its credit deals, the harm occurs in 100% of the credit deals. In every case, the dealer setting up the yo-yo sale is improperly taking a potential customer from the dealers in the marketplace who would not give the consumer a credit contract or lease to sign until it was a real offer by the dealer.

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. See Heltzel v. Mecham Pontiac, 152 Ariz. 58, 730 P.2d 235 (Ariz. 1986)(Court upheld conversion claim for dealer's repossession of new vehicle where dealer represented that financing was completed and had sold trade-in.). Although many legal 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, people want to buy a car not a lawsuit. As a matter of state law, unless the dealer used a properly conditional credit contract allowed by its state, and treats the title, insurance, and date of interest accrual consistent with that condition, and does not represent in other ways that credit was proved then the 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). Many states already prohibit such transactions, but in the ones that have not taken that step, as a matter of state contract law, the dealers do not properly use valid conditions because they do not treat the contract consistent with the claimed condition.

All yo-yo sales are based on some sort of claimed ability for the dealer to cancel the sale. As a state law matter in those states that have not yet prohibited this type of credit sale of a car, 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 actually agreed to subjecting a credit contract to a condition, some courts will uphold that arrangement without properly analyzing whether the claimed condition was really a valid condition properly implemented by the dealer. 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 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); Janikowski v. Lynch Ford, 210 F.3d 765 (7th Cir. 2000(finding a credit sale subject to a condition and assuming without a factual record that the dealer treated the condition like a condition subsequent); Castellana v. Conyers Toyota, Inc., 200 Ga.App. 161, 407 S.E.2d 64 (Ga. App., 1991). In these cases the courts have not analyzed 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. When a credit contract cannot be sold for face value, the dealer chooses whether to buy-down a credit contract and how much to do so. Thus, a credit contract or lease can always be sold and the dealer is merely choosing not to sell it. For this reason, a condition based on the dealer's ability to sell the credit contract or lease is always an improper condition. Although the Truth in Lending Act allows for use of estimates , the estimate cannot be "I estimate that in the future I will decide to honor the disclosed terms" because such a condition is not a valid condition.

The yo-yo sale gets even more complicated if a bankruptcy is filed shortly after the yo-yo documents are signed. The issue is always who owns the car after the documents are signed and the consumer drives off the lot. 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 bankruptcy 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 the consumer received the car could be set aside as a preferential transfer. On the contrary In re McFarland, 131 B.R. 627 (E.D. Tenn., 1990) found a retail installment sale contract was a condition precedent transaction because a purchase price option document stated a condition and the parties all understood that the retail installment sale contract had not yet been approved. The core problem is that it should not take complicated legal analysis to determine who owns a car after a consumer has signed a contract for it, been given it, and the interest or lease charges have already started accruing.

Thus, the simple question in any yo-yo sale is who owned the car when the consumer drove it off the lot, and that answer should be easily knowable. Otherwise, common and simple transaction issues 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. Cappo Mgmt. v. Inc., 282 Va. 33, 711 S.E.2d 209 (2011)(four years of litigation when dealer continued to claim the car always belonged to the dealer because it called off transaction months after the sale). As a matter of fundamental fairness, the dealer is not allowed to have it both ways, and must tell the truth to a consumer. Trying to have it both ways is not good faith and when the car dealer as creditor is preparing TILA disclosures not based on good faith the dealers violate TILA whether or not state law has prohibited these type of transactions.

Based on the comments at the three roundtables, the majority of 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. The minority who refuse to give a credit or lease contract to a consumer unless it is fully approved offer by the dealer are put at a significant competitive disadvantage. No other creditors treat customers in this way, 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 approved.

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. Importantly, those better dealers may have invested in the latest technology that allows rapid interfaces with potential assignees, or they may have spent the resources to train staff to only create deals with a high enough potential for being sold that the dealer chooses to assume the risk of the subsequent sale of the credit contract. Regardless for why those dealers are able to give consumers credit or lease contracts that are fully approved, those dealers deserve the competitive advantage their business practices have earned.

Because the dealer extends credit in a credit sale by signing over title to the property, analyzing the transaction to determine whether the dealer properly structured a claimed condition will depend on how the dealer handled the title to the car and what the state's requirements are for how it should be handled. 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 result of the combination of titling laws, federal odometer laws, and credit laws, is that I have never seen a car dealer that had a properly structured condition. Some states will have a specific statute that prohibits them entirely even if the industry were to try to come up with to implement them that was consistent with contract law. 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").

One federal opinion detailing this practice is found at Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003)(reversedn 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), provides 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 TILA purposes, even if it was a conditional credit contract under state law. For a good state law decision that explains the unlawful repossession aspect of yo-yo sales, see Singleton v. Stokes Motors, Inc., 595 SE2d 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 being determined by the courts. See e.g Padin v. Oyster Point Dodge, 397 F. Supp.2d 712 (E.D. Va. 2005); Cannon v. Metro Ford, 242 F. Supp.2d 1322 (Fla. 2002); and Miranda v. Autonation USA Corp., 789 So.2d 1188 (Fla. App. 2001).

A yo-yo case can result in substantial distress to the person who has been tricked. The Whitaker v. MT Automotive case from Ohio upholds the right to recover general distress damages under consumer protection statutes. 11 Ohio St.3d 177 (2006)(regarding a yo-yo lease). In Hobbs Automotive, Inc. v. Dorsey, 914 So.2d 148 (Miss. 2005) the Mississippi Supreme Court upheld a $100,000 judgment as a result of a yo-yo sale. The trial court refused 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.

A yo-yo sale can also violate the Fair Credit Reporting Act (FCRA) if the dealer does not send an adverse action notice. Barnette v. Brook Rd., Inc., 429 F. Supp.2d 741 (ED Va. 2006). Because some courts have ruled that FACTA has eliminated a private right of action under 15 USC § 1681m, this type of claim cannot be brought by a consumer in many jurisdictions.

The fraud in the yo-yo sale can be articulated as a TILA violation. 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 laws are violated by this practice.

For existing federal statutes, the core TILA, ECOA, FCRA and Odometer Act issue is how a dealer who has not decided whether to approve a credit application and extend credit to the consumer informs the consumer that no decision has been made yet. Giving the consumer a credit contract to sign and pretending to sign over title and starting the interest running is not a way to communicate that no decision has yet been made. Especially when the dealer chooses to embed the TILA disclosures in a contract (which it does not need to do and could instead have them in a separate document), these must represent an actual offer of credit that the consumer can accept. In theory the TILA disclosures are simply a way to represent the contract terms that will be created, but when the creditor chooses to put the disclosures in the text of the contract, the creditor is choosing to make them part of the contract. Under ordinary contract law principles, one side makes an offer which they are legally bound to follow if the other party accepts. The TILA disclosures are simply the standardized way to represent the creditor's offer. If the dealer has not approved the application it cannot represent it has or it violates the ECOA. Because the Odometer Act requires the odometer disclosure to be on the document assigning title, this disclosure must occur on the document giving title ownership to the consumer. If the dealer does not approve the transaction but used a consumer report from a consumer reporting agency, then FCRA notices must be given. The way all these work easily together is if the dealer gives the credit contract to the consumer to sign when the deal is approved, and then signs over title as part of that process. Anything else causes numerous legal problems and unfairly gives the consumer the impression that they are receiving something they are not.