Thomas D. Domonoske on Yo-yo Sales

In the classic yo-yo sale, the consumer signs a credit contract, is given a temporary registration, temporary license plates, and properly thinks the transaction is complete. 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 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, and what was the consumer told about the sale.

For the yo-yo sale, you will want to know exactly how the dealer handled the title to the car. 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, 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 title statutes also 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).

The basic fraud in a yo-yo sale is making the consumer think the sale was a done deal, when in fact the dealer set 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 5.4.5 of its NCLC's Unfair, Deceptive Acts and Practices Manual, Sixth Edition, and is discussed in its Truth in Lending Act Manual, Sixth Edition, section 4.4.5

One federal opinion detailing this practice is found at Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003)(reversed on 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 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 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.

These cases can bring in substantial damages if the jury understands just how much distress such conduct can cause a person. The recent 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).

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 recent 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 (USDC 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 and then explained to a Court for why 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). The truth is that a dealer can always sell a credit contract to a buyer if the dealer is willing to sell for the price the finance markets will pay. Thus, a contract can always be sold.