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Have You Been "Spotted"? Recognizing and Attacking One of the Most Widespread Automobile Dealer Abuses

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FEATURE ARTICLES

Have You Been "Spotted"? Recognizing and Attacking One of the Most Widespread Automobile-Dealer Abuses

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I. A TYPICAL SPOT-DELIVERY SCENARIO[1]

On October 6, 1997, Cathy Carbuyer visits Daffy Dan's Drive-Away to purchase a used automobile. The car she is currently driving gets her around, but she has been required to put more money into it for repairs than she would prefer. So, she decides to buy something a little more dependable. After looking around the lot for a while, Cathy chooses a 1996 Wasabi Thunderbolt XJS. The cash price of the car is $9,800.00. As a down payment for the car, she trades in her old car (for which Daffy Dan's gives her $1,500 applied toward her purchase) and gives Daffy Dan's an additional $1,000 in cash. She signs a Bill of Sale for the car and then proceeds to the finance manager's office to take care of the financing. After waiting for several hours in the finance manager's office, Cathy is told that financing has been obtained and that the Thunderbolt belongs to her. Cathy happily drives her new Thunderbolt home. For the next few weeks, Cathy shows off the Thunderbolt to all of her friends, family, and coworkers.

About two weeks later, Cathy receives a telephone call from Daffy Dan in which Daffy Dan informs her that, because of some late payments she has made on credit cards in the past, the financing "didn't go through." Therefore, according to Daffy Dan, Cathy needs to return to complete some more paperwork. This was the first instance Cathy heard about a problem with her financing.

Confused, Cathy returns to Daffy Dan's to find out what happened. Daffy Dan informs Cathy that she would need to agree to new payment terms in order to keep the Thunderbolt. Specifically, Daffy Dan tells Cathy that the APR would have to be increased to 23.95%. Cathy is shocked and angry because Daffy Dan had led her to believe earlier that the APR was 14.00%. Cathy angrily tells Daffy Dan that she no longer wants to do business with him and asks that her down payment and trade-in be returned to her. Daffy Dan then informs Cathy that her trade-in has already been sold and that it will be keeping part of her down payment to cover Cathy's use of the Thunderbolt for the two-week period.

Now, faced with having no transportation at all and with the prospect of losing part of her cash down payment, Cathy agrees to the new payment terms. She signs a new retail installment contract and is assured that this time, because the financing was already approved by the bank, there would not be any more problems. Again, Cathy leaves with the Thunderbolt XJS.

Three weeks later, Cathy receives a letter in the mail from the Financing-Is-Fun Finance Company stating that it could not finance her purchase of the Thunderbolt because of the late credit card payments that appeared on her credit report. Worried that something might be wrong, Cathy calls Daffy Dan's to inquire about the letter from Financing-Is-Fun. This time, Daffy Dan informs Cathy that it would not be able to finance the Thunderbolt at all. Daffy Dan then demands that Cathy return the car. However, Cathy refuses to return the Thunderbolt because she feels that she is entitled to possession of the car.

A few days later, Cathy receives a telephone call from a man claiming to be a United States Marshall. The "marshall" orders Cathy to give up possession of the Thunderbolt. If she refuses, says the "marshall," she will be criminally prosecuted. Scared, Cathy hangs up the phone.

After a few more days, Cathy awakens one morning to sounds of breaking glass. By the time she grabs her robe and runs to the front door of her house, it is too late. She sees her Thunderbolt, which had been parked safely in her garage, being hooked up to a tow truck by an armed man in a blue uniform. Her garage had been forcibly broken into and her car taken away.

II. WHY DO CAR DEALERS SPOT-DELIVER?

Typically, when a potential customer walks into a car dealership, the dealer wants to put that person into a car before he or she leaves to avoid losing the potential customer to another dealership. If the dealer allows the customer to comparison shop or think about the expense of purchasing a particular car, the customer may not return. So, the dealer wants the customer to become committed to a particular car and to believe that the deal is done. This way, even though the dealer may not know whether financing can be obtained at the terms represented to the consumer, and may in fact be confident that financing will not be obtained at the represented terms, the consumer will become psychologically committed to the deal. By the time the dealer informs the consumer that financing could not be obtained at the agreed upon terms, the consumer has already shown the new car to all of her friends. She may have even invested more money into the car by installing accessories, thereby becoming emotionally and financially committed to the car.

After the consumer becomes committed to the car, the dealer will typically call and inform the consumer that financing could not be obtained at the earlier agreed-to terms. As a result, the consumer must return to the dealer to discuss other less-favorable financing terms. As a further incentive to agreeing to less-favorable terms, the dealer may inform the consumer that her trade-in vehicle has been sold, preventing her from taking her trade-in back and leaving. Additionally, the dealer might tell the consumer that the consumer's down payment will not be returned; rather, it will be retained by the dealer as compensation for the consumer's use of the car. With all of these forces working against the consumer, he or she will often agree to the less-favorable financing terms and the dealer will have succeeded in its scheme.

In a spot-delivery transaction, the automobile dealer has the customer sign a variety of documents, the purposes of which are to bind the customer to purchase the automobile. Upon the signing of the documents, the dealer will deliver the vehicle "on the spot." Like the situation above, the dealer will also usually take immediate possession of a customer's trade-in vehicle.

The documents signed by the customer typically include a sales contract (i.e., a bill of sale or purchase order), which is generally a dealer-drafted contract describing the vehicle and containing pricing and trade-in information. While a bill of sale may reference that the transaction will be financed, it generally does not include the disclosures required by the Truth in Lending Act. Likewise, a bill of sale may or may not contain language indicating that the sales contract is contingent on financing, yet it is not a credit contract. Additionally, any contingency in the sales contract is not necessarily part of a later credit contract.

Specifically, in a spot-delivery, the customer will also be required to sign a binding credit contract. This credit contract is generally a printed form supplied by a third party to whom the dealer intends to assign the contract. It is a combination installment contract, security agreement, and Truth-in-Lending disclosure statement. It typically includes the closed-end credit disclosures required by the Truth in Lending Act[2] ("TILA") and the corresponding implementing provisions of Federal Reserve Board Regulation Z.[3] This credit contract, however, does not typically contain terms making it contingent on the dealer's ability to sell it to a third-party assignee.

In any car purchase, the customer will be asked to sign a variety of documents necessary to consummate the transaction. In almost any sale, these documents will include a sale contract, an "incoming" odometer disclosure statement on the purchased vehicle, an assignment of title (or power of attorney to do so) for any trade-in, an "outgoing" odometer disclosure statement for the trade-in, and a sales tax form. In a credit purchase, the documents will also include a credit application and a credit contract. The customer may also sign additional documents relating to warranty coverage, credit insurance and other associated items. In a spot-delivery transaction, however, the most important documents are the retail installment contract and the sale contract. These are the documents that create obligations on the part of the customer and the dealer regarding the vehicle. The customer is obligated to pay the dealer the amount in the contract, and the dealer is obligated to deliver the vehicle to the customer.

On occasion, a spot-delivery consumer will be required to sign a spot "rider," the intended purpose of which is to condition the transaction on financing. The rider may be attached to the sale contract or to the credit contract. The rider may also be a free-standing document that does not specifically state to which document it is attached. If used, a spot rider will contain language similar to the following:

> If Seller is unable to assign its right, title and interest in the Contract to such sales finance agency within three (3) days of this

> date and so notifies Buyer, Buyer shall, within two (2) days of such notice, return the Vehicle to Seller's place of business and Seller shall return to Buyer all of Buyer's deposits without setoff or deduction of any amounts and the Contract shall then be null and void...

This rider contains nothing more than a condition subsequent to the contract. The underlying contract is enforceable because, as the rider discloses, if the contract is not assigned, it "shall then be null and void." As discussed below, this is a very important distinction.

III. WHAT THE ATTORNEY SHOULD KNOW

The scenario described above generates many potential legal problems for the dealer. These include potential violations of the Truth in Lending Act, the Equal Credit Opportunity Act, state consumer-fraud acts, and may also give rise to claims for common-law conversion and fraud.

A. Failure to Properly Disclose the Financing Terms Required by the Truth in Lending Act

The federal Truth in Lending Act[4] requires that the lender accurately give certain disclosures to the customer when financing is provided in a consumer transaction, including the sale of an automobile. These disclosures include the amount financed, the finance charge, the annual percentage rate, the payment schedule, the total of payments, and whether any security is taken in connection with the transaction. The disclosures must be given at the time a credit sale[5] is "consummated," meaning when a contractual obligation on the consumer's part is created.[6] If any of the information required to be disclosed is not known, the lender must make the disclosures based on the best information reasonably available and must label the disclosures as estimates.

1. The "amount financed"

Section 1638(a)(2)(A) of the TILA requires that the "amount financed" be disclosed as "the amount of credit[7] of which the consumer has actual use."[8] In the transaction discussed above, since Cathy Carbuyer did not actually receive financing on October 6, 1997, she did not have actual use of the "amount financed" as disclosed. Therein lies a TILA violation. Since the best information reasonably available to the dealer was that financing for Cathy Carbuyer was only possible and not definite at the time of the execution of the contracts, the dealer should have labeled the disclosures as estimates.[9]

The Truth in Lending Act requires more than mathematical precision; it requires that the disclosures reflect the credit actually granted to the consumer. The fact that the disclosures given by the dealer are mathematically correct as disclosed is of no consequence. The dealer's inability to find a lender to whom it could assign the loan is not an occurrence that excuses the inaccurate TILA disclosures. Rather, in a typical spot-delivery transaction, whether the dealer is able to obtain financing for the consumer's purchase of a car is a condition subsequent to the formation of a contract.

In contract law, a condition subsequent is a condition which divests liability that has already attached on the failure to fulfill the condition. A condition subsequent is different from a condition precedent, which must be satisfied before the obligation becomes binding on the parties.[10]

The contracts involved in most spot-delivery transactions contain language to the effect that the consumer is bound by the contract, but the contract may be canceled if financing is not obtained within a certain time frame. Thus, although the contract has become enforceable, its continued enforceability depends on the dealer's ability to obtain financing for the consumer. As a result, it becomes a binding contract subject to a condition subsequent.[11] Therefore, since the contract is enforceable, a credit obligation has been created on the part of the consumer, i.e., "consummation"of the vehicle has occurred. Since accurate TILA disclosures must be given before consummation,[12] the dealer may be liable for violating the TILA[13] if the consumer does not have actual use of the amount disclosed as the amount financed.

2. The annual percentage rate

The TILA requires that the annual percentage rate be accurately stated on an installment contract.[14] The term "annual percentage rate," ("APR"), refers to the "actual cost of borrowing money, expressed in [the] form of [an] annual rate to make it easy for one to compare [the] cost of borrowing money among several lenders or sellers on credit."[15] If the consumer does not have actual use of the amount financed from the date disclosed on the contract, the APR will be inaccurately stated. This is because the APR depends on the length of the term of the contract. If an installment contract states that the APR is calculated based on a loan term beginning January 1, 2000, and, in reality, the loan was not approved until February 1, 2000, the consumer has had actual use of the amount borrowed for one month less than the contract states. If the APR for the same loan was calculated based on a term that began on February 1, 2000, the resulting APR would be greater because the consumer had use of the money for less time despite the fact that the finance charge is the same.[16] So, in spot-delivery transactions dealers systematically underestimate the APR.

In addition, if the dealer re-writes the consumer's loan at a higher annual percentage rate, the rate may be further underestimated if the dealer calculates the rate based on the date of the original contract rather than the date of the new contract. For example, if the dealer back-dates the retail installment contract, there is a sufficient cause of action under the TILA.[17]

B. Failure to Notify the Consumer of Adverse Action Taken on a Credit Report in Violation of the Equal Credit Opportunity Act

The Equal Credit Opportunity Act[18] ("ECOA") and its implementing regulations require creditors to notify credit applicants in writing if their applications for financing are denied.[19] The notification must be given to a credit applicant within "30 days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application."[20] The notification must contain:

> a statement of the action taken; the name and address of the creditor; a statement of the provisions of section 701(a) of the Act; the name and address of the Federal agency that administers compliance with respect to the creditor ; and either: (i) a statement of specific reasons for the action taken; or (ii) a disclosure of the applicant's right to a statement of reasons within 30 days . . . .[21]

The purpose of the notification requirement is to give the applicant the opportunity to correct errors that may have caused the rejection of their credit application. Consumers are informed as to why they were denied credit so that they can try to become more creditworthy before applying for credit again.[22] In addition, the notification requirements help prevent creditors from engaging in discriminatory practices: "only if creditors know they must explain their decisions will they effectively be discouraged from discriminatory practices."[23]

Car dealers that regularly arrange for the extension of credit to consumers are considered creditors under the ECOA.[24] As such, the dealer in the above example is a "creditor" who must comply with the written-notification requirements of 15 U.S.C. § 1691(d) and 12 C.F.R. § 202.9.[25] Furthermore, section 1691e(a) of the ECOA states:

> Any creditor who fails to comply with any requirement imposed under this sub-chapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.[26]

By failing to notify the consumer that the dealer was unable to obtain financing for the consumer, the dealer has violated the ECOA. Dealers often argue that a claim under the ECOA requires the plaintiff to have alleged discrimination in order to state a violation.[27] However, the clear language of the ECOA and the purpose behind the ECOA clearly illustrate that discrimination is not an element necessary to state a claim under the Act.[28] Moreover, the existence (or non-existence) of ECOA denial letters may help the consumer determine the extent to which the dealer shopped around for credit for the consumer.

C. Dealer Repossession and Section 9-503 of the Uniform Commercial Code

In a typical automobile transaction, the retail installment contract will grant the lender a security interest in the purchased vehicle. But in a spot-delivery transaction, questions arise as to whether the lender possesses a security interest at all and, if so, whether the lender can enforce the security interest against consumers that have been "spotted." Therefore, if the dealer uses self-help repossession to retake the vehicle, (as Dealer did with Cathy Carbuyer in the above example), the dealer has probably overstepped the boundaries of the law.

Section 9-503 of the Uniform Commercial Code provides that a secured party does have the right to repossess collateral if the debtor defaults, and the "secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action."[29] Thus, in order to utilize self-help repossession, the lender must possess a valid security interest, the consumer must be in default, and the lender must not breach the peace in performing the repossession.

Since a car dealer will often argue in response to a Truth in Lending Act claim that the retail installment contract was never binding, and since the retail installment contract is typically the only document containing language relating to the creation of a security interest, the consumer's attorney can argue that no security interest was ever created. The dealer cannot disclaim the validity and enforceability of the retail installment contract while simultaneously claiming the benefit of a security interest contained in the retail installment contract. Without a valid security interest in the vehicle, self-help repossession is illegal and the damages provisions of section 9-507 would most likely apply.

In addition, if the court finds that the dealer did have a valid security interest in the vehicle, it is unlikely that the consumer is in default under the contract. In a typical spot-delivery transaction, the consumer's first payment does not become due by the time the dealer repossesses the vehicle. Without a default by the consumer, self-help repossession is illegal.

Finally, regardless of whether a valid security interest exists or whether the consumer is in default, self-help repossession must not involve a breach of the peace. The phrase "breach of the peace" connotes conduct that incites or is likely to incite immediate public turbulence, or that leads or is likely to lead to immediate loss of public order or tranquility.[30] Examples include breaking into property or destruction of barriers designed to exclude trespassers,[31] but does not include entry onto private property so long as no gates, barricades, doors, enclosures, buildings, or chains were breached or cut, even though such entry might constitute criminal trespass.[32] Breach of the peace may also include unequivocal oral protests.[33]

Claims for breach of the peace in violation of 9-503, in many jurisdictions, can be brought against both the repossession agent and the actual creditor because repossession is generally viewed as a nondelegable duty.[34] As the Supreme Court of Texas stated, a creditor cannot avoid liability for tortious repossession by hiring an independent contractor to accomplish the repossession:

> [t]he rule imposing liability on secured parties for breaches of the peace is based on longstanding policy concerns regarding the exercise of force or violence. The preservation of peace, courts recognize, 'is of more importance to society than the right of the owner of chattel to get possession of it.' As a general rule, when a duty is imposed by law on the basis of concerns for public safety, the party bearing the duty cannot escape liability by delegating it to an independent contractor.[35]

Violations of section 9-503 can lead to considerable damages to the consumer including actual damages. In the case of consumer goods such as automobiles, damages may include "an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price."[36]

D. The Illinois Consumer Fraud and Deceptive Business Practices Act

Claims under Illinois' Consumer Fraud Act[37] ("CFA") evolve though several different means in a spot-delivery transaction. For example, a dealer may represent that he will attempt to arrange financing at certain credit terms with the intent that the consumers discontinue their search for a car. While making these representations, the dealer knew that he would not shop around for financing at those terms.[38] After the negotiations for the purchase have been completed, the dealer will call the consumer to inform him that financing could not be obtained, and then try to convince the consumer to sign a subsequent contract containing less favorable terms. If the dealer knew in advance that his attempt to arrange financing for the consumer would fail or if the dealer never requested financing at the agreed-upon terms, the consumer can allege a violation of the CFA.[39] As noted above, the consumer can gain some insight into the extent of the dealer's search based on whether the consumer received any ECOA credit denial letters.

One of the most common violations of the CFA occurs when the dealer is unable to arrange financing for a consumer, yet refuses to or cannot return the consumer's down payment or trade-in. Section 505/2C of the Consumer Fraud Act requires that a dealer return any down payment if the furnishing of merchandise, such as a car, is conditioned on the consumer providing adequate credit references or having a credit rating acceptable to the seller.[40] The down payment can take any form, including money or goods.[41] Moreover, the dealer may not retain any part of the down payment as a fee for investigating the credit of the consumer or as liquidated damages to cover depreciation of the merchandise.[42] Thus, dealers that retain a portion or all of a consumer's down payment because the consumer has been using the spot-delivered car have violated section 505/2C of the Consumer Fraud Act.[43]

E. Illegal Repossession Under the Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act[44] ("FDCPA") prohibits debt collectors[45] from repossessing goods unless an enforceable security interest exists with respect to the goods. Specifically, section 1692f(6)(a) of the FDCPA prohibits a debt collector from "[t]aking . . .any non-judicial action to effect dispossession or disablement of property if . . . there is no present right to possession of the property claimed as collateral through an enforceable security interest."[46]

This section subjects repossession agencies to liability for repossessing consumer's automobiles when the creditor does not have a valid security interest or when the consumer is not in default. Similar to the legal theories discussed in subsection D relating to violations of the UCC, if an installment contract is not binding, the dealer will most likely not have an enforceable security interest in the consumer's car. Furthermore, if a security interest does exist, the consumer probably has not had the car long enough to be in default at the time of the repossession. Therefore, any security interest that did exist would not likely be enforceable. By repossessing a consumer's car when the creditor does not have an enforceable security interest, a repossession agency violates section 1692f(6)(a) of the FDCPA. In addition, under the non-delegable duty analysis explained above in subsection C, the creditor may also be liable for violating the FDCPA.

F. Conversion of the Consumer's Trade-in Vehicle

When a dealer sells a consumer's trade-in vehicle and the deal for the car that the consumer wanted to purchase falls through, the dealer may be liable for conversion of the trade-in. If a sale is truly contingent and it has not yet been finalized, the dealer does not yet own the consumer's trade-in and, therefore, does not have the right to sell it. As a result, by selling the trade-in prior to finalization of the deal, the dealer obtains "unauthorized and wrongful assumption of control, dominion, and/or ownership" over the trade-in vehicle.[47] In this situation, until the dealer arranges financing, the consumer has an immediate right to possession of the trade-in.[48]

G. Conversion of the Spot-Delivered Car

In addition, if the dealer has sold the consumer's trade-in and then repossesses the car that the consumer purchased, the consumer may have a claim for conversion of the purchased car.[49] Dealers may argue that the consumer did not have an immediate right to possession of the new vehicle due to the existence of a financing contingency in the contract. However, the financing contingency at issue in a spot-delivery case is a condition subsequent to the formation of the contract.

As discussed above in subsection A, a condition subsequent is a condition which divests liability that has already attached on the failure to fulfill the conditions, as opposed to a condition precedent which is to be performed before the obligation becomes binding on the parties.[50] In a spot-delivery transaction, this means that the retail installment contract has become enforceable, but its continued enforceability depends on the dealers ability to obtain financing for the consumer. A condition subsequent can, however, be waived.[51]

Waiver is an intentional relinquishment of a known right and can arise either expressly or by conduct inconsistent with an intent to enforce that right.[52] To determine whether contractual rights have been waived, the focus is on the intent of the non-breaching party.[53] An implied waiver of a right may exist if the actions of the person against whom the waiver is maintained are inconsistent with anything other than an intention to waive such right.[54]

In the spot-delivery context, assuming that a financing contingency gives the dealer the right to cancel the contract, the dealer can waive that right by taking steps that were inconsistent with the financing contingency, such as selling the consumer's trade-in vehicle. The financing contingency usually contains language to the effect that the dealer will return the trade-in vehicle if and when it decides to cancel the contract. By selling the trade-in instead of returning it to the consumer, the dealer relinquishes its right to cancel the contract.

If a waiver of the financing condition occurs, the dealer can no longer cancel the contract for the consumer's purchase of the new car. As long as the consumer is not in default or late on any payments at the time of the repossession, he has an immediate right to possession of the new car,[55] and if the dealer repossesses the car, the consumer has a cause of action for conversion.

IV. CONCLUSION

Car dealers, by engaging in spot deliveries rather than simply waiting for financing approval, create a maze for themselves. Because they often do not understand the legal issues surrounding their own transactions, they often create problems for themselves and consumers alike. Transactions, like that of Cathy Carbuyer described above, need not mushroom into complicated legal disputes because they are simple transactions.

Had Daffy Dan not been so concerned with getting Cathy Carbuyer financially and psychologically committed to buying a car, he would not have been as likely to violate so many laws. Unfortunately, car dealers are under severe pressure to sell cars. That pressure will likely remain indefinitely. Therefore, the best way to avoid the problems associated with spot-delivery transactions is for both consumers and attorneys alike to become knowledgeable of the auto-industry practices. With knowledge of the motives and methods of car dealers, consumers can better ensure that they do not fall prey to spot-delivery. With the knowledge of the various laws that can be utilized to attack spot-delivery practices, attorneys will be better equipped to protect the rights of consumers.

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Endnotes

1. Based on facts alleged in actual cases handled by The Langone Law Firm. *See, e.g.*, Williams v. Thomas Pontiac, 99 C 882; Williamson v. Bob Watson, 98 C 8242; Tode v. Rizza Chevy, Inc., No. 98 L 11114; Johnson v. Grossinger Motorcorp, Inc., No. 98 L 10854; Drew v. Chrysler Financial Corp., and International Intelligence Agency, No. 98 L 8934.

2. *See* 15 U.S.C. § 1638.

3. *See* 12 C.F.R. § 226.18.

4. *See* 15 U.S.C. 1601.

5. A credit sale is defined by the TILA as "any sale in which the seller is a creditor." 15 U.S.C. § 1602(g).

6. *See* 12 C.F.R. § 226.2(a)(13); Nash v. First Financial Savings & Loan Assoc., 703 F.2d 233 at 239 (7th Cir. 1983); Janikowski v. Lynch Ford, Inc., No. 98 C 8111, 1999 WL 608714, at *3 (N.D.Ill. Aug. 5, 1999); Partida v. Warren Buick, Inc., 454 F.Supp. 1366 (N.D. Ill. 1978).

7. "Credit" is defined as "the right granted by a creditor to a debtor to defer payments or debt or to incur debt and defer its payment." 15 U.S.C. § 1602(e).

8. 15 U.S.C. § 1638 (a)(2)(A) (emphasis added).

9. *See* 12 C.F.R. § 226.17(c)(2).

10. *See* Wysocki v. Bedrosian, 124 Ill. App. 3d 158, 163, 463 N.E.2d 1339, 1344 (2d Dist. 1984).

11. Compare this to a true condition precedent, i.e., "this contract is not effective unless and until a third -party finance company agrees to purchase the retail installment contract from the dealer." Here, there is no contract until financing is obtained. But dealers do not typically use this language because the consumer is not bound by the contract and might actually know that they are not yet bound, thereby increasing the chance that the dealer may lose the customer to another dealership prior to financing being approved for the consumer.

12. *See Nash*, 703 F.2d at 238-39.

13. *See*, No. 99 C 882, slip op. at 4-5 (denying the defendant's motion to dismiss because the defendant's failure to give accurate TILA disclosures prior to consummation and despite the existence of a rider, if proved, would result in a finding that the defendant violated the TILA).

14. *See* 15 U.S.C. § 1638(a)(4); *see also* 12 C.F.R. § 226.22 (discussing tolerance levels for disclosure of annual percentage rate).

15. BLACK'S LAW DICTIONARY, 82 (5th Ed. 1979).

16. As an example, suppose that $100 is loaned to a consumer for one year with a finance charge of $25. The APR in that example would be 25%. But for a loan for $100 that imposes the same $25 finance charge but has a term of 2 weeks, such as a payday loan, the APR is 514%. In both examples, the amount financed and finance charges are the same. The APR, however, is much higher because the consumer has use of the money for a much shorter period of time.

17. *See id.*

18. *See* 15 U.S.C. § 1691.

19. *See* 15 U.S.C. § 1691(d)(1); *see also* 12 C.F.R. § 202.9. A notification must only be given in writing if the creditor "act[s] on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken." 15 U.S.C. §

1691a(4); 12 C.F.R. § 202.9(d).

20. 12 C.F.R. § 202.9(a)(1)(i).

21. 12 C.F.R. § 202.9(a)(2).

22. Pinkett v. Payday Today Loans, LLC, No. 99 C 3332, 1999 WL 592189, at *1 (N.D.Ill. Aug. 3, 1999); S. REP. NO. 589, 94TH CONG., 2D SESS. (1976) *reprinted in* 1976 U.S.C.C.A.N. 403, 406.

23. *Id.*

24. *See* 15 U.S.C. § 1691a(e).

25. *See Williams*, No. 99 C 882, slip op. at 6-7.

26. 15 U.S.C. § 1691e(a) (emphasis added).

27. *See Pinkett*, 1999 WL 592189 at *1.

28. *See* Jochum v. Pico Credit Corp. of Westbank, 730 F.2d 1051, 1043 (5th Cir. 1984); *Pinkett*, 1999 WL 592189 at *1; *Williams*, No. 99 C 882, slip op. at 6-7.

29. 810 ILL. COMP. STAT. ANN. 5/9-503; while we have cited and will discuss the Illinois version of the Uniform Commercial Code, most other states have similar, if not identical, provisions relating to self-help repossession.

30. *See* Chrysler Credit Corp. v. Koontz, 277 Ill.App.3d 1078, 1082, 661 N.E.2d 1171, 1173 (5th Dist. 1996).

31. *See id.*

32. *See Chrysler Credit Corp.*, 277 Ill.App.3d at 1084, 661 N.E.2d at 1175.

33. *See* Dixon v. Ford Motor Credit Co., 72 Ill.App.3d 983, 391 N.E.2d 493 (1st Dist. 1979).

34. Jurisdictions accepting the view that self-help repossession involves a nondelegable duty include Alabama, Oklahoma, Texas, New Jersey, Montana, New York, Tennessee, Mississippi, Missouri, Minnesota, and. The issue will be addressed by the Court of Appeals in Illinois for the first time in the near future in a case brought

by the authors of this article.

35. Mbank of El Paso v. Sanchez, 836 S.W.2d 151, 152-53 (Tex. 1992)(citations omitted).

36. 810 ILL. COMP. STAT. ANN. 5/9-507; Kouba v. East Joliet Bank, 135 Ill.App.3d 264, 481 N.E.2d 325 (3d Dist. 1985).

37. 815 ILL. COMP. STAT. ANN. 505.

38. *See Williams*, No. 99 C 882, slip op. at 5-6.

39. *See* 815 ILL. COMP. STAT. ANN. 505/2.

40. *See* 815 ILL. COMP. STAT. ANN. 505/2C.

41. *See id.*

42. *See id.*

43. *See* Roche v. Fireside Chrysler-Plymouth, Mazda, Inc., 235 Ill.App.3d 70, 82-83, 600 N.E.2d 1218, 1225-26 (2nd Dist. 1992). Many other states have similar provisions requiring that all deposits must be returned if the deal falls through. *See, e.g.*, LA. REV. STAT. § 32.1254(N)(3)(f); VA. CODE § 46.2-1530; WASH. REV. CODE § 46.70.180(4).

44. *See* 15 U.S. C. § 1692.

45. *See* 15 U.S.C. § 1692a(6)(defining debt collector as "any person who uses any instrumentality of interstate commerce or the mails in an business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or asserted to be owed or due another. . . . For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. . . ."

46. 15 U.S.C. § 1692f(6)(a).

47. Stopka v. Alliance of American Insurers, 1996 WL 494269 (N.D. Ill. 1996) (citing Pavilon v. Kaferly, 204 Ill. App. 2d 235, 561 N.E.2d 1245, 1253 (1990); Jensen v. Chicago & Western Indiana R. Co., 94 Ill. App. 3d 915, 419 N.E.2d 578, 593 (1981)).

48. *See id.*

49. *See Williams*, No. 99 C 882, slip op. at 8-9.

50. *See* Wysocki v. Bedrosian, 124 Ill.App.3d 158, 163, 463 N.E.2d 1339, 1344 (2d Dist. 1984).
51. *See* Sherman v. Town of Jefferson, 274 Ill. 294, 113 N.E. 624 (1916).

52. *See* Guice v. Sentinel Technologies, Inc., 294 Ill.App.3d 97, 105, 689 N.E.2d 355, 361 (1st Dist. 1997).

53. *See id.*

54. *See* Barker v. Leonard, 263 Ill.App.3d 661, 663, 635 N.E.2d 846, 848 (1st Dist. 1994).

55. *See* First Chicago Gary-Wheaton Bank v. Gaughan, 275 Ill.App.3d 53, 63, 655 N.E.2d 936, (2d Dist. 1995).