NISEN & ELLIOTT, LLC

AUTO ALERT™

Auto Finance Legal Compliance Report

©MARCH 2012

Monthly Report and Impact Analysis:
Developments in Motor Vehicle Lease
and Retail Installment Transactions*

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IV. Appendix of Exhibits

Please contact David Gemperle at (312) 696-2531 or dgemperle@nisen.com if you would like to receive a copy of any legislation discussed in Auto Alert or if you have questions regarding any of the cases, regulations or legislation summarized.

1. 77 Fed. Reg. 10725.

2. 2012 VA S.B. 421.

3. Wickersham v. Lynch Motor Co. of Auburn, Inc., 2012 WL 715322 (M.D. Ala. Mar. 6, 2012).

4. Toney v. Kinsch, 2012 WL 567729 (N.D. Ill. Feb. 21, 2012).

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18. 2012 WV S.B. 648.

* The following substantive areas are specifically excluded from **AUTO ALERT™:** Federal, state and local tax parameters, lemon laws, advertising, marketing and promotional issues, non-disclosure elements of insurance, warranty and extended service contracts, motor vehicle license, title and registration requirements, direct loans, Federal and state fair credit reporting laws, credit discrimination statutes and debt collection practices and Federal and state breach of data security laws.

AUTO ALERT™ is intended as a report of significant developments in motor vehicle retail installment sale and lease transactions. It is not intended as specific legal advice with respect to a particular contract form or procedure. For individualized advice related to such contract forms or procedures, Nisen & Elliott, LLC should be consulted. In addition, the matters discussed herein do not constitute opinions of federal or state law.

I. Statutory and Regulatory Developments

A. FEDERAL STATUTORY AND REGULATORY DEVELOPMENTS

1. CFPB Establishes Consumer Advisory Board

The Consumer Financial Protection Bureau ("CFPB") established a Consumer Advisory Board to advise the CFPB as required by the Dodd-Frank Act. Nominations for members received by the CFPB before March 30, 2012 will be considered for membership on the Board. Qualifications and other background information can be found in the Federal Register. 77 Fed. Reg. 10725 (February 23, 2012).

Nominations may be sent:

- Electronically: CABnominations@cfpb.gov
- Via Mail: Monica Jackson/CAB Nominations
  Consumer Financial Protection Bureau
  1500 Pennsylvania Avenue NW.
  (Attn: 1801 L Street)
  Washington, DC 20220.

77 Fed. Reg. 10725.

Impact Analysis
Industry participants should be aware of this opportunity to nominate experienced professionals to assist and advise the CFPB.

2. FTC Seeking Comments on Vehicle Financing and Leasing

On February 21, 2012, the Federal Trade Commission ("FTC") announced that it is still seeking public comments from regulators, consumer advocates, industry participants, and other interested parties regarding consumer protection issues in connection with motor vehicle sales and leasing.

More information on how to participate may be found on the FTC's website at: http://www.ftc.gov/opa/2012/02/motorvehicle.shtm

Impact Analysis
Industry participants should be aware of this opportunity to submit comments to the FTC.

B. STATE STATUTORY AND REGULATORY DEVELOPMENTS

1. Virginia: Petition for Title

Effective July 1, 2012, the provisions of Virginia law governing the Motor Vehicle Transaction Recovery Fund are amended to provide that, where a motor vehicle dealer has gone out of business, a motor vehicle purchaser that cannot obtain title to a vehicle it has purchased may request a court to order the third party holding title to release the title to the purchaser. The court would determine whether the purchaser has a superior right to title.

2012 VA S.B. 421.

Impact Analysis
Effective July 1, 2012, motor vehicle purchasers that are unable to obtain the certificate of title from a dealer that is no longer engage in business can request that a court order the title to be released by the title holder to the purchaser. The change appears to aid retail purchasers at the expense of title holders that are owed compensation from the same insolvent dealership. The legislation may be indicative of a national trend of certificate of title related protections for consumers that have purchased vehicles from dealers that are insolvent or otherwise stop engaging in business.

II. Case Law

A. FEDERAL CASE LAW

1. Motion to Compel Arbitration Granted.

On March 6, 2012, the United States District Court for the Middle District of Alabama granted the motion of a defendant motor vehicle dealer to compel arbitration of a plaintiff's claims related to the contingent sale of a motor vehicle. In August of 2010, the plaintiff executed a retail installment contract that included an arbitration provision. The plaintiff also executed a "delivery receipt" that purported to make the sale contingent on financing. On September 23, 2010, the dealer repossessed the vehicle, apparently after failing to assign the retail installment contract. The arbitration provision in the retail installment contract included an agreement to arbitration of "any dispute" but excluded self-help remedies and the right to seek provisional remedies in a court from the scope of the provision.

The Court did not undertake any unconscionability analysis, and instead considered whether a valid contract under Alabama law existed. The plaintiff, stated in her complaint that she "entered into a written contract with Defendant" and accepted possession based on the retail installment contract and representations by the dealer that she had been approved for financing by AmeriCredit. That retail installment contract included an arbitration provision. Therefore, the Court concluded the plaintiff entered into an agreement to arbitrate and directed the plaintiff to seek redress in arbitration.

Wickersham v. Lynch Motor Co. of Auburn, Inc.,
2012 WL 715322 (M.D. Ala. Mar. 6, 2012).

Impact Analysis
The U.S. District Court for the Middle District of Alabama, interpreting Alabama law, has held that a plaintiff's claims related to a "spot-delivery" must be arbitrated based on the fact that the plaintiff admitted entering into the retail installment contract and that document included an arbitration provision. Although California courts have repeatedly refused to compel arbitration based on unconscionability, the analysis in other states, such as Alabama will not necessarily relate to unconscionability.

2. Adverse Action and Consumer Fraud Act Claims Dismissed against Assignee

On February 21, 2012, the United States District Court for the Northern District of Illinois granted Capital One Auto Finance, Inc.'s ("Capital One") motion to dismiss a consumer's claims for violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq. ("ECOA") and the Illinois Consumer Fraud Act, 15 U.S.C. § 1691 et seq. ("CFA"). The facts described herein were assumed to be true for purpose of the motion to dismiss. The plaintiff entered into a retail installment contract for the purchase of a motor vehicle on, according to the plaintiff, September 12, 2008. The plaintiff did not have a valid driver's license and intended to co-sign for her son. However, the dealer told the plaintiff that if she entered into the financing agreement, her son could refinance the vehicle in his name in four months. The dealer also said that the purchase of a $2,000 service contract was necessary to obtain financing. The plaintiff provided proof of here social security disability insurance and widow's pension benefits and provided a down payment. The dealer did not provide the plaintiff a copy of the contract. The plaintiff contacted Capital One, which sent her the retail installment contract and credit application and informed her that the service contract was not required. The retail installment contract was back-dated to September 6, 2012 and the credit application overstated her monthly income by $1,800. The dealer left a voicemail message telling the plaintiff that Capital One did not want her business.

The vehicle was repossessed on October 5, 2008. On October 6, 2008 Capital One informed that plaintiff that it had not authorized the repossession. On the same day an automatic check payment of $592.16 was withdrawn by Capital One from the plaintiff's checking account. In November of 2008, Capital One informed the plaintiff that the dealership had repurchased the contract, provided an "overpayment refund" of $193.59, and released its security interest.

The ECOA Adverse Action notice requirements are triggered by the following:

> A denial or revocation of credit;
>
> A change in the terms of an existing credit arrangement;
>
> A refusal to grant credit in substantially the amount or on substantially the terms requested.
>
> 15 U.S.C. § 1691b(a).

The plaintiff argued that Capital One's reassignment of the retail installment contract to the dealer was a "refusal to grant credit in substantially the

amount or on substantially the terms requested." However, the Court held that the terms of credit did not change. The creditor changed back from Capital One to the dealer while the contract remained. The plaintiff also suggested that Capital One terminated her financing (a denial or revocation of credit triggering adverse action notice requirements) by assigning the retail installment contract to a dealer that had already repossessed the vehicle. Under Love v. O'Connor Chevrolet, Inc., the act of repossession does not trigger adverse action requirements. Love v. O'Connor Chevrolet, 2006 WL 2024239 (N.D. Ill. July 11, 2006). Even if Capital One was aware that the dealer had repossessed, it was the dealer's decision to terminate financing. Finally, reassignment could not trigger the adverse action notice requirements because the plaintiff agreed to assignment in the retail installment contract. Under the Regulation B, "[a] change in the terms of an account expressly agreed to by an applicant" is not an adverse action. 12 C.F.R. § 202.2(c)(2)(i).

In order to recover under the CFA, a plaintiff must show (1) a deceptive act or unfair practice occurred, (2) the defendant intended for plaintiff to rely on the deception, (3) the deception occurred in the course of conduct involving trade or commerce, (4) the plaintiff sustained actual damages, and (5) such damages were proximately caused by the defendant's deception. Illinois law requires consideration of the Federal Trade Commission's interpretation of "unfairness" in deciding whether a deceptive act or unfair practice has occurred. 815 ILCS 505/2. The FTC measures unfairness based on (1) whether the practice offends public policy (2) whether the practice is immoral, unethical, oppressive, or unscrupulous, and (3) whether the practice causes substantial injury to consumers. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972). The CFA claim against Capital One was based on Capital One's automatic checking account withdrawal the day after the motor vehicle dealer repossessed the vehicle. The Court focused on the FTC factors as interpreted by Illinois courts and decided that Capital One's practice in withdrawing funds the day after being notified by the plaintiff of the repossession was not unfair. First, the practice did not offend public policy or "fall within the penumbra of some established concept of fairness" because at the time of the withdrawal, Capital One had not yet verified the repossession that the plaintiff had informed it of the previous day. Second, the withdrawal was not unethical or oppressive given that the payment had been scheduled in advance. Capital One was not required to halt the payment based solely on the plaintiff's unverified allegations regarding the dealer's actions. Regarding the third factor, the Court conceded that plaintiff was injured by the withdrawal, but the injury was not substantial enough to overcome the lack of a relevant public policy or unethical action. Capital One refunded $193.59 of the $592.16. While the approximately $400 shortfall may support a breach of contract action, it did not implicate consumer protection concerns.

Toney v. Kinsch, 2012 WL 567729 (N.D. Ill. Feb. 21, 2012).

Impact Analysis
In a favorable decision for assignees, the United States District Court for the Northern District of Illinois has dismissed claims against Capital One for violation of the ECOA and for unfair trade practices where the dealer engaged in questionable behavior and Capital One made a scheduled withdrawal the day after being notified that the dealer repossessed the vehicle. Although the scheduled withdrawal by Capital One did not support a consumer fraud claim, assignees should attempt to verify and/or require dealer repurchase before the next withdrawal is scheduled to occur. Under this decision, creditors do not take an "adverse action" when they require dealer repurchase of retail installment contracts.

3. Summary Judgment for Defendant on TILA, MVRSFA and ECOA Claims in Spot-Delivery

On February 23, 2012, the United States District Court for the Middle District of Florida granted summary judgment to a motor vehicle dealer on spot-delivery related claims for violation of the Truth-in-Lending Act ("TILA"), the Florida Motor Vehicle Retail Sales Finance Act ("MVRSFA"),the Equal Credit Opportunity Act ("ECOA"), the Florida Uniform Commercial Code ("UCC"), and for a claim that Florida Statutes §§ 319.001(9), and 320.60(10), which describe notice that a vehicle has been delivered to a previous purchaser and thereby purport to allow spot-delivery, are unconstitutional. The Court also denied summary judgment on a claim for violation of the Florida Deceptive Trade Practices Act.

The plaintiff took possession of the motor vehicle after signing a retail installment sales contract including TILA disclosures and a merger clause and signing a bailment agreement for spot-delivery transferring possession to the plaintiff, among other documents. The plaintiff alleged that defendant had no intention of providing or obtaining credit for customers, such as herself, on the terms stated in the original retail installment contract that the customers execute. According to the plaintiff, defendant baits customers with favorable terms and then switches the customer to terms more favorable to the dealer after the customer has taken possession.

The Court undertook an extensive review of the contested and uncontested facts and also considered expert testimony for the plaintiff and for the defendant and concluded that no issues of material fact existed regarding (1) the identity of the actual creditor (the prospective assignee), (2) the reason the contract was not assigned (failure to document income), or (3) whether the dealer would necessarily profit by changing financing terms. According to the Court, the plaintiff's testimony established that she understood that the dealer would not provide financing, and would instead act as an agent or broker to procure financing from a third party finance company that required verification of income. Her testimony also suggested that she did not understand that the sale was conditioned on assignment to the third party finance company. The plaintiff did not contest testimony by the dealership's finance manager that the vehicle was repossessed under the terms of the bailment agreement and not based on a security interest under the retail installment contract. The adverse action notice sent by the third party finance company indicated that approval was conditioned on an increased monthly payment and additional information regarding income. The finance manager also presented uncontested testimony that switching the terms of financing for a subprime customer would not necessarily result in the dealership making more money because of the varying fees charged by assignees.

The Court granted summary judgment on the TILA, MVRSFA, ECOA, UCC, and unconstitutionality claims because they require a finding that the dealer becomes the legal creditor obligated to provide financing on the retail installment contract terms when the parties execute the retail installment contract. Florida law permits conditional sale and also permits multiple documents, such as the bailment agreement, to be construed together as a single contract and the merger clause in the retail installment contract does not change this result. The TILA and MVRSFA claims failed because the disclosures in the retail installment contract were not illusory. The Court denied the ECOA claim on the grounds that the dealer was not a creditor, and therefore had no adverse action notice duties. The dealer acted as an agent or broker and the third party made the relevant finance decision. Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971 (7th Cir. 2004). Summary judgment on the UCC claim for improper actions in repossessing, was granted by virtue of the fact that the dealer retook the vehicle under the bailment agreement, and not as a secured creditor under the retail installment contract. The Court also decided that the record and existing authority does not support a holding that the Florida statutes related to spot delivery are unconstitutional.

The Court denied summary judgment on the Florida Deceptive Trade Practices, finding that it was not clear from the record whether the plaintiff was told that the transaction was final on the day the retail installment contract was executed or that she was told that she would be charged for excessive wear and mileage. The record also showed that the defendant did not return the trade-in vehicle or the plaintiff's deposit.

Vereen v. Lou Sobh Auto. of Jax, Inc., 2012 WL 601217 (M.D. Fla. Feb. 23, 2012).

Impact Analysis

In a favorable decision for dealers, the District Court held that in a spot-delivery transaction, the dealer did not have any duties to send adverse action notices, the retail installment contract disclosures were not illusory, and the merger clause in the retail installment contract did not merge contemporaneously executed documents out of the agreement between the parties. Each of these holdings stand in contravention of decisions in other jurisdictions. See, for example, Patton v. Jeff Wyler Eastgate, Inc., 608 F. Supp. 2d 907 (S.D. Ohio 2007).

4. Creditor's Motion to Dismiss ECOA/FCRA Claim Denied

On February 6, 2012, the United States District Court for the Eastern District of Virginia rejected the motions to dismiss submitted by creditors that either denied or approved a consumer's application for indirect financing credit, but did not notify the consumer of their decision. The consumer submitted an online credit application to a car dealership in an attempt to finance a the purchase of a motor vehicle. The dealership used DealerTrack to distribute the credit application to defendants Crescent-Virginia Loan Production, Inc. ("Crescent"), JPMorgan Chase Bank, N.A.("Chase"), and Consumer Portfolio Services, Inc. ("CPS"). Both CPS and Chase indicated to the dealer that they, in the words of the Court "would provide financing" and "approved the application." Chase indicated an APR range of 9.75% to 12.25%. The plaintiff negotiated a reduced purchase price at the dealership in exchange for an increased down payment and was again informed that financing had been approved. The plaintiff was informed that the "best" financing available was an APR of 12.49%. The dealer never informed the plaintiff of the Chase 9.75% to 12.25% range and never provided a notice of adverse action. The retail installment contract assignment provision indicated Wells Fargo Dealer Services ("Wells Fargo") as the assignee. The plaintiff was called a week later and was told that new contracts had to be executed. The second contract was conditional on assignment, and again listed Wells Fargo as the assignee. The plaintiff contacted Wells Fargo, which had no record of a finance contract. The dealer initially sought rescission and return of the vehicle, but then retracted that cancellation and repossessed the vehicle. The default alleged consisted of a failure to pay the entire down payment shown on the retail installment contract.

The plaintiff filed suit alleging violation of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C.§1691 et seq., and violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C.§1691m. The plaintiff asserted that the creditors that had a chance to review the initial credit application (the dealer, Crescent, Chase and CPS) should have provided notice of their approval or denial of the application. According to the plaintiff, this failure to notify constituted a violation of the ECOA and FCRA. The ECOA requires creditors to give credit applicants a statement of reasons for any adverse action taken, such as a denial of credit. Where a retail installment contract application is circulated to multiple potential creditors, as long as one creditor's offer of credit is accepted, the other potential creditors are relieved of any requirement to give notice directly or indirectly. Chase and Crescent argued that their duty was relieved because the Wells Fargo offer was accepted, or the dealer, acting as a creditor, made an offer that was accepted. According to the Court there was indication that Crescent or Chase asked Global to furnish the adverse action notice on their behalf, or that Global sent an adverse action notice on their behalf.

The Court held that a factual determination had to be made as to whether the plaintiff entered into a financing agreement with the dealer that displaced the obligations of the other creditors under the ECOA. Although the dealer was named as the seller/creditor on a credit application, the facts could show that the dealer was acting as a finder of credit, and not as the source of credit. In addition, the record did not support Chase's contention that Wells Fargo made an offer that was accepted. Wells Fargo was named on the retail installment contracts, but in fact denied being the assignee. The Court denied Chase and Crescent's motions to dismiss and stated that the facts could show that both Chase and Crescent violated their duty to notify the plaintiff of the adverse action taken.

Martin v. Q&A Enterprises, Inc., 2012 WL 380065 (E.D. Va. Feb. 6, 2012).

Impact Analysis

The District Court's decision to deny the creditor's motion to dismiss the plaintiff's ECOA/FCRA claim for failure to provide an adverse action notice in a situation where the dealer has circulated an application to multiple creditors reflects the need for creditors to contractually require dealers to send adverse action notices on their behalf. Although a potential retail installment assignee may satisfy Section 202.9(g) of Regulation B by sending an adverse action notice directly, the notice may be provided by a third party. The dealer or other third party may nevertheless fail to send the notice. However, note that Comment 9(g)-3 of the Federal Reserve Board Official Staff Commentary provides the following limitation of liability: "When a notice is to be provided through a third party, a creditor is not liable for an act or omission of the third party that constitutes a violation of the regulation if the creditor accurately and in a timely manner provided the third party with the information necessary for the notification and maintains reasonable procedures adapted to prevent such violations." 12 C.F.R. § Pt. 202, Supp. I, Official Staff Comment 9(g)-3.

5. Lessor Violated Automatic Stay by Repossessing Vehicle after Notice of Bankruptcy

On February 27, 2012, the United States Bankruptcy Court for the Middle District of Florida granted actual damages and punitive damages against a motor vehicle dealer/lessor that violated the Bankruptcy Code § 362(a) Automatic Stay by repossessing a leased motor vehicle and refusing to return the vehicle after notice of the bankruptcy filing. The debtor filed a bankruptcy petition on November 14, 2011 and listed the dealer/lessor EZ Auto Van Rentals ("EZ Auto") as a creditor. The Automatic Stay, which begins at filing, prevents "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(k). The Bankruptcy Court issued notice of the Automatic Stay to EZ Auto at the address listed on the lease agreement on November 18, 2011. On November 28, 2011, EZ Auto repossessed the vehicle. The repossession agent apparently knew of the bankruptcy and discussed the bankruptcy with the debtor during the repossession. Debtor's counsel advised EZ Auto of the bankruptcy automatic stay and requested the vehicle. EZ Auto failed to return the vehicle and the debtor's counsel filed an emergency motion for sanctions on December 2, 2011. The Bankruptcy Court issued an order enjoining EZ Auto from taking any action and set an evidentiary hearing for December 9, 2011. At that hearing, the Bankruptcy Court found that EZ Auto's possession and retention of the vehicle violated the Automatic Stay, but directed to EZ Auto to return the vehicle only after the debtor brought payments current and provided proof of insurance. The debtor provided the payments and the vehicle was returned.

The Court held that EZ Auto willfully violated the Automatic Stay by repossessing and retaining the motor vehicle. A violation is willful if the creditor "(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay." A debtor may recover actual damages, costs and attorneys' fees, and, where appropriate, punitive damages for a willful violation of the Automatic Stay. The Court found that EZ Auto knew of the existence of the Automatic Stay based on (1) the notice issued by the Bankruptcy Court two weeks before the repossession, (2) the statements of the repossession agent regarding the bankruptcy case during the repossession, and (3) the communications from the debtor's counsel to EZ Auto about the Automatic Stay. EZ Auto's violation was willful because it had actual knowledge of the bankruptcy filing and intentionally repossessed and retained the Vehicle. The Bankruptcy Court awarded the debtor actual damages of $1,500.00, attorneys' fees of $500.00, car rental fees of $441.13, and $558.87 for emotional distress as well as $500.00 in attorneys' fees and punitive damages of $500.00.

In re Gholston, 2012 WL 639288
(Bankr. M.D. Fla. Feb. 27, 2012).

Impact Analysis
The United States Bankruptcy Court for the Middle District of Florida held that a motor vehicle dealer/lessor was liable for actual and punitive damages for repossessing a motor vehicle subject to a consumer lease after notice of the bankruptcy filing. The December 9, 2011, evidentiary hearing at which the Bankruptcy Court required the lessee to bring payments current in order to obtain possession should not be taken as a recommendation to repossess vehicles leased by lessees that have filed a bankruptcy petition. If a lessee has defaulted prior to repossession, the lessor should not repossess the vehicle without the approval of the Bankruptcy Court.

B. STATE CASE LAW

1. California: Trespass Claim Dismissed Against Repossessing Lessor's Parent Company

On February 14, 2012, a California Court of Appeals upheld a lower court dismissal of a trespassing claim and a breach of contract claim Toyota Motor Sales U.S.A., Inc. ("TMS") related to the lease and repossession of a vehicle. Toyota Motor Credit Corporation financed the plaintiff's lease of a vehicle on June 6, 2006. In January 12, 2008 a licensed repossession agency repossessed the vehicle on behalf of TMCC and allegedly trespassed on the plaintiff's property. The plaintiff asserted claims against TMS for trespass and breach of contract. The trial court sustained a TMS general demurrer on grounds of uncertainty on both counts. In California, a demurrer is similar to a motion to dismiss for failure to state a claim on which relief can be granted, with the "grounds of uncertainty" potentially reflecting a position that the complaint is ambiguous or unintelligible. After sustaining the demurrer, the trial court dismissed the action.

The plaintiff alleged that the repossession agency entered his property and did not allege that TMS entered his property. Under Section 7507.13 of California's Business and Professional Code, a lessor is not liable for any act or omission by a licensed repossession agency. Cal. Bus. & Prof. Code § 7507.13. Therefore, the Court held, TMS could not be liable for trespass based on the facts alleged in the complaint.

The plaintiff also alleged that TMS misstated and misrepresented the price of the leased vehicle. He asserted that he discovered the true price of the vehicle on a sticker in the glove compartment on June 7, 2006. The Court held that the three year statute of limitations under Cal. Civ. Code § 338(d) began to run from the date of discovery of the alleged fraud. Therefore, the statute of limitations expired well before the January 19, 2010 complaint.

K'Zorin v. Toyota Motor Sales U.S.A., Inc.,
2012 WL 470092 (Cal. Ct. App. Feb. 14, 2012).

Impact Analysis
A California Court of Appeals has upheld the dismissal of a claim against a motor vehicle lessor's parent company for trespassing that occurred when a repossession agency allegedly entered onto the lessee's property. California law provides that creditors are not responsible for the acts of licensed repossession agencies. Creditors should confirm that all repossession agencies utilized to repossess vehicles are properly licensed.

III. Proposed Legislation.

The following is a summary of proposed legislation affecting motor vehicle retail installment sales and leases. The intent is to place you on notice regarding proposed legislation which could have a material impact upon your business operations and contract disclosures rather than to provide you with a detailed analysis of proposed legislation that may never become law. A complete copy of any of the proposed federal or state legislation referenced in this section is available upon request.

A. FEDERAL PROPOSED LEGISLATION

No applicable developments.

B. STATE PROPOSED LEGISLATION

1. Arizona: Late Charge Reduction

On February 16, 2012, a bill was introduced in the Arizona legislature that would amend the definition of a "sales finance company" in Arizona so that a "sales finance company" would only include a person engaged in holding retail installment contracts, instead of holding and creating retail installment contracts, that exceed a total indebtedness of $50,000, instead of the current $25,000.

2012 AZ H.B. 2272.

Impact Analysis
If this bill is enacted, Arizona will clarify that entities only creating and not holding retail installment contracts are not classified as sales finance companies. Additionally, sales finance companies will not need to maintain an Arizona sales finance company license if it holds Arizona retail installment contracts with a total indebtedness of $50,000 or less.

2. Colorado: Innovative Motor Vehicle Tax Credit

On February 13, 2012, a bill was introduced in the Colorado legislature that specifies that the motor vehicle lessee, not the lessor, that is entitled to claim the innovative motor vehicle tax credit. This bill would overturn a Colorado Department of Revenue rule that currently specifies that the motor vehicle lessor has the option of claiming the innovative motor vehicle tax credit or passing the right to claim the credit to the motor vehicle lessee.

2012 CO H.B. 1299.

Impact Analysis
If this bill is enacted, motor vehicle lessors in Colorado would no longer have the right to claim the innovative motor vehicle tax credit.

3. Kansas: Cash Rebates – Sales Tax

On February 2, 2012, a bill was introduced in the Kansas legislature that would exclude cash rebates paid by a vehicle manufacturer to a purchaser or lessee of a new motor vehicle from the definition of "sales or selling price" as used for the calculation of sales tax on vehicles.

2012 KS H.B. 2607.

Impact Analysis
In 2006, cash rebates paid by a vehicle manufacturer to a purchaser or lessee of a new motor vehicle were excluded from the sales tax calculation in Kansas. This policy ended in 2009 as a result of a sunset provision. If this bill is enacted, cash rebates paid by a vehicle manufacturer would again be excluded from the sales price of the vehicle for sales tax purposes in Kansas.

4. Kentucky: Retail Installment Contract Requirements

On February 16, 2012, a bill was introduced in the Kentucky legislature that would alter several requirements for retail installment contracts. Some of these alterations include (1) providing that a retail installment contract need not appear on a single page, (2) authorizing agreements that appear after the buyer's signature on the back or subsequent pages with a provision incorporating such agreements, and (3) increasing the permissible delinquency and collection charge to 5% of each installment or $15, up from $5, whichever is greater, instead of whichever is less.

2012 KY H.B. 417.

Impact Analysis
If this bill is enacted, Kentucky retail installment contracts will need to be reviewed for compliance.

5. Louisiana: Disclosures Triggered by Down Payment or Deposit

On March 2, 2012, a bill was introduced in the Louisiana legislature that would change the definitions and penalty provisions in connection with deposits and down payments on used motor vehicles. The proposed law would require any used motor vehicle dealer who accepts a deposit or down payment from a consumer to provide the consumer with a purchase agreement statement containing the following:

(1) A complete description of the motor vehicle subject to the purchase agreement, including the make, model, year and vehicle identification number,

(2) The purchase price of the vehicle,

(3) The amount of the deposit or down payment,

(4) A statement identifying whether the funds received by the dealer are for deposit or down payment, and

(5) Any conditions necessary for the sale.

The proposed law would also mandate every used motor vehicle dealer who accepts a deposit or down payment for a purchase agreement conditioned upon a consumer's ability to obtain financing of the remainder of the purchase price to return the deposit or down payment upon a determination that the consumer does not qualify for financing.

2012 LA H.B. 804.

Impact Analysis
If passed, used motor vehicle dealers in Louisiana would have to disclose detailed information about a deposit or down payment in the context of a "purchase agreement", which may include a motor vehicle installment sale contract. In addition, such dealers would have to return any consumer deposit or down payment in the event the consumer was unable to qualify for financing.

6. Mississippi: Unlawful Acts

On February 20, 2012, a bill was introduced in the Mississippi legislature that would make it unlawful and a misdemeanor for a motor vehicle dealer or salesman to sell an extended service contract, extended maintenance plan, or similar product, that is not offered, endorsed, or sponsored by a manufacturer without disclosing to the consumer, orally and in writing, that the offered product is not supported by a manufacturer or distributor.

The proposed legislation also would make it unlawful and a misdemeanor for a manufacturer to attempt to require, coerce, or attempt to coerce any new motor vehicle dealer to sell, offer to sell, or sell exclusively an extended service contract, extended maintenance plan, or similar product by a number of specified means. The proposed legislation additionally provides that it would be unlawful and a misdemeanor for a manufacturer to coerce or require or attempt to coerce or require any motor vehicle dealer to provide installment financing with a specified financial institution.

Note that the definition of a "manufacturer" under the Mississippi Motor Vehicle Commission Law does not include a sales finance company.

2012 MS H.B. 1475.

Impact Analysis
If this bill is enacted, Mississippi dealers will have to disclose orally and in writing when non-manufacturer sponsored ancillary financing products are offered to consumers. Additionally, if enacted, manufacturers should be made aware of the Mississippi prohibitions on requiring or coercing dealers in (1) the sale of ancillary finance products, and (2) the use of a specified financial institution.

7. Oklahoma: Service Warranty Act

On February 6, 2012, a bill was introduced in the Oklahoma legislature that would establish a Service Warranty Act. Service warranties would not be considered insurance, but service warranty associations would be regulated by the Insurance Commissioner. Under the bill, a "service warranty" does not include extended warranties or service contracts issued by a company which performs at least seventy percent (70%) of the service work itself, which has been honoring such contracts in Oklahoma for at least twenty (20) years, or such extended warranties and service contracts issued by a company which has net assets in excess of $100MM or $25MM if the parent of the company has net assets of at least $75MM.

2011 OK S.B. 1475.

Impact Analysis
If this bill is enacted, Oklahoma will exclude vehicle service contracts from regulation under provisions of the Oklahoma Insurance Code. The Supreme Court of Oklahoma previously held that vehicle service contracts function like insurance and that their providers "should be subject to the same covenants of good faith that insurers must meet." McMullan v. Enter. Fin. Group, Inc., 247 P.3d 1173 (Okla. 2011).

8. Rhode Island: Lessor Licensing

On February 9, 2012, a bill was introduced in the Rhode Island legislature that would require business that lease any motor vehicles to obtain a lessor license. Under current law, a lessor that leases five(5) or fewer vehicles is not required to obtain a license.

2011 RI H.B. 7482.

Impact Analysis
If this bill is enacted, any finance company with minimal leasing business in Rhode Island should that has not already obtained a lessor license will need to obtain such license.

9. Utah: More Favorable Retail Financing to Dealers Financing Inventory with Captive Prohibited

On February 17, 2012, a bill was introduced in Utah that would prohibit a franchisor or its affiliates (including finance companies) from offering vehicle financing to customers of a franchisee (dealer) that finances inventory through the franchisor or affiliate on terms that more favorable than terms offered to customers of a franchisee that does not finance inventory through the franchisor or affiliate.

2012 UTAH H.B. 455.

Impact Analysis
If passed, Utah would make it illegal for vehicle manufacturers, distributors and finance companies to offer more favorable terms, such as lower interest rates, to customers of dealer who finance their vehicle inventory than those dealers who do not finance their vehicle inventory through the manufacturer, distributor or finance company.

10. West Virginia: Lender Advances for Lapsed Insurance

On February 17, 2012, a bill was proposed in West Virginia that would amend the collateral protection insurance statute to prevent the lapse of an insurance policy in certain cases, specifically, in situations where the lack of insurance upon collateral which a lender has a security interest and is a named additional insured on such insurance policy will result in a lapse of an existing policy for nonpayment of a renewal premium, such lender cannot force place insurance to protect the lender's security interest, but rather such lender would be required to advance sums that are necessary to prevent a lapse in the existing insurance policy and all sums advanced would be added as additional principal the promissory note, finance contract or other instrument creating the obligation and secured by the lender's lien document.

2012 WV S.B. 648.

Impact Analysis
If this bill is adopted, West Virginia law would prohibit a lender from force placing insurance in circumstances where the vehicle buyer's insurance has lapsed for nonpayment of a renewal premium and require the lender to pay for such renewal premium and add such amount to the balance of a finance contract.

AUTO ALERT™ Appendix of Exhibits

1. 77 Fed. Reg. 10725.

2. 2012 VA S.B. 421.

3. Wickersham v. Lynch Motor Co. of Auburn, Inc., 2012 WL 715322 (M.D. Ala. Mar. 6, 2012).

4. Toney v. Kinsch, 2012 WL 567729 (N.D. Ill. Feb. 21, 2012).

5. Vereen v. Lou Sobh Auto. of Jax, Inc., 2012 WL 601217 (M.D. Fla. Feb. 23, 2012).

6. Martin v. Q&A Enterprises, Inc., 2012 WL 380065 (E.D. Va. Feb. 6, 2012).

7. In re Gholston, 2012 WL 639288 (Bankr. M.D. Fla. Feb. 27, 2012).

8. K'Zorin v. Toyota Motor Sales U.S.A., Inc., 2012 WL 470092 (Cal. Ct. App. Feb. 14, 2012).

9. 2012 AZ H.B. 2272.

10. 2012 CO H.B. 1299.

11. 2012 KS H.B. 2607.

12. 2012 KY H.B. 417.

13. 2012 LA H.B. 804.

14. 2012 MS H.B. 1475.

15. 2011 OK S.B. 1475.

16. 2011 RI H.B. 7482.

17. 2012 UTAH H.B. 455.

18. 2012 WV S.B. 648.