

NISEN & ELLIOTT, LLC

AUTO ALERT™

Auto Finance Legal Compliance Report

©MARCH 2009

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

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* 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. Omnibus Appropriations Act of 2009

Under Section 626 of the Omnibus Appropriations Act of 2009, enacted March 11, 2009, state attorneys general are given authority to bring civil actions on behalf of state residents to enforce the provisions of the federal Truth in Lending Act (“TILA”).

2009 H.R. 1105.

<http://thomas.loc.gov/cgi-bin/query/z?c111:h1105:>

Impact Analysis

The Omnibus Appropriations Act of 2009, enacted on March 11, 2009, appears to broaden the enforcement scope of TILA actions beyond the federal United States Attorneys to state attorneys general. With this new enforcement power, states will be able to expand their public enforcement authority through state attorneys general under TILA. The enactment of this provision could lead to a greater number of public enforcement actions through state attorneys general and result in a greater need for TILA compliance reviews by creditors.

B. STATE STATUTORY AND REGULATORY DEVELOPMENTS

No relevant developments

II. Case Law

A. FEDERAL CASE LAW

1. Eleventh Circuit Upholds Arbitration Agreement Enforcement after Rescission of Separate Motor Vehicle Retail Installment Sales Contract

On February 17, 2009, in an unpublished opinion, the United States Court of Appeals for the 11th Circuit ruled in favor of arbitration where a motor vehicle retail installment sales contract was rescinded in a spot delivery scenario by a motor vehicle dealer, but the parties had signed a separate Agreement to Arbitration. The plaintiff asserted claims under the Florida Motor Vehicle Sales Finance Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act and the Florida Unfair and Deceptive Trade Practices Act arising out of the motor vehicle sales transaction. The dealer rescinded the motor vehicle retail installment sales contract, but the parties had signed a separate Agreement to Arbitrate which stated the following:

By entering into this Agreement to Arbitrate ("Agreement"), Customer(s) and Dealership (collectively referred to as "the Parties") agree, except as otherwise provided in this Agreement, to settle by binding arbitration any dispute between them regarding: (1) the purchase/lease by Customer(s) of the above-referenced Vehicle; (2) any products and services purchased in conjunction with the Vehicle; and/or (3) any dispute with respect to the existence, scope or validity of this Agreement. Matters that the Parties agree to arbitrate include, but are not limited to, disputes related to the Retail Purchase/Retail Lease Agreement and any documents incorporated therein by reference (whether such reference is made in the Retail Purchase/Retail Lease Agreement or the document itself), the application for and terms of financing for the transaction, the Finance/Lease Contract, any alleged promises, representations and/or warranties made to or relied upon by the Parties and any alleged unfair, deceptive or unconscionable acts or practices.

Notwithstanding any other provision of this Agreement, the Parties agree that they are not waiving their right to exercise any self-help or provisional remedy available at law or pursuant to agreement between them. Nor is either Party required to arbitrate any individual claim (as opposed to a class action) that is filed and properly within the jurisdiction of a small claims court or equivalent state court.

. . . This Agreement evidences a transaction involving interstate commerce. The parties acknowledge and agree that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) ("FAA") shall govern any arbitration under this Agreement.

. . . the Parties agree that by entering into this Agreement, they are waiving their right to a jury trial and their right to bring or participate in any class action or multiplaintiff action in court or through arbitration. Once one of the parties has demanded arbitration, binding arbitration is the exclusive method for resolving any and all claims between them.

The Eleventh Circuit held that the parties agreed in the Agreement to Arbitrate to resolve all disputes through arbitration and that the arbitration agreement was still valid even though the retail installment sales contract was rescinded. Unlike an unconscionability challenge to an arbitration agreement which attacks the enforceability of the arbitration agreement, the issue of revocation of the arbitration agreement is a dispute between the parties that must be decided by the arbitrator.

Scott v. EFN Invs., LLC, 2009 U.S. App. LEXIS 3035 (11th Cir. Fla. Feb. 17, 2009).

Impact Analysis

On February 17, 2009, the Eleventh Circuit has held that the plaintiff retail installment purchaser's Florida MVRISA, FCRA, ECOA and Florida UDTPA claim must be decided by an arbitrator. The Court required parties to arbitrate the issue of whether the rescission of a retail installment contract triggers the revocation of a separately signed arbitration agreement. Creditors should be aware of the advantage, particularly to dealerships, of separate arbitration agreements in the spot delivery context.

2. District Court Enforces Arbitration Clause for Post-Payoff FCRA Claims

On February 9, 2009, the United States District Court for the District of Arizona granted the defendant motor vehicle lessor's motion to compel arbitration of the plaintiff's Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. ("FCRA") and defamation claims pursuant to the provision in the lease agreement that provides that "[a]ny controversy or claim between or among [the parties], including, but not limited to, those arising out of or relating to this lease . . . or any claim based on or arising from an alleged tort, shall at the request of either party be determined by arbitration." The plaintiff alleged that the defendant improperly reported to the credit reporting agencies that plaintiff failed to make certain payments even though the payments had been made or were not due. The plaintiff argued that since some of the alleged erroneous credit reports occurred after the lease was paid off, that contractual privity no longer existed and the arbitration clause was inapplicable to these reports. However, the Court held that the parties agreed to arbitrate claims regarding these reports because they were related to, and had their origin in, the contractual relationship of the parties. The Court cited the case of Simula, Inc. v. Autoliv, Inc. for this interpretation, stating that the parties may agree to resolve in arbitration "every dispute . . . having a significant relationship to the contract and all disputes having their origin or genesis in the contract." citing Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 718 (9th Cir. Ariz. 1999).

The Court also held that an arbitration clause need not state that the arbitration will be "binding" for the clause to require binding arbitration. In the arbitration clause, both the selection of the American Arbitration Association forum and the statement that disputes will be "determined" by arbitration were sufficient to convince the Court to conclude that the lease called for binding arbitration.

Piccini v. Wells Fargo Auto Fin., Inc., 2009 U.S. Dist. LEXIS 9517 (D. Ariz. Feb. 9, 2009).

Impact Analysis

On February 9, 2009, the United States District Court for the District of Arizona enforced a lease arbitration clause even though some of the credit reports at issue occurred after lease payoff. Creditors should ensure that arbitration clauses are broad enough to cover disputes with the consumer that may occur after the consumer has paid the obligation to the creditor or any disputes that originated in the contractual relationship between creditor and consumer. By invoking the arbitration clause, the Creditor may avoid class litigation related to erroneous use of consumer information.

3. GAP Insurance Prepayment Refund Class Certification Denied.

On February 12, 2009, the United States District Court for the Middle District of Georgia denied a motion to certify a class of plaintiffs allegedly owed refunds on GAP insurance from the defendant Monumental General Casualty Company and its successor-in-interest, Stonebridge Casualty Insurance Company, after prepayment of the loans financing the insurance premium. The plaintiffs argued that the defendant insurance company had a contractual duty to refund unearned premiums “whenever early termination occurs,” regardless of whether the defendant had received notice of the early payoff. Therefore, the class was to be defined as follows, and was to include insureds who never requested a refund even though the representative plaintiff had requested a refund:

"All those individuals during the time period:

- (a) who purchased GAP insurance and/or certificates in the following nine states: AL; TX; TN; MI; NE; NV; UT; SD; and OR; and
- (b) who have been or will be insured by Monumental and Stonebridge under a single-premium GAP insurance contract; and
- (c) whose underlying loan stopped or could stop prior to the expiration of the term of the indebtedness; and
- (d) who were not paid or might not be paid a refund of unearned premium.”

The proposed class must satisfy the requirements for class certification in Federal Rule of Civil Procedure 23(a) and (b)(2) or (b)(3). Rule 23(a), (b)(2) and (b)(3) read as follows:

- (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
 - (1) the class is so numerous that joinder of all members is impracticable;
 - (2) there are questions of law or fact common to the class;
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

- (4) the representative parties will fairly and adequately protect the interests of the class.
- (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
 - (3) the Court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
 - (A) the class members' interests in individually controlling the prosecution or defense or separate actions;
 - (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
 - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
 - (D) the likely difficulties in managing a class action.

The District Court held that as in Bishop v. Protective Life Ins. Co., 2009 U.S. Dist. LEXIS 8987 (M.D. Ga. Feb. 9, 2009), class certification was not appropriate here because individual issues predominated over common issues. For one, the District Court found that the representative plaintiff was not similarly situated to putative class members on the issue of the GAP refund because the representative plaintiff had requested a refund, while the proposed class was to include plaintiffs that had not requested a refund. Additionally, the District Court noted that the plaintiffs were asking the court to find a duty under the GAP insurance certificates for the defendant insurance company to obtain loan payoff dates and make unearned premium refunds without any notice by the insured that a loan had been paid early—even though the insurance certificates did not expressly place such a duty on the insurance company. The District Court reasoned that the “Plaintiff has not shown that the question here—whether the Court should imply a duty on Defendant to have a system for finding out when early payoffs are made—can be answered on a classwide basis rather than a case-by-case basis.”

The District Court also held that it lacked jurisdiction over the only remaining claim in the case—plaintiff’s breach of contract claim arising from the defendant insurance company’s failure to refund the unearned GAP premium—and therefore this action was dismissed in its entirety for lack of subject matter jurisdiction.

Adams v. Monumental Gen. Cas. Co.,
2009 U.S. Dist. LEXIS 10506 (M.D. Ga. Feb. 12, 2009).

Impact Analysis

On February 12, 2009, the United States District Court for the Middle District of Georgia denied certification of a class representing GAP insurance purchasers who prepaid motor vehicle “loans” but were not refunded a portion of the GAP insurance premium. The District Court was unwilling to certify the class in part, because it was unwilling to determine that the insurance provider had an implied duty to obtain loan payoff dates and make unearned premium refunds without any notice by the insured that a loan had been paid early.

Creditors should be aware that there may be a variety of defenses to a class action certification in the context of a GAP refund case, given the unique nature of state statutes and regulations governing GAP products, GAP contract provisions concerning unearned premium refunds, and the circumstances surrounding each individual plaintiff’s loan payoff.

4. Magnuson-Moss Applicable if State Service Contract Requirements Satisfied

On February 4, 2009, the United States District Court for the Northern District of Illinois held that the plaintiff service contract purchasers could not void the service contracts based on fraud. The plaintiffs alleged that the defendants never intended to pay claims under the motor vehicle service contracts. The Court determined that the plaintiffs were improperly attempting to convert a contract claim into a fraud claim because the fact that service contract claims had been paid for years showed that the contracts were not, from the outset, a scheme for fraud.

The Court also denied the motion to dismiss plaintiffs' Magnuson-Moss Warranty Act ("Magnuson-Moss"), claim under 15 U.S.C. § 2306. The defendants argued that since the McCarran-Ferguson Act, 15 U.S.C. § 1011 et. Seq., prevents federal preemption of state regulation of the business of insurance, Magnuson-Moss should not apply to the service contracts. The FTC regulation regarding Magnuson-Moss and McCarran-Ferguson reads as follows:

The Act recognizes two types of agreements which may provide similar coverage of consumer products, the written warranty, and the service contract. In addition, other agreements may meet the statutory definitions of either 'written warranty' or 'service contract,' but are sold and regulated under state law as contracts of insurance. One example is the automobile breakdown insurance policies sold in many jurisdictions and regulated by the state as a form of casualty insurance. The McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., precludes jurisdiction under federal law over 'the business of insurance' to the extent an agreement is regulated by state law as insurance. Thus, such agreements are subject to the Magnuson-Moss Warranty Act *only to the extent they are not regulated in a particular state as the business of insurance.*

16 C.F.R. § 700.11 (emphasis added by the District Court for the Northern District of Illinois).

The Illinois Service Contract Act, 215 ILCS 152/1 et. seq., states that "service contract providers and related service contract sellers and administrators complying with this Act are not required to comply with and are not subject to any provision of the Illinois Insurance Code" 215 ILCS 152/10. The Illinois Service Contract Act imposes financial requirements and registration requirements on service contract providers under Section 15 and Section 25 of the Illinois Service Contract Act. The Court concluded that if a contract complies

with section 15 and section 25 of the Illinois Service Contract Act, then it is a “service contract” and it is not regulated as “the business of insurance.” If the service contract complies with section 15 and section 25, then Magnuson-Moss is applicable. Therefore, since there was no determination regarding compliance with section 15 and section 25 of the Illinois Service Contract Act, the Court could not dismiss the Magnuson-Moss claim.

Kennedy v. Butler Fin. Solutions, LLC, 2009 U.S. Dist. LEXIS 8303 (N.D. Ill. Feb. 4, 2009).

Impact Analysis

The U.S. District Court for the Northern District of Illinois denied a fraud claim and denied a motion to dismiss a Magnuson-Moss Warranty Act claim based on states rights to regulate insurance. State regulation of service contracts includes registration and financial responsibility statutes and disclosure requirements. Typically the statutes stipulate that if the requirements of the statute are met, the insurance code, or other provisions of the insurance code, are inapplicable. Creditors should be aware of the identity of third party service contract providers and consider their compliance with the state service contract act requirements. Although Magnuson-Moss will be inapplicable, if the agreement is regulated as insurance under state law, the relevant disclosure requirements and the permissibility of a charge for the agreement in the retail installment sales contract may change.

5. District Court Compels Arbitration for Claims Against Assignee of Creditor.

On February 11, 2009, the United States District Court for the District of Minnesota held that the plaintiff retail buyer's claims against Chrysler Financial that stemmed from the repossession of the plaintiff's motor vehicle must be submitted to arbitration pursuant to the arbitration agreement in the retail installment sale contract ("Contract") signed by the plaintiff and the original creditor, and then assigned to Chrysler Financial. However, the District Court determined that Chrysler Financial could not compel the plaintiff's claims against the repossession company, MFR Asset Recovery, and the agents of the repossession company (the "MFR Defendants") to be submitted to arbitration as well, and those claims would remain before the court.

The Contract signed by the plaintiff and assigned to Chrysler Financial by the original creditor contained the following arbitration provision:

[A]ny claim or dispute, whether in contract, tort or otherwise (including any dispute over the interpretation, scope, or validity of this contract, the arbitration clause or the arbitrability of any issue), between us or Creditor's employees, agents, successors or assigns, which arise out of or relate to this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at the election of either of us (or the election of any such third party) be resolved by a neutral, binding arbitration and not be a court action.

The District Court held that the arbitration provision was enforceable, despite the plaintiff's arguments that the arbitration clause was unconscionable and that Chrysler Financial waived its right to pursue arbitration. The District Court rejected the plaintiff's argument that the Contract was an unconscionable contract of adhesion, in part because the arbitration agreement was not "buried in the fine print of a lengthy document" as it was contained in a two-page document and appeared in the same font size as the other contractual terms and under a bold heading in larger font that read "IMPORTANT ARBITRATION TERMS." The District Court also determined that the arbitration agreement was not procedurally unconscionable. Additionally, the District Court found that Chrysler Financial did not "substantially invoke" the litigation process, so as to waive its right to arbitrate, either by sending a collection letter to the plaintiff or by repossession the plaintiff's vehicle.

However, the District Court looked to Simitar Entertainment, Inc. v. Silva Entertainment, Inc., 44 F. Supp. 2d 986 (D. Minn. 1999), and determined that Chrysler Financial could not compel the arbitration of any claims the plaintiff filed against the MFR Defendants because they were not signatories to the

Contract and they have not elected to submit the plaintiff's claims against them to arbitration:

[N]on-signatories to an arbitration agreement can, under certain circumstances, compel arbitration under the agreement. *Simitar*, 44 F. Supp. 2d at 993 n.5. In particular, a signatory may be bound to arbitrate with a nonsignatory "at the nonsignatory's insistence" in certain situations. *Simitar*, however, does not stand for the proposition that a signatory to an arbitration agreement can invoke arbitration on behalf of a third-party non-signatory.

Lindsley v. DaimlerChrysler Fin. Servs. Americas LLC,
2009 U.S. Dist. LEXIS 10871 (D. Minn. Feb. 11, 2009).

Impact Analysis

The United States District Court for the District of Minnesota has held that Chrysler Financial could compel arbitration as to the claims the plaintiff filed against it pursuant to the arbitration provision contained in the retail installment sale contract executed between the plaintiff retail buyer and the original creditor, and assigned to Chrysler Financial, but could not compel arbitration as to third parties.

Creditors should be aware that under Minnesota law, a signatory to an arbitration agreement cannot invoke arbitration on behalf of a third-party non-signatory where the third-party non-signatory has not elected to submit the claims against it to arbitration.

6. District Court Dismisses TILA Claim against Holder for “Burying” Negative Equity

On February 3, 2009, the United States District Court for the District of Rhode Island held that a plaintiff motor vehicle retail installment purchaser failed to prove that the defendant motor vehicle seller violated the Truth-in-Lending Act (“TILA”) in the disclosure of negative equity in the retail installment sales contract. The cash price shown as an unitemized \$19,300, was comprised of the unitemized actual cash price of \$14,800 and \$5,500 of negative equity. The net trade-in line showed \$352.28 even though the amount owed on the trade-in exceeded the assigned value of the trade-in. The defendant motor vehicle seller had anticipated the pay-off on the trade-in to be an even \$10,000. When the actual pay-off was \$9,646.72, the defendant used the Net Trade-In line to disclose the \$352.28 difference between the anticipated and actual pay-off as a credit to the buyer. The Court cited the following Regulation Z commentary regarding negative equity:

Content of Disclosures, 18(c) Itemization of Amount Financed

Comment 18(c)-2 is revised in response to requests for guidance by creditors offering credit sales when downpayments involve a trade-in and an existing lien that exceeds the value of the trade-in. (See comment 2(a)(18)-3, where a consumer owes \$ 10,000 on an existing automobile loan and the trade-in value of the automobile is \$ 8,000, leaving a \$ 2,000 deficit.)

The amount by which the lien exceeds the trade-in value would be reflected in the amount financed. (See § 226.18(b).) Assuming the cash price for the new car was \$ 20,000, the amount financed would be \$ 22,000 (\$ 20,000 representing the cash price plus \$ 2,000 representing the excess of the lien over the trade-in value financed by the creditor.)

The regulation provides great flexibility for disclosing the itemization of amount financed. Comment 18(c)-2 iii . . . is revised to clarify that any amounts financed by the creditor and representing the excess of the lien over the trade-in value (\$ 2,000 in this example) must appear in the itemization of the amount financed. However, creditors may also add other categories to explain, in this example, the consumer's trade-in value of \$ 8,000, the creditor's payoff of the existing lien of \$ 10,000, and the resulting amount of \$ 2,000 included in the amount financed.

The Court permitted burial of negative equity in the cash price, citing the case of Slover-Becker v. Pitre Chrysler. Slover-Becker v. Pitre Chrysler Plymouth Jeep of Scottsdale, Inc., 409 F. Supp. 2d 1158 (D. Ariz. 2005).

Fitts v. King Richard's Auto Ctr., Inc., 2009 U.S. Dist. LEXIS 8003 (D.R.I. Feb. 3, 2009).

Impact Analysis

On February 3, 2009, the United States District Court for the District of Rhode Island held that, under TILA, a creditor may bury negative equity in the cash price. Note that other cases, such as Thompson v. 10,000 RV Sales, Inc., 130 Cal. App. 4th 950 (Cal. App. 2005), have held that this manner of negative equity disclosure is improper. Nisen and Elliott LLC, strongly recommends that finance entities insist that negative equity be clearly disclosed in the Itemization of Amount Financed, and disclosed separately. We believe that this type of “daylight disclosure” was intended under federal Regulation Z.

7. Plaintiff's Claims for Negligence, Conversion and Breach of Contract Arising from Retail Installment Sale Contract Survive Summary Judgment Challenge.

On February 24, 2009, the United States District Court for the Eastern District of Tennessee granted GMAC Financial Services Corporation's ("GMAC") motion for summary judgment as to plaintiff's claim of violation of the Fair Debt Collection Practices Act ("FDCPA"), his claims of intentional and/or negligent infliction of emotional distress, his claims for gross negligence and punitive damages, and his claim for losses for serious bodily injury and permanent disability, and denied GMAC's motion for summary judgment as to plaintiff's claims for negligence, conversion, and breach of contract.

In June of 2000, the plaintiff entered into a retail installment sale contract ("Contract") with a motor vehicle dealership (that was then assigned to GMAC) that provided for 35 monthly payments of \$345.65 and a final payment of \$14,089.83 on June 23, 2003. Although the Contract was entitled "Retail Installment Sale Contract," the Contract was essentially a lease agreement with an optional purchase at the end of the lease because the plaintiff had the option to fulfill his obligation to make the final payment by surrendering (option to sell) the motor vehicle to the dealership.

Then in November of 2003, the plaintiff and GMAC entered into a refinancing agreement ("Refinance Contract") for the same motor vehicle for \$17,140.17, which terminated the option to sell the motor vehicle to GMAC and provided for 65 monthly payments of \$344.87. The plaintiff claimed that the parties entered into the Refinance Contract because GMAC asserted that the plaintiff had actually purchased the motor vehicle and had not exercised his option to sell and that the plaintiff owed additional money on the motor vehicle. GMAC, on the other hand, argued the Refinance Contract was a renewal granted after several extensions were permitted for delinquent payments.

The motor vehicle was repossessed in June of 2005, and sold at auction, resulting in a claimed deficiency in the amount of \$11,072.97. Plaintiff claimed that GMAC engaged in a course of harassment after the sale in an attempt to wrongfully recover the alleged delinquency, and wrongfully reported the repossessions to the major credit bureaus, adversely affecting plaintiff's good credit rating, and causing plaintiff a stroke, physical and emotional suffering, and permanent bodily injury.

FDCPA

The plaintiff's claim against GMAC under the FDCPA, 15 U.S.C. § 1692 et seq., failed because GMAC was not a debt collector for purposes of the FDCPA

since GMAC does not regularly collect or attempt to collect, debts owed or due or asserted to be owed or due another, but rather collects its own accounts.

INTENTIONAL/NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The District Court also granted GMAC's motion for summary judgment as to plaintiff's claims of intentional and negligent infliction of emotional distress on the ground that the plaintiff himself conceded that his "claims under these theories fail," because he cannot prove all of the elements of the torts, and namely the existence of a serious or severe emotional injury.

NEGLIGENCE

The District Court notes that it has given the plaintiff the benefit of the doubt in finding that the plaintiff has asserted a negligence claim by alleging that GMAC breached a duty based on the parties' contractual and consumer/creditor relationship in its attempt to collect its alleged debt, lack of reasonable care in reporting accurate information to credit bureaus, and inaccurate record keeping. However, to the extent the plaintiff's alleged injuries and damages arose from the alleged breach by GMAC of its contractual obligations, the District Court agreed with GMAC that those claims sound in contract and not in tort. The District Court also noted that it was clear that the plaintiff's claims for serious personal injury and/or permanent disability failed for lack of expert testimony as to causation.

GROSS NEGLIGENCE

The District Court determined that the plaintiff's claim of gross negligence failed because the plaintiff did not allege any conduct on the part of GMAC that would constitute "such a reckless disregard for the rights of others that a conscious indifference for consequences is implied in law."

BREACH OF CONTRACT/CONVERSION

The District Court summarized that this case amounted "to little more than a run of the mill breach of contract and/or conversion case" given that "[e]ach party asserts that it has fully complied with the contracts at issue in this case and that the other party has failed to do so." Therefore, GMAC's motion for summary judgment on the breach of contract and conversion claims was denied.

PUNITIVE DAMAGES

The District Court determined that the plaintiff did not establish his entitlement to punitive damages, which are limited to the most egregious of cases.

Wilson v. GMAC Fin. Servs. Co.,
2009 U.S. Dist. LEXIS 14385 (E.D. Tenn. Feb. 24, 2009).

Impact Analysis

The United States District Court for the Eastern District of Tennessee has denied the finance company's motion for summary judgment on the plaintiff's claims of negligence, breach of contract, and conversion that stemmed from the retail installment sale contract executed by the plaintiff and motor vehicle dealership and assigned to the finance company. Creditors should be aware that Tennessee has failed to reject a retail buyer's negligence claim based on a contractual relationship as a disguised contract claim.

B. STATE CASE LAW

1. **Florida: Florida's Long-Term Lessor Statute Preempted by the Federal Graves Amendment.**

On February 6, 2009, the Court of Appeals of Florida held that the Graves Amendment preempted Florida's long-term lessor statute and that the long-term lessor of the motor vehicle involved in the accident giving rise to this suit was not vicariously liable for the lessee's negligent operation of the motor vehicle. Florida's long-term lessor statute provides that a motor vehicle lessor is not deemed the owner of the leased motor vehicle for purposes of vicarious liability provided the vehicle's lessee has the designated policy of liability insurance in place or the lessor has a \$1,000,000 blanket policy. Fla. Stat. § 324.021(9)(b)(1).

The federal Graves Amendment preempts state statutes that impose vicarious liability on the lessors of motor vehicles, where the leased vehicle is involved in an accident through no fault of the lessor. 49 U.S.C. § 30106(a). However, the Graves Amendment provides the following exceptions to preemption:

- (b) Nothing in this section supersedes the law of any State or political subdivision thereof--
 - (1) Imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or
 - (2) Imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.

49 U.S.C. §30106(b).

The Court of Appeals of Florida relied heavily on the decision of the Eleventh Circuit Court of Appeals in Garcia v. Vanguard Car Rental USA, Inc., which involved Florida's short-term lessor statute. In Garcia, the Eleventh Circuit Court of Appeals determined that the exceptions to the Graves Amendment did not apply to Florida's short-term lessor statute because the statute established liability caps and did not impose financial responsibility or insurance standards on the owner of a motor vehicle. The Court of Appeals of Florida found that Florida's long-term lessor statute was similar in that it did not compel a motor vehicle lessor to meet certain insurance standards or impose liability for failure to comply with those standards, but rather provided the leasing company the option

to have insurance in place in order to avoid liability under Florida's dangerous instrumentality doctrine.

Rosado v. DaimlerChrysler Fin. Servs. Trust,
2009 Fla. App. LEXIS 967 (Fla. Ct. App. Feb. 6, 2009).

Impact Analysis

On February 6, 2009, the Court of Appeals of Florida held that Florida's long-term lessor statute was preempted by the Graves Amendment, and was not exempted from preemption under the financial responsibility savings clause. This holding is another positive development for motor vehicle lessors doing business in Florida and indicates that they should not be exposed to vicarious liability due to the Graves Amendment. This decision also suggests that only those state statutes that impose financial responsibility on the owner for the privilege of registering and operating a motor vehicle or impose liability for failing to meet a financial responsibility or liability insurance requirement will be exempted from preemption under the savings clause of the Graves Amendment.

2. Illinois: Consumer Fraud Act Violated by Repossession During Period of “7 Day Extension Letter”

On February 9, 2009, in an unpublished opinion, the Appellate Court of Illinois affirmed a trial court grant of summary judgment against GMAC in an action related to the repossession of a motor vehicle subject to a motor vehicle retail installment sales contract. The Court held that GMAC violated the Illinois Consumer Fraud Act and Deceptive Business Practices Act (“Illinois Consumer Fraud Act”), Section 815 ILCS 505/2 and acted unfairly in failing to honor the terms of a “7 day extension letter” by repossessing a vehicle during the 7 day extension period and demanding payment of the entire accelerated balance. Two of the plaintiff’s checks had been returned for non-sufficient funds when the plaintiff called GMAC on August 13, 2003 and authorized, by phone, a payment from the plaintiff’s bank account. GMAC, which had authorized an agency to repossess the vehicle, placed the repossession on hold and sent the plaintiff a 7 day extension letter stating the following:

Thank you for your recent payment; however, your account is still past due. You have until August 21, 2003 to pay the remaining amount due of \$ 2,202.54, as well as any payments which may become due before then. If you do not pay by this date, we may exercise our rights under the law. These rights may include the right to take the vehicle from you.

If you are late again in making your payments, we may exercise our rights without sending you another notice like this one. If you have questions, write or telephone us promptly.

On August 15th, the day after the extension letter was sent, the motor vehicle was repossessed and the plaintiff called GMAC, notifying GMAC that he would be filing a disability claim (according to the Court, the retail installment contract “included health, accident and disability insurance) and that as a result of disability he had been unable to travel to deposit funds to cover the August 13, 2003, telephone authorized payment. GMAC demanded the entire accelerated balance and did not return the motor vehicle. On August 19, 2003, the telephone authorized payment cleared on the second presentment and on August 20, 2003, the plaintiff offered to pay the \$2,202.54 by direct deposit. GMAC sold the motor vehicle and “held the plaintiff responsible” for the deficiency.

The Appellate Court affirmed that GMAC violated the Illinois Consumer Fraud Act in breaching the terms of the 7 day extension letter because GMAC's actions were oppressive under the Illinois Consumer Fraud Act. The plaintiff still had 6 days to supply funds even after it informed GMAC that the telephone payment would not clear. The Court also affirmed the attorneys' fees based on 33.9 hours of work and attorney billing rates of \$270 and \$300 per hour and a paralegal billing rate of \$90 per hour.

Demitro v. GMAC, 2009 Ill. App. LEXIS 73 (Ill. App. Ct. 1st Dist. Feb. 9, 2009).

Impact Analysis

On February 9, 2009, the Appellate Court of Illinois affirmed a ruling that GMAC violated the Illinois Consumer Fraud Act when it failed to honor the terms of a 7 day extension letter. Regardless of the content of the contract and state law regarding default and notice to the consumer, creditors must respect the rights of the consumer described in the creditors' own notices. Extension letters should be standardized and personnel should be uniformly instructed to wait until the end of the extension period prior to taking action against the consumer. Customer service representatives should be aware of all communications with the consumer and the rights granted in those communications.

3. New Jersey: Supreme Court of New Jersey Holds that Request for Refund not Required prior to Lawsuit

On February 19, 2009, the Supreme Court of New Jersey held that a consumer is not required to request a merchant refund prior to filing a complaint under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -20. The Retail Buyers Order documenting a motor vehicle sale included a “Registration Fee” of \$117 that the plaintiff asserted was in excess of the actual cost of vehicle registration. The plaintiff argued that since the \$117 fee exceeded the fee for vehicle registration, that there was an undisclosed fee for document preparation included in the amount in violation of the New Jersey Consumer Fraud Act and N.J. Stat. § 56:12-14 to 18. The Supreme Court of New Jersey found that the plaintiff asserted the elements sufficient for a claim under the New Jersey Consumer Fraud Act:

- (1) unlawful conduct by defendant;
- (2) an ascertainable loss by plaintiff; and
- (3) a causal relationship between the unlawful conduct and the ascertainable loss.

The New Jersey Supreme Court held that there was no “punitive” requirement under the New Jersey Consumer Fraud Act to request a refund prior to filing a claim. The plaintiff could establish all three elements, including an “ascertainable loss,” without requesting a refund prior to the suit. The Court also noted that treble damages would not be based on the vehicle sales price, but rather on the alleged overpayment.

Bosland v. Warnock Dodge, Inc., 2009 N.J. LEXIS 16 (N.J. Feb. 19, 2009).

Impact Analysis

On February 19, 2009, the Supreme Court of New Jersey held that a plaintiff could state a claim under the New Jersey Consumer Fraud Act without first requesting a refund the difference between the cost of registration and the amount of the “Registration Fee” on the retail installment sales contract itemization of amount financed. Creditors should ensure that any itemized fees are appropriate in amount and description under state law. Descriptions that relate to specific amounts owed to the state should be followed only by those specific amounts.

4. Ohio: Attorney Fees Denied where Parties Agreed Sale and Finance Transaction Rescinded.

On February 2, 2009, the Court of Appeals of Ohio held that plaintiff motor vehicle retail buyers were not entitled to attorney fees in their consumer protection action against an auto mall because the plaintiffs were not the prevailing party since the parties had agreed to rescind the sale and finance transaction.

The plaintiffs executed a retail installment sales contract with the defendant auto mall, with delivery of the financed vehicle scheduled to take place the following day. However, on the scheduled pick-up date, the plaintiffs informed the auto mall they would not take the motor vehicle. In fact, the plaintiffs purchased a similar motor vehicle from a different dealership, and obtained financing through the same finance company. The auto mall did not cancel the financing of the motor vehicle, and therefore the plaintiffs received payment notices, even though they never took possession of the motor vehicle. The plaintiffs filed a complaint against the auto mall, alleging that the auto mall committed a violation of Ohio's consumer protection act and seeking monetary damages.

Because the plaintiffs pled for both rescission of the contract and an alternative claim of common law fraud, the trial court found that the plaintiffs were not entitled to proceed with their claims relating to money damages based on the contract and/or fraud because they had elected at the outset to rescind the contract. The trial court entered a final judgment which provided that final judgment was awarded in favor of plaintiffs and against defendant auto mall on the claim for violation of the Consumer Sales Practices Act. The trial court also issued an order providing that the plaintiffs were not entitled to attorney fees because "although technically, the agreement [the parties] entered into [which rescinded the contract] awarded judgment to Plaintiffs, there was never a fact finder's decision in favor of Plaintiff."

The Court of Appeals of Ohio found that the trial court did not abuse its discretion in refusing to award attorney fees because awards of attorney fees are only available where there has been a prevailing party in a consumer protection action. The final judgment order did not indicate that the plaintiffs were the prevailing party or that the defendants had committed a consumer protection violation. Rather, the final judgment only indicated that the parties agreed that the retail installment sale contract was rescinded.

White v. Lima Auto Mall, Inc.,
2009 Ohio App. LEXIS 313 (Ohio Ct. App. Feb. 2, 2009).

Impact Analysis

On February 2, 2009, the Court of Appeals of Ohio affirmed the trial court decision not to award attorney fees for the alleged consumer protection violations of the defendant auto mall, where the parties had agreed that the retail installment sale contract executed between them was rescinded. Attorney fees based on a consumer protection violation are governed by Ohio Rev. Code § 1345.09, which provides, in pertinent part, as follows:

(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

- (1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;
- (2) The supplier has knowingly committed an act or practice that violates this chapter.

This decision provides clarity as to the conditions Ohio courts will consider before granting attorney fees in the context of a consumer protection lawsuit.

5. **Texas: Court of Appeals Holds that Dealer's Inventory Tax was Properly Disclosed**

On February 5, 2009, the Court of Appeals of Texas held that a dealer's inventory tax was appropriately included as a separately itemized amount in the retail installment sales contract itemization of amount financed. Following the same reasoning as the Court of Appeals of Texas in Gifford v. Don Davis Auto, Inc., reported in the January 2009 Edition of **Auto Alert**, the Court followed an administrative interpretation of the Texas Consumer Credit Commissioner. Gifford v. Don Davis Auto, Inc., 2008 Tex. App. LEXIS 9250 (Tex. App. Fort Worth Dec. 11, 2008).

In an advisory letter dated December 22, 1993, and an interpretation dated January 24, 1994, Texas Consumer Credit Commissioner approved of inclusion of the unit property tax in the itemization of amounts owed under Tex. Fin. Code 348.005. In the 1994 administrative interpretation, the Texas Consumer Credit Commissioner explained that the "unit property tax value" calculated under Tex. Tax Code § 23.122 is "encompassed in the term 'any taxes'" in Section 348.005 and that "the unit property tax value could be included in the cash price or shown as an itemized charge [in a retail installment contract]." 19 Tex. Reg. 655 (Jan. 24, 1995).

The Court of Appeals also held that a documentary fee may be charged under the Texas Finance Code and that dealer rate participation is not a documentary fee. Texas Finance Code Section 348.301, which addresses sale on motor vehicle retail installment contracts, reads as follows:

A person may acquire a retail installment contract or an outstanding balance under a contract from another person on the terms, including the price, to which they agree. Notwithstanding any other applicable law of this state, no person acquiring or assigning a retail installment contract, or any balance under a contract, has any duty to disclose to any other person the terms on which a contract or balance under a contract is acquired, including any discount or difference between the rates, charges, or balance under the contract and the rates, charges, or balance acquired. Tex. Fin. Code § 348.301.

The dealer was not required to disclose the rate participation under the specific terms of Texas Finance Code Section 348.301.

Feagins v. Tyler Lincoln-Mercury, Inc., 2009 Tex. App. LEXIS 721 (Tex. App. Texarkana Feb. 5, 2009).

Impact Analysis

On February 5, 2009, the Texas Court of Appeals affirmed that the “dealer’s inventory tax” may be included in a motor vehicle retail installment contract itemization of amount financed. The Court also held that dealer participation need not be disclosed to the consumer and that such participation is not an undisclosed documentary fee. This holding is additional confirmation that in the context of retail installment sales the Texas dealer inventory tax may be passed on to the consumer.

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 federal proposed legislation.

B. STATE PROPOSED LEGISLATION

1. Maryland: Notice of Defects

On February 6, 2009, a bill was introduced in the Maryland legislature that would amend the Maryland Transportation Code to require motor vehicle dealers to include in a contract for sale of a used vehicle a notice of all defects identified during the vehicle inspection. If the notice is not provided, the dealer is liable for repairs to the vehicle such as engine or transmission replacement, but not customary periodic repairs such as oil changes, tire repair or brake repair.

2009 MD H.B. 629.

Impact Analysis
If enacted, this bill will require Maryland motor vehicle sellers to include a notice regarding vehicle defects in the motor vehicle sale contract. Maryland dealers are required to complete an inspection of a used motor vehicle prior to resale. Under this bill an additional notice would be required in the contract for sale.

2. **Michigan: Consumer Credit Report Contact**

On February 17, 2009, a bill was introduced in the Michigan legislature that would amend the Michigan Consumer Protection Act to require creditors to provide consumers the name, address and contact information of a person with whom the consumer may file a complaint or obtain impartial data concerning consumer credit practices.

2009 MI S.B. 235.

Impact Analysis

If enacted, this bill would require creditors to notify consumers of “a person with whom the consumer may file a complaint or obtain impartial data concerning consumer credit practices.” A notification indicating the name, address, and telephone number of the Michigan Attorney General’s Consumer Protection Division would appear to satisfy this requirement. Under the bill there is no requirement to place the notification within the motor vehicle retail installment contract or lease agreement.

3. Michigan: Consumer Reporting Agency Rule

On February 17, 2009, a bill was introduced in the Michigan legislature that would make it a violation of the Michigan Consumer Protection Act for any consumer reporting agency to fail to investigate and resolve a dispute regarding an error in a credit report within 30 days after receiving written notice from the consumer of the dispute. The fine for failure to comply with this new requirement is \$10,000.

2009 MI S.B. 236.

Impact Analysis

The general rule under the FCRA is that a state law will not be preempted governing collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. However, FCRA will preempt state laws “relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file.” 15 U.S.C. § 1681t. This Michigan bill, if enacted, would appear to be preempted by federal law.

4. Missouri: Administrative Fee Permissible and Form Completion not the Practice of Law

On February 5, 2009, a bill was introduced in the Missouri legislature that would specifically permit motor vehicle dealers to complete blanks on forms related to motor vehicle leases and retail installment sales. The bill would also specifically permit an administrative fee, which may result in profit to the motor vehicle dealer, for the storage of documents and other administrative or clerical services not otherwise prohibited. In the August 2007 case of Eisel v. Midwest BankCentre, the Supreme Court of Missouri held that the defendant engaged in the unauthorized practice of law when its employees filled out pre-printed mortgage forms that includes a “document preparation fee” or “processing fee.” In that case, the court emphasized the compensation received for completing the forms and quoted the following definition:

The “law business” is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

Eisel v. Midwest BankCentre, 230 S.W.3d 335 (Mo. 2007) quoting Mo. Rev. Code § 484.010.2 (emphasis provided by the Court).

The Court in Eisel held against the defendants even though the legislature appeared to specifically approve of documentary fees prior to the trial:

The legislature enacted section 484.025, effective August 28, 2005. It provides, “No bank or lending institution that makes residential loans and imposes a fee of less than two hundred dollars for completing residential loan documentation for loans made by that institution shall be deemed to be engaging in the unauthorized practice of law.” This section may be applicable to preclude penalties under section 484.020, but does not affect this Court’s ability to enjoin or otherwise punish such fees if they constitute the unauthorized practice of law. This case predates the effective date of section 484.025.

This Missouri bill would say that document completion is not the unauthorized practice of law. Unlike the charge permitted under Section 484.025,

this bill would authorize a charge for activities like document storage, and not for document preparation. The document preparation itself would be completed for no consideration.

2009 MO H.B. 630.

Impact Analysis

If enacted, motor vehicle lessors and retail installment sellers doing business in Missouri would be permitted to charge an administrative fee in the context of motor vehicle lease agreements and motor vehicle retail installment sales contracts and would also be able to fill in blank forms without violating the Missouri prohibition on the unauthorized practice of law.

5. New York: Retail Installment Sale and Lease Translation Requirements

On February 10, 2009, a bill was introduced in the New York legislature that would require dealers that negotiate motor vehicle retail installment sale and lease agreements primarily in a language other than English to provide an unsigned translation of the contract in the negotiation language. The terms of the agreement executed in the English language would govern the rights of the parties. However, the translation would be admissible to show that, because of substantial differences in the material terms, there was no actual contractual agreement. If the copy is not provided, the contract is subject to cancellation by the purchaser or lessee and the dealer would be required to repurchase the agreement from the assignee. A second bill, 2009 NY A.B. 5093, was introduced to amend the City Code of New York to apply the same requirement specifically to city residents.

2009 NY A.B. 5017.

2009 NY S.B. 1545.

Impact Analysis

If this bill is enacted, motor vehicle retail installment sellers and lessors doing business in New York will be required to provide an unsigned copy of the motor vehicle retail installment sales contract or lease agreement to be provided by the dealer to the consumer when the dealer and consumer negotiate primarily in a language other than English.

6. New York: Co-Signer Notice of Delinquency

On February 23, 2009, a bill was introduced in the New York legislature that would require motor vehicle retail installment sellers and lessors to provide co-signers notice of any delinquency on the buyer or lessor's account.

2009 NY S.B. 2538.

Impact Analysis

New York law does not currently require a notice of delinquency to either the primary buyer or to any co-signer in the context of a motor vehicle retail installment sale. In the context of a New York consumer lease, a notice of right to reinstate is currently required, but the law does not state that the notice must be sent to a co-signer. If enacted, this bill, as written would require notice to a co-signer regarding any delinquency, even if the creditor has not yet declared a default. If enacted, creditors should examine current post-repossession notices to determine if they may be used to satisfy this co-signer notice requirement.

7. New York: End of Term Lease Disclosure

On February 13, 2009, a bill was introduced in the New York legislature that would require motor vehicle lessors to provide lessees at scheduled termination a statement describing the excess wear and damage to the vehicle for which the lessee may be liable with a provision specifically itemizing all components of the vehicle to be examined and the method used to examine the vehicle before arriving at the excess wear and damage charge.

2009 NY A.B. 5406.

Impact Analysis

New York currently has state specific end-of lease term requirements related to excess wear and damage in New York Personal Property Law Section 343. Lessors should already be providing a statement describing the excess wear and damage. Notices would need to be reviewed to ensure that notices comply with the new itemization of components and the method of examination disclosures.

8. Pennsylvania: Pennsylvania Motor Vehicle Sales Finance Act Re-Codified with Changes

On February 18, 2009, a bill was introduced in the Pennsylvania legislature that would change the location of the Pennsylvania Motor Vehicle Sales Finance Act (“MVSFA”) from 69 P.S. § 601, et seq. to 12 Pa. Cons. Stat. § 6201, et seq.. The MFSFA would be moved along with the Goods and Services Installment Sales Act (“Goods Installment Act”) into Part IV, of Title 12 of the Consolidated Statutes. In this Consumer Credit Part, some general provisions would be apply to both the MVSFA and the Goods Installment Act. In addition to minor changes, such as changing the order of provisions and breaking provisions into subparts, some notable differences are as follows:

- The holder would be permitted to charge a fee not to exceed the cost of production for furnishing a copy of the retail installment contract.
- Payments need not be in substantially equal amounts when the contract provides for “fixed residual value financing.” Fixed residual value financing would permit balloon contracts where the creditor would be required to offer the refinancing of the balloon payment.
- The installment contract would be required to include the following statement: “If you encounter a problem, you may have additional rights under the Unfair Trade Practices and Consumer Protection Law, which is administered by the Pennsylvania Office of Attorney General.”
- The acknowledgment above the signature line would read as follows:

NOTICE TO BUYER: Do not sign this contract in blank. You are entitled to an exact copy of the contract you sign. Keep it to protect your legal rights. Any holder of this consumer credit contract is subject to all claims and defenses which the buyer could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the buyer shall not exceed amounts paid by the buyer hereunder.

- Acceleration in the event of bankruptcy, default on a cross-collateralized obligation, and false information in the credit application would be permitted.
- Requirement to send a deficiency notice within 30 days of the sale with (1) the sale price of the repossessed motor vehicle; (2) the itemized costs associated with the repossession and sale of the repossessed motor vehicle; and (3) the amount of the deficiency owed by the buyer.

2009 PA H.B. 506.

Impact Analysis

If enacted, Pennsylvania House Bill would move the MVSFA to the consolidated statutes and make changes that would require amendment of motor vehicle retail installment contracts. Deficiency notices would need to be reviewed to ensure that they itemize all costs of repossession. In addition, creditors would be specifically permitted to offer balloon contracts in Pennsylvania and any balloon contract would be required to offer a right to refinance the balloon payment.

9. South Carolina: Notarized Receipt of Payoff on Trade-in prior to Resale

On February 11, 2009, a bill was introduced in the South Carolina legislature that would make it unlawful for a motor vehicle dealers sell a vehicle with a payoff due to a third party creditor without paying off the balance and submitting a notarized receipt to the South Carolina Department of Motor Vehicles.

2009 SC S.B. 408.

Impact Analysis

If this bill is enacted, motor vehicle dealers will not be able to sell a trade-in motor vehicle until the payoff amount is transferred to the creditor that financed the purchase of the trade-in and a notarized receipt of the transfer is provided to the South Carolina Department of Motor Vehicles. If this bill is enacted, it may be appropriate for South Carolina creditors to require a copy of the receipt of transfer.

10. **Texas: Documentary Fee**

On February 24, 2009, Senate Bill 1096 was introduced in the Texas legislature that would increase the documentary fee permissible in a motor vehicle retail installment sales contract from \$50 to \$100. The bill would also amend the documentary fee notice required in retail installment sales contracts under Tex. Fin. Code § 348.006 to reflect the change. The new notice provision, which must appear conspicuously set out from the surrounding writing in reasonable proximity to the documentary fee disclosure, would read as follows:

A DOCUMENTARY FEE IS NOT AN OFFICIAL FEE. A DOCUMENTARY FEE IS NOT REQUIRED BY LAW, BUT MAY BE CHARGED TO BUYERS FOR HANDLING DOCUMENTS AND PERFORMING SERVICES RELATING TO THE CLOSING OF A SALE. A DOCUMENTARY FEE MAY NOT EXCEED \$100 FOR A MOTOR VEHICLE CONTRACT OR A REASONABLE AMOUNT AGREED TO BY THE PARTIES FOR A HEAVY COMMERCIAL VEHICLE CONTRACT. THIS NOTICE IS REQUIRED BY LAW.

Note that a second bill, Senate Bill 1965, introduced on March 12, 2009, would leave the permissible charge at \$50, but delete the commercial vehicle reference “or a reasonable amount agreed to by the parties for a heavy commercial contract” from the documentary fee disclosure. A third bill, House Bill 3621, introduced on March 12, 2009, would permit documentary fees in a “reasonable amount” and would amend the documentary fee disclosure to read as follows:

A DOCUMENTARY FEE IS NOT AN OFFICIAL FEE. A DOCUMENTARY FEE IS NOT REQUIRED BY LAW, BUT MAY BE CHARGED TO BUYERS FOR HANDLING DOCUMENTS RELATING TO THE SALE. A DOCUMENTARY FEE MAY NOT EXCEED A REASONABLE AMOUNT AGREED TO BY THE PARTIES. THIS NOTICE IS REQUIRED BY LAW.

2009 TX S.B. 1096.

2009 TX S.B. 1965.

2009 TX S.B. 3621.

Impact Analysis

If Senate Bill 1096 is enacted, motor vehicle retail installment sellers may include a \$100 documentary fee in Texas motor vehicle retail installment sales contracts if the contracts include the statutory notice of the new fee amount. If Senate Bill 1965 is enacted, motor vehicle retail installment sellers will still be permitted to charge \$50 for a documentary fee, but the statutory notice will be changed to delete the reference to commercial vehicles. If House Bill 3621 is enacted, the dollar amount limitation on the documentary fee will be eliminated so that a “reasonable” fee may be charged and the documentary fee notice will be amended to reflect this change. Each of these changes will require an amendment to new motor vehicle retail installment contracts.

11. **Texas:** **Retail Installment Contract may Finance Outstanding Lease Obligation**

On March 12, 2009, a bill was introduced in the Texas legislature that would amend the motor vehicle retail installment provisions of the Texas Finance Code to permit a retail seller to finance repayment of the obligation under a previous lease or retail installment obligation. Texas currently permits retail sellers to finance the pay-off amount on a trade-in.

2009 TX H.B. 3659.

Impact Analysis
If this bill is enacted, motor vehicle retail installment sellers will be specifically permitted to include amounts owed on a consumer's lease agreement as an amount financed in a motor vehicle retail installment contract.

12. **Texas:** **Assignee not shown as Lienholder on Certificate of Title**

On March 10, 2009, a bill was introduced in the Texas legislature that would clarify that a security interest in a motor vehicle remains perfected where the party noted on the certificate of title has assigned the security interest but the assignee is not yet named on the certificate of title. The assignor “lienholder” remains liable for any obligations as lienholder until the assignee is actually shown on the certificate of title.

2009 TX S.B. 1592.

Impact Analysis

If this bill is enacted, finance companies that take assignment of Texas motor vehicle retail installment sellers will have a perfected security interest where the assignor’s interest is still shown on the certificate of title. In a typical transaction, the motor vehicle dealer will prepare an Application for Certificate of Title to the motor vehicle in the name and address of the Buyer with the assignee shown as the 1st lienholder. The title is then sent to the finance company. This legislation relates to the less common scenario where that 1st lienholder subsequently assigns the individual contract and security interest to another party. Motor vehicle retail installment sellers that take assignment directly from the motor vehicle dealer immediately after origination will not need to change procedures in response to this legislation.

13. Texas: Spot Delivery Agreements Permitted

On March 5, 2009, a bill was introduced in the Texas House that would, if enacted, allow the use of spot delivery agreements and prevent motor vehicle dealers from conditioning the execution of a motor vehicle retail installment sale contract on the subsequent assignment of the contract by the dealer.

2009 TX H.B. 2556.

Impact Analysis
If this bill is enacted, it would resolve the issue of spot delivery agreements by Texas motor vehicle dealers. This bill suggests that in Texas, motor vehicle spot deliveries which are properly documented and disclosed to consumers as conditional delivery agreements will likely be a permissible motor vehicle dealer practice under Texas law.

14. Texas: **Sale of Motor Vehicles at Auto Auction Private Disposition**

On March 11, 2009, a bill was introduced in the Texas Senate that would, if enacted, provide that the sale of a used motor vehicle at an auto auctions would be considered a “private disposition” under Chapter 9 of the Business and Commerce Code if (1) neither the debtor nor the secured party is present, and (2) there is no advertisement or public notice prior to the sale that specifically describes the collateral.

2009 TX S.B. 1827.

Impact Analysis
Under Texas repossession law, creditors are currently permitted to sell motor vehicles by either public or private disposition. Sellers utilizing motor vehicle auctions should be aware that if enacted, this bill will impact the form of notice that is required.

15. Texas: Debt Cancellation Agreements Not Insurance

On March 12, 2009, a bill was filed in the Texas Senate that would expressly permit debt cancellation agreements to be financed in motor vehicle retail installment sale contracts. The bill provides that debt cancellation agreements are not considered insurance and that the retail installment seller may not require the purchase of a debt cancellation agreement by the retail buyer in order to enter into a retail installment transaction.

2009 TX S.B. 1966.

2009 TX H.B. 3338.

Impact Analysis

If this Texas legislation is enacted, Texas motor vehicle creditors will be expressly permitted under Texas law to sell debt cancellation agreements. In addition, debt cancellation agreements would be excluded from the definition of “insurance” under the Texas insurance code.

16. Washington: Documentary Fee Increase and Disclosure

On February 3, 2009, a bill was introduced in the Washington legislature that would require motor vehicles charging documentary fees to affirmatively disclose to the purchaser or lessee in writing that the documentary fee is a negotiable fee. This disclosure must be in as large a typeface as the typeface used in the document containing the disclosure. However, the bill does not state that the disclosure is to be included in the motor vehicle retail installment sales contract text or motor vehicle lease agreement text. The bill would also increase the maximum documentary fee from \$50 to \$100.

2009 WA H.B. 1939.

Impact Analysis

If enacted, this bill would require Washington motor vehicle sellers and lessors to provide a new disclosure to prospective purchasers and lessees regarding documentary fees. The bill would also permit an increase in the documentary fee from \$50 to \$100. If the bill is enacted, creditors should ensure that consumers are provided the negotiability disclosure. However, the bill does not state that a change to the text of the motor vehicle retail installment sales contract or motor vehicle lease is required.

17. West Virginia: Disclaimer of Warranties on Used Vehicles

On February 18, 2009, a bill was introduced in the West Virginia Legislature that would permit modification and exclusion of warranties in the case of used motor vehicles if the exclusion is conspicuous, signed, and identifies the defects for which the warranty is waived, as well as additional defects. The bill would also permit low priced (under \$2,500), heavily used (more than \$80,000 miles) and older vehicles (7 years) to be so on an “as is” basis if a particular disclosure is included in the sales contract and signed by the consumer. The text of relevant provisions of the bill are as follows:

- (B) Except as otherwise provided in this section, an agreement entered into by a consumer for the purchase of a used motor vehicle that excludes, modifies or attempts to limit any warranty, express or implied, including, the warranties of merchantability and fitness for a particular purpose, is void as contrary to public policy, and the dealer nevertheless shall be considered, as a matter of law, to have given the warranty

- (C) Notwithstanding the provisions of subsections (A) and (B) of this section, a consumer who purchases a used motor vehicle may waive a warranty as to a particular defect or malfunction which the dealer has disclosed in writing to the consumer. No such waiver is effective unless the waiver:
 - (1) Is in writing
 - (2) In conspicuous and is in plain language
 - (3) Identifies the particular disclosed defect or malfunction in the used motor vehicle for which the warranty is to be waived;
 - (4) Describes any additional defects or malfunctions, if any;
 - (a) disclosed to the dealer by a previous owner of the used motor vehicle;
 - (b) discoverable by the dealer through an inspection of the used motor vehicle; and
 - (c) that need to be repaired before the used motor vehicle can comply with the motor vehicle inspection and test laws set forth in article 16, chapter 17C of this code
 - (5) States what warranty, if any, applies to any disclosed defect or malfunction, and
 - (6) Is signed by both the consumer and the dealer before the sales contract is executed.

* * *

(D) A motor vehicle may be sold “as is” and the prohibition against exclusion, modification or limitation of any warranty or remedy, as set forth in this section, does not apply to:

- (1) a used motor vehicle sold for less than \$2,500
- (2) a used motor vehicle that has been driven more than 80,000 miles
- (3) a used motor vehicle that is 7 years of age or older, calculated from January 1, of the designated model year of the vehicle.
- (4) a vehicle that has been custom built or modified for show purposes or racing:
- (5) a vehicle that is inoperable and a total loss

* * *

(E) A used motor vehicle may be sold “as is” by a dealer only if it falls within one or more of the exemptions set out in subsection (D) of this section. No “as is” disclaimer by a dealer is enforceable unless all of the following conditions are met:

- (1) A disclaimer must appear on the front page of the contract of sale, and must read as follows, in 12 point bold, with the heading in 16 point:

<p>“AS IS”</p> <p>THIS VEHICLE I SOLD “AS IS”. YOU WILL HAVE TO PAY FOR ANY REPAIRS NEEDED AFTER THE SALE. IF WE HAVE MADE ANY PROMISES TO YOU, THE LAW SAYS WE MUST KEEP OUR PROMISES, EVEN IF WE SELL, “AS IS”. TO PROTECT YOURSELF, ASK US TO PUT ALL PROMISES IN WRITING</p> <p>_____</p>

- (2) The consumer must sign and date the box.

2009 WV H.B. 2596.

Impact Analysis

If West Virginia House Bill 2596 is enacted, warranties on used motor vehicles sold in West Virginia may be modified or excluded entirely, in some cases, if the proper disclosures are made. The “as is” disclaimer may only be used where the vehicle is older or has been more heavily used, and must be included in the motor vehicle sale contract.

IV. AUTO ALERT™ Appendix of Exhibits

1. 2009 H.R. 1105.
2. Scott v. EFN Invs., LLC, 2009 U.S. App. LEXIS 3035 (11th Cir. Fla. Feb. 17, 2009).
3. Piccini v. Wells Fargo Auto Fin., Inc., 2009 U.S. Dist. LEXIS 9517 (D. Ariz. Feb. 9, 2009).
4. Adams v. Monumental Gen. Cas. Co., 2009 U.S. Dist. LEXIS 10506 (M.D. Ga. Feb. 12, 2009).
5. Kennedy v. Butler Fin. Solutions, LLC, 2009 U.S. Dist. LEXIS 8303 (N.D. Ill. Feb. 4, 2009).
6. Lindsley v. DaimlerChrysler Fin. Servs. Americas LLC, 2009 U.S. Dist. LEXIS 10871 (D. Minn. Feb. 11, 2009).
7. Fitts v. King Richard's Auto Ctr., Inc., 2009 U.S. Dist. LEXIS 8003 (D.R.I. Feb. 3, 2009).
8. Wilson v. GMAC Fin. Servs. Co., 2009 U.S. Dist. LEXIS 14385 (E.D. Tenn. Feb. 24, 2009).
9. Rosado v. DaimlerChrysler Fin. Servs. Trust, 2009 Fla. App. LEXIS 967 (Fla. Ct. App. Feb. 6, 2009).
10. Demitro v. GMAC, 2009 Ill. App. LEXIS 73 (Ill. App. Ct. 1st Dist. Feb. 9, 2009).
11. Bosland v. Warnock Dodge, Inc., 2009 N.J. LEXIS 16 (N.J. Feb. 19, 2009).
12. White v. Lima Auto Mall, Inc., 2009 Ohio App. LEXIS 313 (Ohio Ct. App. Feb. 2, 2009).
13. Feagins v. Tyler Lincoln-Mercury, Inc., 2009 Tex. App. LEXIS 721 (Tex. App. Texarkana Feb. 5, 2009).
14. 2009 MD H.B. 629.
15. 2009 MI S.B. 235.

16. 2009 MI S.B. 236.
17. 2009 MO H.B. 630.
18. 2009 NY A.B. 5017.
19. 2009 NY S.B. 2538.
20. 2009 NY A.B. 5406.
21. 2009 PA H.B. 506.
22. 2009 SC S.B. 408.
23. 2009 TX S.B. 1096.
2009 TX S.B. 1965.
2009 TX S.B. 3621.
24. 2009 TX H.B. 3659.
25. 2009 TX S.B. 1592.
26. 2009 TX H.B. 2556.
27. 2009 TX S.B. 1827.
28. 2009 TX S.B. 1966.
29. 2009 WA H.B. 408.
30. 2009 WV H.B. 2596.