

## *The CARLAWYER©*

*By Thomas B. Hudson and Emily Marlow Beck*

The courts, the plaintiffs' lawyers and the Attorneys General never stop, even for summer vacation. Here's the latest.

In this feature, we bring you federal and significant state legislative highlights, and a recap of some of the litigation we track every month. Note that what we report here is not every recent development, but just ones that we think are of particular interest to car dealers, and that this column does not offer legal advice – you need to consult your lawyer with questions.

We include items from other states for two reasons. First, we want you to be able to see trends, and, second, another state's laws might be a lot like your own state's laws – if laws are being enacted there, or AGs are pursuing particular types of claims, those laws and claims might be coming soon to your neck of the woods. As always, though, you need to check with your own lawyer before you rely on anything we report or if you have any questions.

### **Federal Law**

**Beat that dead horse!** Once more this month, we'll mention the Federal Trade Commission's new Red Flags Rule. We're mentioning it again, and we'll keep mentioning it until November, because we are down to weeks in counting the time before you must be in compliance with the Rule. The Rule imposes duties on dealers that are designed to curb identity theft, and is effective now - - dealers may comply with it if they elect to. But dealers *must* comply with the rule beginning November 1, 2008. You only have a few weeks to design and implement a program, so what are you waiting for?

**A New Used Car Rule?** It may be on the way. The Federal Trade Commission approved publication of a Federal Register notice soliciting public comments on the effectiveness and practicality of the Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455, commonly known as the Used Car Rule. Among other things, the FTC requests comments on changing the Used Car Rule to require a bilingual Buyers Guide and revising the Buyers Guide to reflect the various types of warranty products available in today's marketplace. Get your comments in to the FTC quickly. But, until then, maybe now is the perfect time to make sure your existing Buyers Guides are up to snuff.

**A federal usury limit?** Senator Richard Durbin (D-Ill.) has introduced S. 3287, the "Protecting Consumers from Unreasonable Credit Rates Act". The bill would amend the federal Truth in Lending Act to cap the "annual percentage credit rate" at 36% for all consumer credit transactions. The bill defines annual percentage credit rate broadly to include all charges payable directly or indirectly incident to, ancillary to, or as a condition of the extension of credit. The bill would not preempt, or override, more restrictive state laws and provides for civil and criminal penalties as well as state attorney general

enforcement. The bill is not expected to pass during the current Congressional session, but could serve as a launching point for the next session.

**Will dealers be required to collect race and gender information?** Mortgage lenders have had to do so for years – now car dealers may face the same requirement. The Financial Services Subcommittee on Oversight and Investigations held a hearing which examined findings of a recent Government Accountability Office Report on Regulation B, which implements the Equal Credit Opportunity Act. Reg. B prohibits the collection of race, gender, or other demographic data on non-mortgage loans in most situations. The GAO Report analyzes: (1) studies on possible discrimination in non-mortgage lending and the data used in them; (2) the Federal Reserve Board’s 2003 decision to retain the prohibition of voluntary data collection; and (3) the benefits and costs of a data collection and reporting requirement. Stay tuned!

### State Developments

Summer vacation or not, state legislatures keep cranking out new statutes that just might impact your dealership’s operations. Here are some examples:

**It’s freezing in August!** States continue to enact “security freeze” laws. California AB 372 concerns requests by consumers to place a security freeze on their credit reports. Missouri HB 1384 specifies the procedures for a person to place a security freeze on his or her credit report and gives identity theft victims the right to have an incident report filed by their law enforcement agency.

**Tax, Title, and Bounced Checks.** Louisiana HB 607 provides for an extension of the amount of time a motor vehicle dealer has to remit collected taxes. HB 809 relates to the application requirements for vehicle registration and certificates of title. SB 373 requires the electronic recording of information concerning the perfection and release of vehicle security interests. SB 764 relates to charges for checks returned for insufficient funds.

**Wholesalers Escape Retail Liability.** Missouri HB 1970 prohibits a person from initiating a civil action seeking monetary damages or other relief against any licensed motor vehicle dealer with whom he or she did not directly and personally negotiate or communicate during the retail sale or lease of a motor vehicle or other related merchandise.

**May I See Your Registration, Sir?** New Hampshire HB 1596 changes certain motor vehicle fees and permits the Commissioner of Safety to waive the fee for certified copies of registrations, licenses, and driving records under certain circumstances. HB 1318 increases the time period for a dealer to deliver an application for a certificate of title to the department of safety if the title is in the possession of the lienholder.

**Rholling Along in Rhode Island.** Rhode Island HB 7497 and SB 2442 amend section 6-51-1 and 6-51-3 of the Rhode Island Automobile Repossession Act with respect to the notice of right to cure a default under an automobile lease or loan agreement. HB 8159

and SB 2262 provide that a borrower who seeks to void a financing agreement will be responsible for any damage to the vehicle. SB 2902 creates an exemption to the licensing provisions of chapter 19-14 (the “Licensed Activities Provisions”) for certain notes evidencing the indebtedness of a buyer of a motor vehicle that include as part of the amount financed an amount representing negative equity.

**Lien this Way!** South Carolina HB 3323 amends Section 56-19-265 of the South Carolina Code relating to the Department of Motor Vehicles’ acceptance of electronically filed lien information.

**New Regs in the Lone Star State.** The Texas Office of Consumer Credit Commissioner has finalized several new regulations recently. Two new rules contain operational provisions regarding insurance, payoff statements, and collection practices and contacts. Another rule authorizes the Commissioner to require a licensee to review records and make corrections if an examination reveals that a licensee is engaging in a pattern or practice that appears to be a systemic violation of the law.

**Taxes and Titles in the Mountain State.** The West Virginia Division of Motor Vehicles finalized a rule that establishes the criteria for the collection and determination of the tax related to the titling of vehicles by the Division. The rule implements the provisions of HB 2775 which changed the nature of the tax on vehicles collected by the Division from a Privilege Tax to a Sales Tax under the provision of West Virginia Code Chapter 11.

### **Litigation**

Here’s our report on some of the more interesting litigation that popped up this month.

#### **Let’s Go to Plan B**

**Arbitration Clause in First RISC Applicable to Counterclaim under Second RISC:** A car buyer signed a second retail installment sales contract when the dealership told him it could not obtain financing under the terms of the first contract. After the buyer defaulted, he sued the dealership, alleging a litany of claims. The dealership moved to compel arbitration based on the arbitration clause in the first contract; the second contract did not contain an arbitration clause. The parties agreed to arbitrate the buyer’s dispute. Later, the dealership filed a counterclaim for the amount owed on the contract after repurchasing the contract from the assignee. The buyer challenged the arbitrability of the counterclaim, but the arbitrator ruled the counterclaim was arbitrable. After the arbitrator awarded damages on the buyer’s claims and the dealership’s counterclaim, the buyer moved to vacate the arbitration award, arguing, among other things, that the counterclaim was not subject to arbitration. The trial court denied the motion to vacate and confirmed the award. The Illinois Court of Appeals affirmed the trial court's decision, concluding that the counterclaim was subject to arbitration. See *Anderson v. Golf Mill Ford, Inc.*, 2008 WL 2444686 (Ill. App. June 16, 2008).

## **Nobody's Perfect**

**Failure to Perfect Security Interest Within 20 Days Makes Lien Avoidable as Preference:** Do you need another reason to dot every "I" and cross every "T" when it comes to processing your title paperwork? Check out this recent Washington case. A title application that would have noted the creditor's lien was rejected because it was not accompanied by an inspection affidavit. The creditor re-filed the application with the affidavit 21 days after the car buyers bought the car. A week later, the buyers filed a Chapter 7 bankruptcy petition, and their trustee filed a preference action against the creditor. The bankruptcy court ruled for the trustee, and the U.S. Bankruptcy Appellate Panel for the Ninth Circuit affirmed. The appellate panel determined that while the creditor perfected its security interest within Idaho's filing period, the creditor was too late for purposes of Section 547 and, therefore, the bankruptcy court properly determined that perfection of the security interest was a preferential transfer. The appellate panel also ruled that the bankruptcy court properly awarded the trustee money damages in an amount equal to the value of the interest avoided in lieu of making the avoidance permanent. See *In re Taylor*, 2008 WL 2579100 (9th Cir. BAP (Bankr. W.D. Wash.) June 20, 2008).

### **A Lease is a Lease is . . . a Security Interest!**

**Car Lease Deemed Security Interest:** Courts don't typically care about what name you stick on a transaction when determining how the transaction will be viewed for legal purposes. This case is another example. A lessor and lessee entered into a motor vehicle lease agreement. The lease agreement provided for an early termination penalty and a purchase option for \$206 plus taxes and official fees. The lease also provided that it was a true lease, but that if a court or arbitrator determined the lease was a financed lease, the lessee agreed to grant the lessor a security interest in the vehicle. After the lessee filed a Chapter 13 bankruptcy petition, the lessor objected to the lessee's plan because it referred to the lease as a secured transaction. The bankruptcy court confirmed the plan. The U.S. District Court for the Western District of Louisiana affirmed, concluding the lease agreement created a security interest because the lessee did not have the right to terminate her obligations under the lease agreement, the option price to purchase the vehicle at the end of the lease period was nominal, and the economic realities of the transaction suggested a security interest was created. See *Automotive Leasing Specialists, LLC v. Little*, 2008 WL 2369145 (W.D. La. June 10, 2008).

### **No Harm, No Foul?**

**Notice of Intent to Sell With Inaccurate Non-Mandatory Information Does Not Support Statutory Damages Claim:** Attention buy here, pay here dealers! Do you know what your collection letters say? After a creditor repossessed a car for nonpayment, it sent a "Notice of Intent to Dispose of Repossessed or Surrendered Motor Vehicle." The notice correctly stated the payment default and the itemized amount the buyer was required to pay in order to redeem the vehicle. The creditor sought a deficiency after the sale of the vehicle, and the buyer counterclaimed for damages for an

inaccurate notice. The trial court granted the creditor's motion for summary judgment. The Ohio Court of Appeals acknowledged that the notice inaccurately stated the redemption period. Because this information was not required by Ohio law, the appellate court found that the buyer was not entitled to statutory damages. The appellate court recognized that actual damages would have been appropriate but there was no evidence that the incorrect information resulted in any harm to the buyer. See *Nissan v. Pedro*, 2008 WL 2347919 (Ohio App. June 9, 2008).

### **Hey Mr. Customer, We Paid Off Your Trade . . .**

**Negative Equity Counts When Determining Whether Federal Truth in Lending Act Applies:** The retail installment sales contract that a car buyer signed in connection with her car purchase listed the cash price as \$29,595. The contract did not separately itemize the items that made up the cash price, including negative equity on the buyer's trade-in. The buyer sued the dealership for violations of the federal Truth in Lending Act and the Michigan Motor Vehicle Sales Finance Act. The dealership argued that TILA did not apply because the amount financed exceeded the \$25,000 jurisdictional limit of TILA. The buyer argued that the negative equity amount should not be included in the amount financed to determine if the \$25,000 jurisdictional limit of TILA was exceeded. The U.S. District Court for the Eastern District of Michigan found that negative equity was part of the amount financed and that TILA did not apply because the consolidated amount financed exceeded TILA's jurisdictional limit. Additionally, the buyer argued that the dealership violated the MVSFA by not separately itemizing the purchase price of the new car, the trade-in value of the old car, the negative equity, and the sales tax on the purchase price of the new car. The court found that the MVSFA required separate itemization of such amounts and granted summary judgment to the buyer on her MVSFA claim. See *Schultz v. Burton-Moore Ford, Inc.*, 2008 WL 2355588 (E.D. Mich. June 5, 2008). So, the dealer skated past the TILA claim, but still has to face up to the state law claim.

So, there you have it. Stay legal! See you next issue.

---

Tom and Emily are partners in the law firm of Hudson Cook, LLC. Tom (tbhudson@hudco.com) is the author of a book, *CARLAW*®, and, with Emily (ebeck@hudco.com), is the Editor/author of the *CARLAW*® **F&I Legal Desk Book**. The books are available at [www.counselorlibrary.com](http://www.counselorlibrary.com). Tom is also the publisher of *Spot Delivery*®, a monthly legal newsletter for auto dealers, and the Editor in Chief of *CARLAW*®, a monthly report of legal developments in all states for the auto finance and leasing industry (not to be confused with the book). *Spot Delivery*, *CARLAW* and the books are produced by CounselorLibrary.com LLC. For information, call 410-865-5411 or visit [www.counselorlibrary.com](http://www.counselorlibrary.com). Copyright CounselorLibrary.com 2008, all rights reserved. Single publication rights only, to the Association. HC# 4833-0990-8226 (8/08).

---