

Yo-Yo Sales: The Predatory Practice of Unscrupulous Car Dealers

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As vehicle sales continue to slump, car dealers are becoming more and more desperate and engaging more frequently in dishonest and illegal sales tactics. One of these is the “yo-yo” sale. This practice is prevalent amongst both new and used car dealers and its effects can be devastating – both financially and emotionally – to the consumer. A good consumer advocate should be able, when the potential client first contacts the office, to immediately recognize and identify this scam and provide practical advice which will serve the consumer in the short term and preserve the ability to prosecute claims later. The intended purpose of this article is threefold: 1) to describe the practice of the yo-yo sale, 2) to provide suggestions for the practitioner to give the consumer in the middle of a yo-yo sale and 3) to list the myriad state and federal laws which are violated when a car dealer engages in this most unfair and deceptive practice.

1. Recognizing the Yo-Yo Sale

In most cases, a distraught consumer describes a vehicle purchase which is followed, days or weeks later, by a phone call from a sales person who states that the consumer must either return the vehicle, get a co-signer for the loan or sign completely, new paperwork because, “. . . the financing fell through.” This is usually confusing to the purchaser, who, in many cases, has copies of a signed retail installment contract, a signed application for title, and a temporary license plate. The demand of the sales person is especially perplexing in light of the fact that the dealer had previously led the consumer to believe that all the conditions necessary for the proper credit sale of the vehicle had been met and that the vehicle had -- in fact -- been sold on credit to the consumer. Typically, the consumer, in light of these facts, wants to know whether to go back to the dealership. If the

consumer returns, new terms of sale and credit are often presented which ultimately result in a deal which is less advantageous than the original. Sometimes, the dealer demands that the consumer bring a co-signer. Other times, the dealer will suggest a close relative from the consumer's list of references. In cases where the salesperson detects reluctance on the part of the consumer, or where the consumer refuses to bring the vehicle back, the salesperson may threaten arrest or repossession. Frequently, if the purchaser continues to refuse, dealerships will repossess the vehicle, and, in some cases, will report the vehicle stolen.

Dealers who are skilled in the practice of yo-yo selling may retrieve the purchaser several times, wearing down the consumer's sales resistance to these pressure tactics, until the dealer has maximized his profits from the consumer. All the while, the dealer retains the full value of any down payment or trade in. Thus, the consumer is held captive to the seller and the terms which the dealer prescribes.

Yo-yo selling is a consequence of a more widespread illegal practice^{1 2} called, "spot delivery." In a spot delivery sale, the consumer takes delivery of the vehicle before the dealer has confirmed assignment of the purchase money security interest to a third party lender. In most spot deliveries, the dealer is able to shop the contract around to various third party lenders after the consumer has already left with the vehicle, and eventually the contract is assigned under the terms on its face and the consumer, not knowing any of this has occurred, is no worse for the wear³.

¹ Motor Vehicle Installment Sales Contracts conditioned upon assignment violate the Motor Vehicle Sales Finance Act, MCL § 492.112(a) and (b).

² See the May 22, 1989 letter on facing page.

³Until the consumer goes to apply for credit during the next two years and discovers that several credit pulls in the days following the car deal are bringing his

However, when the dealer is unable to assign the contract for an acceptable profit, the yo-yo scenario arises.

The yo-yo sale may be recognized as a seller's attempt to enforce a condition precedent which was hidden from the consumer at the time of the transaction. The car dealer, who previously represented that the transaction was, "a done deal," tells the customer that the deal was actually conditioned on a future event, which the dealer typically characterizes as, "getting the customer financed." This secret condition precedent can be more accurately described as, "the dealer's ability to profit from the assignment of the credit contract."

2. *Advising the Potential Client*

Ideally, the potential client will seek legal advice soon after the dealer calls and says, "Your financing fell through," and tells the consumer that he or she must sign new paperwork, get a co-signer or bring back the vehicle. At once, the consumer advocate must advise based on the potential client's immediate needs and long term litigation strategies. There are three important instructions for the yo-yo victim:

1. Get Everything Valuable out of the Vehicle.

credit score down.

It is important to let the potential client know that the dealer may repossess the vehicle, in spite of the prohibitions in UCC Article Nine⁴ and the penal code⁵. Many victims of yo-yo scams cannot afford to lose laptops, car seats, wallets, after-market stereos etc. Valuable items will be stolen by the dealership or the towing company.

2. Collect all of the paperwork. All of it! Especially the temporary plate.

⁴ MCL § 440.9610

⁵ MCL § 750.356

Many of us throw all the transactional paperwork in the glove compartment after we buy a vehicle. If the vehicle in a yo-yo scam is repossessed the first thing, the dealer will do is destroy all of the paperwork. Therefore, it all needs to be removed from the car immediately. These documents will establish that there was a final sale with a binding contract. The temporary plate – it’s usually green and taped in the rear window – will further establish that the dealer actually sold the vehicle to the consumer.⁶ These temporary plates are for the exclusive use of, “purchasers of vehicles.”⁷ Having the temporary plate will effectively prevent the dealer from claiming that your client was merely “test driving” the vehicle and failed to return it.

Be sure to stress that every piece of paper in the entire vehicle is important, including stickers in the window and owner’s manuals in the trunk or glove box. Have the client put all of these papers in a large envelope or file. It will be important later to establish which documents the consumer received and which were not provided at the time of sale.

3. Document the Dealer’s excuses

⁶ Since the car cannot be driven without the plate, have your client make a xerox copy of both sides of the document. In many cases, there will be several temporary plates issued, in spite of the fact MCL 257.226a prohibits a dealer from issuing more than one and further, the Motor Vehicle code requires that the dealer process and transfer title to the purchaser within 15 days of delivery of the sale and delivery.

⁷ MCL § 257.226a(1)

In many cases, after being sued as a result of a yo-yo sale, the dealer will claim that your client committed fraud and that there was never any threat of repossession. It is therefore important to document the dealer's excuses while the yo-yo scam is in progress. The most effective way to do this is to have your client call the dealer back and tape record the conversation.^{8 9} Have the client ask the dealer open-ended questions such as, "Why do I have to bring the car back?" or "What went wrong?" or "Who is responsible for this?" or "Why isn't this *my* car?" After that, the consumer should ask, "What happens if I do not bring the car back?" If the consumer traded in a vehicle or made a down payment, the consumer should inquire as to a refund or return of the trade.

It is not so important *what* the dealer says. It is more important that the dealer's reasons and threats are established in a form which, later, cannot be effectively contradicted.

It may also be wise to have the consumer offer, on tape or in writing, to make payments directly to the dealer. If the consumer wants to keep the vehicle, there is an obligation to make payments under the installment contract.

3. *Causes of Action*

Among the many statutory violations which may arise out of the facts of a yo-yo sale are several which provide for private causes of action and, in some cases, fee shifting provisions.

1. The Federal Truth in Lending Act

⁸ The eavesdropping statute, MCL § 750.539 *et seq.*, does not prohibit a party to a telephone conversation from tape recording conversation absent consent of all other participants. Sullivan v. Gray, 117 Mich. App. 476 (1982). The consumer may not allow a third party to listen in to the conversation without the consent of all parties to the phone call.

⁹ NB: If the consumer and the dealer are not both in Michigan, consult the eavesdropping statute's in foreign jurisdictions before advising the caller to tape record conversations.

It is the purpose of the Truth in Lending Act¹⁰ (“TILA”) to assure a meaningful disclosure of credit terms in order to prevent the uninformed use of credit and to protect consumers against inaccurate and unfair practices involving certain credit sales. Meaningful and timely disclosures of the terms of financing provide consumers with knowledge of the "true" cost of credit prior to consummation of the transaction.

¹⁰ 15 U.S.C. § 1638 *et seq.*

In the yo-yo sale, the dealer treats the transaction as conditional, in spite of the fact that the consumer has signed a binding retail installment contract which contains all of the terms of the contract and mentions nothing about a condition precedent. As a result of this undisclosed condition, it cannot be determined when the financing begins; in turn, the first payment period is shortened and this significantly affect the annual percentage rate calculation. Failure to accurately disclose the applicable annual percentage rate is a violation of the TILA¹¹ and entitles the consumer who prevails to recover statutory damages equal to twice the finance charge along with costs and attorneys fees.¹²

In many of these cases, the dealer will attempt to defend by stating that the financing fell through because the consumer committed fraud on the credit application. Usually, this allegation can be refuted factually (especially if you have a tape recording which contradicts this allegation of fraud), but it is important to note two legal points of import. First, as a matter of law, the financing did not fall through. The car dealer is the “creditor” under all of the federal credit reform statutes including the TILA.¹³ As such, where the car dealer arranges the financing, the car dealer provides the financing. Most retail installment contracts will identify the dealer as the creditor. The second important point of law is:

¹¹ 15 U.S.C. § 1638(a)(3); Reg Z § 226.18(32); Reg Z § 226.22.

¹² 15 U.S.C. § 1640.

¹³ The dealer is a creditor under the TILA where -- in the ordinary course of its business -- it regularly extended or offered consumer credit for which a finance charge is, or may be imposed or which, by written agreement is payable in more than four installments and is the person to whom the transaction which is the subject of this action *is initially payable*, and is a “creditor.” 15 U.S.C. § 1602(f) and regulation Z § 226.2(a)(17).

Fraud is not a defense to a TILA violation.¹⁴ Nowhere in the statute nor in Regulation Z is their provision for any fraud defense to a TILA violation.

2. The Motor Vehicle Installment Sales Contract Act

¹⁴ *Purtle v Eldridge Auto Sales, Inc.*, 91 F.3rd 797 (6th Cir. 1996), held that fraudulent inducement of a credit agreement is not a defense to liability under the TILA. "[O]nce a court finds a violation of the TILA, no matter how technical, the court has no discretion as to the imposition of civil liability."

The Michigan Motor Vehicle Installment Sales Contract Act¹⁵ (“MVISCA”) requires car dealers to properly complete all the necessary terms of the installment contract.¹⁶ In the yo yo sale, the most basic and necessary term is intentionally misrepresented: whether the contract is binding or conditional. The MVISCA provides for statutory damages in the amount of the finance charge.¹⁷

It is likely that during the course of litigation, the dealer will assert that the condition precedent was disclosed – in tiny, red letters – somewhere on the document entitled “purchase agreement” or “buyer’s order” or else in a “rider” or “addendum” to the installment contract. Under the MVISCA (and the Motor Vehicle Sales Finance Act¹⁸), all agreements between the customer and car dealership have to be included in one installment contract.¹⁹ Thus, the terms in the “purchase agreement” or “buyer’s order” are not binding, as a matter of law, in a credit sale. Neither are the conditional terms in the “rider” nor “addendum.”²⁰

3. The Equal Credit Opportunity Act

It is the function of the Equal Credit Opportunity Act²¹ (“ECOA”) to provide consumers with clear and unambiguous notice of whether or not credit has been extended, and if such credit is

¹⁵ M.C.L. § 566.301 *et seq.*

¹⁶ “The written instrument shall contain all of the agreements of the parties made with reference to the subject matter of the retail installment sale” M.C.L. § 566.302

¹⁷ M.C.L. § 566.302

¹⁸ M.C.L. § 492.114

¹⁹ *Rugumbwa v. Betten Motor Sales*, 136 F.Supp.2d 729 (WD Mich 2001).

²⁰ *Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321 (WD Mich 2000).

²¹ 15 U.S.C. § 1691 *et seq.*

denied or revoked, to inform the consumer of the reasons for denial. This function furthers the statute's salutary purpose of eliminating discriminatory lending practices through a record-keeping process. In so doing, the statute mandates a complete documentary trail establishing, when and why credit is denied.

In the yo yo deal, the consumer is initially informed that the credit application has been approved in spite of the fact that the dealer knows this to be a lie. This false credit approval violates the ECOA and its regulations.²² The ECOA mandates that a credit decision be made by the dealer within 30 days of receiving a complete application, and that the dealer provide an accurate notice of that decision²³. In instances where the credit application is subsequently rejected without a counteroffer and the client is told to bring the vehicle back, ***the dealer***, along with ***all of the potential third-party finance companies that considered the credit application***, must provide the consumer with a written adverse action notice under the ECOA.²⁴ The failure to maintain records under the ECOA is also actionable.²⁵ Damages under the ECOA are statutory, punitive damages are available and the prevailing

²² Regulation B, 12 C.F.R. § 202.9

²³ 12 C.F.R. § 202.9(a)(1)

²⁴ 12 C.F.R. § 202.9(a)(2)

²⁵ 12 C.F.R. § 202.12

party may recover costs and attorneys fees.²⁶

4. The Fair Credit Reporting Act

²⁶ 15 U.S.C. § 1691e

The Fair Credit Reporting Act²⁷, *inter alia*, requires users of credit reports to provide written adverse action notices to consumers who have been denied credit as a result of information obtained from a credit report.²⁸ In a yo yo scenario, where a credit report is accessed and the consumer is told to bring the vehicle back, ***the dealer***, along with ***all of the potential third-party finance companies that considered the credit application*** must provide the consumer with a written adverse action notice under the FCRA. Statutory damages, punitive damages and attorneys fees are available for a wilful violation of the FCRA.²⁹

5. Federal Motor Vehicle Cost Savings and Information Act

The Federal Motor Vehicle Cost Savings and Information Act,³⁰ and its regulations,³¹ require certain disclosures to be made in writing and on the certificate of title. In many yo yo cases, the purchaser never sees the title at the time the rest of the transactional documents are executed. In this way, the Federal Motor Vehicle Cost Savings and Information Act is violated. The greater of treble actual damages or \$1,500.00 and attorneys fees are available for a violation of this statute with intent to defraud.³²

6. Other Remedies

²⁷ 15 U.S.C. § 1681 *et seq*

²⁸ 15 U.S.C. §1681m *et seq*.

²⁹ 15 U.S.C. § 1681o and 15 U.S.C. § 1681n

³⁰ 49 U.S.C. § 32701 *et seq*.

³¹ 49 C.F.R. § 580.1 *et seq*.

³² 49 U.S.C. § 32705

Depending on the specific facts, there may be other more familiar remedies available to the consumer who is the victim of a yo yo scam. These remedies may be pursued under the Michigan Consumer Protection Act,³³ the Conversion Statute,³⁴ common law conversion, breach of contract and fraud.

4. *Conclusion*³⁵

A “spot delivery” occurs when a consumer and an auto dealer sign an installment contract for the sale and finance of a vehicle and where the consumer takes delivery, “on the spot,” before the dealer has assigned the contract. The sale becomes a “yo yo” scam when the dealer changes the terms of the contract based on an undisclosed condition or a condition in a document other than the financing document. The practice illegal and deceptive. Consumer advocates should be able to recognize the situation and provide effective advice and representation.

³³ M.C.L. § 445.901 *et seq.*

³⁴ M.C.L. § 600.2919a *et seq.*

³⁵ See, www.michigan.gov/documents/cis_ofis_spotdeli_23752_7.pdf