Consumer Law Newsletter

Volume 8, No. 2

August 2003

State Bar of Michigan Consumer Law Section

Auto Litigation Expert to Address Section Annual Meeting

Tom Domonoske

Tom Domonoske, a nationally-recognized litigator handling auto sales fraud cases, will be the featured speaker at the Consumer Law Section annual meeting, to be held Thursday, September 11, 1:30 pm, at the State Bar Annual Meeting at the Lansing Center.

Tom has handled numerous federal and state auto, mobile home and home improvement cases. He was counsel for the plaintiffs in *Polk v Crown Auto*, 221 F 3d 691, a seminal case in which the Fourth Circuit held that TILA was violated when a car dealer did not provide financing disclosures in a written form the consumer could keep before the agreement was signed, so that the consumer could take the documents without signing them and compare deals.

Thomas Domonoske began practicing law in California in 1990 before moving to North Carolina where he taught classes at the University of North Carolina Law School. He then practiced as a legal aid lawyer with the Virginia Legal Aid Society at its Farmville office from 1993 to 1996. From July 1996 through August 2000, he was a Senior Lecturing Fellow at Duke Law School. While at Duke, he maintained a small consumer law practice in Virginia through an Of Counsel relationship with the Law Office of Dale W. Pittman. Starting August 2000, he returned to the practice of law in Virginia with that office.

Tom has published articles about autofraud, about Virginia titling laws, about illegal lease termination provisions, about compliance with the Truth in Lending Act's disclosure requirements, and about how the federal consumer protection laws strengthen the economy in the National Association of Consumer Advocates's *The Consumer Law Advocate*. Articles on processing fees in car sales, on the Fair Credit Reporting Act, and on arbitration have appeared in the Virginia Trial Lawyers Association's *The Journal*. Additionally, he has contributed to drafting new subsections of the National Consumer Law Center's *Truth in Lending Act Manual*. In the past six years he has given over sixty consumer law trainings at various events around the country. He sits on the board of the National Association of Consumer Advocates and is regularly consulted by lawyers from around the country for his analysis.

Consumer Law Section Annual Meeting Notice

Thursday, September 11
1:00 Business meeting
1:30 Program
Lansing Center, Room 103

Featured Speaker:

Tom Domonoske, Harrisonburg, VA
Speaking on "Auto Fraud"

Presentation of Frank J. Kelley Consumer Advocacy Award

To John Schneider, Lansing State Journal columnist

Election of Section Officers and Council Members

(See back page for nominations and election information)

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COUNCIL 2002-2003

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From the Chair

The 2002-2003 term of the Consumer Law Section is the Section's eighth year. Membership continues to increase, to over 500 members currently. Throughout this term, the Section and its Council have continued to promote Section goals of raising the profile of consumer law practice within the profession, providing assistance to members, and advancing both the effective practice of consumer law and the interests of Michigan consumers.

As Chair, I would like to thank all Section and Council members for their commitment and service to the goals of the Section. I would particularly like to thank Gary Victor and Ian Lyngklip, who will be presenting a consumer law education seminar on behalf of the Section at the fall conference of the District Court Judges Association in Frankenmuth. Also Fred Miller, who continues to be instrumental to the publication of the Section newsletter and Josh Ard, who as Section list manager, has increased access and use of the Section listserv.

At the September 11, 2003 Section meeting, to be held in conjunction with the State Bar Annual Meeting at the Lansing Center, Steve Goren will take over as the Section Chair. The program at the meeting will feature Tom Domonoske, a nationally recognized expert on auto fraud issues and litigation strategies. I appreciate the privilege of having been permitted to serve as the Chair of the Consumer Law Section this term, and hope to see you at the September meeting.

Kathy Fitzgerald, Section Chair

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

By Adam G. Taub

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 that 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 that are violated when a car dealer engages in this most unfair and deceptive practice.

Recognizing the Yo-Yo Sale

In most cases, a distraught consumer describes a vehicle purchase that 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 that 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 resistence 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 that 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 wear[3]. 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 that 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."

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:

Get Everything Valuable out of the Vehicle. It is important to let the potential client know that the dealer may repossess the vehicle, in spite of the prohibitions in UCC Article Nine[4] and the penal code[5]. 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.

Collect all of the paperwork. All of it! Especially the temporary plate. Many of us throw all the transactional paperwork in the glove compartment after we buy a vehicle. If the vehicle

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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.

Document the Dealer's excuses. 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 that, 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.

Causes of Action

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

The Federal Truth in Lending Act. It is the purpose of the Truth in Lending Act[10] ("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.

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 affects the annual percentage rate calculation. Failure to accurately disclose the applicable annual percentage rate is a violation of the TILA[11] 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: 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.

The Motor Vehicle Installment Sales Contract Act. The Michigan Motor Vehicle Installment Sales Contract Act[15] ("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 Act[18]), 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]

The Equal Credit Opportunity Act. It is the function of the Equal Credit Opportunity Act[21] ("ECOA") to provide consumers with clear and unambiguous notice of whether or not credit has been extended, and if such credit is 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 decision[23]. 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 party may recover costs and attorneys fees.[26]

The Fair Credit Reporting Act. The Fair Credit Reporting Act[27], 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]

Federal Motor Vehicle Cost Savings and Information Act. The Federal Motor Vehicle Cost Savings and Information Act, [30] and it's 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]

Other Remedies. 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.

STATE OF MICHIGAN

EUGENE W. KUTHY
Commissioner

FINANCIAL INSTITUTIONS' BUREAU
P.O. Box 30224Lansing, Michigan 48909

JAMES J. BLANCHARD, Governor
DEPARTMENT OF COMMERCE
DOUG ROSS, Director

May 22, 1989

To The Licensee Addressed:
Re: "Spot Delivery"

In recent examinations of motor vehicle installment sellers, the Financial Institutions Bureau has uncovered several examples of the practice of "spot delivery". As it has been explained to us, a "spot delivery" occurs when a buyer and seller sign an installment contract for the sale of a vehicle and the buyer takes delivery of the vehicle "on the spot". The buyer agrees, usually by signing a rider to the contract that the contract is void if the seller does not assign it within a certain number of days. If the contract is void, the buyer must either pay the balance in full or return the vehicle, pay for any damage, and sometimes pay rent or for "excessive mileage".

The intent of the Motor Vehicle Sales Finance Act (Act) is to protect installment buyers. The Act does so in several ways, including requiring a certain form of written installment sale contract which discloses important information. The Act also prohibits some contract terms, including any agreement whereby a buyer waives rights granted by the Act, and a provision whereby the seller can accelerate the balance because he deems himself insecure.

The seller has a choice whether or not to assign a contract. The seller has sole control over the effort he will exert to assign a contract. A contract term which requires an installment buyer to waive all his contract rights and protections under the Act because the seller is unable to take advantage of an optional assignment is absolutely inconsistent with the Act.

It is the Bureau's opinion that a motor vehicle installment sales contract conditioned upon assignment violates the Act. Further, the practice is coercive, unconscionable, and preys on the impulse buyer.

The Bureau intends to take appropriate enforcement action in the future for those dealers which engage in such practices.

Very truly yours,
/ss/

Murray E. Brown
Deputy Commissioner
MEB/PDG/jmb
cc: Michigan Automobile Dealers Association
Detroit Automobile Dealers Association

The Financial Institutions Bureau took a strong stand on the legality of yo-yo car sales in this 1989 opinion letter, which can be found on the website of the Department of Consumer and Industry Services, http://www.michigan.gov/documents/cis_ofis_spotdel_24239_7.pdf.

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

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an undisclosed condition or a condition in a document other than the financing document. The practice is illegal and deceptive. Consumer advocates should be able to recognize the situation and provide effective advice and representation.

Endnotes

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.

3 Until 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 credit score down.

4 MCL § 440.9610

5 MCL § 750.356

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)

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.

10 15 U.S.C. § 1638 et seq.

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).

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."

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.

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

26 15 U.S.C. § 1691e

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.

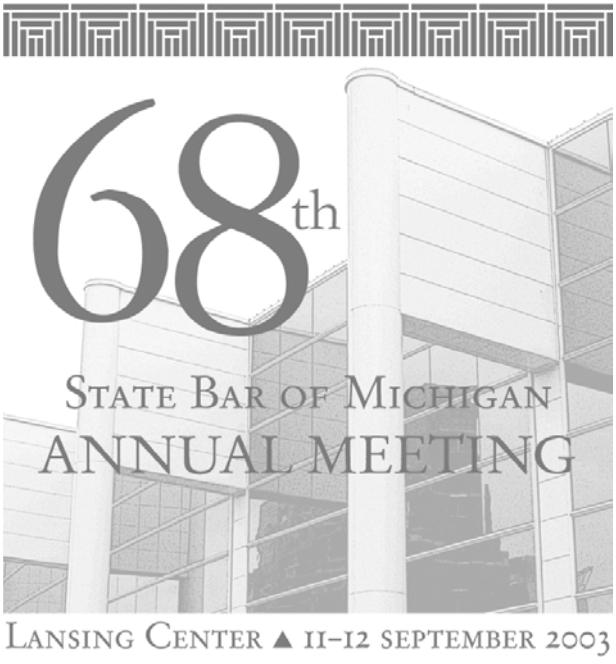
31 49 C.F.R. § 580.1 et seq.

32 49 U.S.C. § 32705

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*



Michigan Decision Nixes Mag-Moss Exception to Arbitration Clause Enforcement

By Fred Miller

The Michigan Court of Appeals rejected the argument that binding arbitration clauses in consumer warranties are barred by the federal Magnuson-Moss Warranty Act, in a published decision in July. In *Abela v General Motors*[1], the Court held that it was bound by Fifth and Eleventh Circuit federal decisions on the law, despite conflicting federal district court decisions and the absence of any Sixth Circuit ruling.

The Magnuson-Moss Warranty Act[2] issue has been among an array of issues consumer lawyers have raised to challenge the widespread use of binding arbitration clauses in consumer contracts. Magnuson-Moss sets federal standards for warranty disclosures. Since the Act details permissible pre-suit informal dispute mechanisms in warranty cases, and requires that they be non-binding, the Federal Trade Commission concluded that the Act prohibits binding arbitration clauses.[3]

"The Magnuson-Moss Warranty Act issue has been among an array of issues consumer lawyers have raised to challenge the widespread use of binding arbitration clauses in consumer contracts."

However, the two federal circuit cases disagreed, and refused to defer to the FTC.[4] The Michigan Court of Appeals deemed itself bound to apply these cases. Judge Murphy concurred, with a separate opinion to emphasize his disagreement with the holdings of the two federal appellate courts. The majority did not venture its own opinion, but cited a number of federal and state opinions at variance with the Fifth and Eleventh Circuit decisions, suggestion it was open to the argument.

If any of the federal circuit courts upholds the FTC's opinion, this conflict will open the way for a reconsideration of the issue in the Michigan courts.

The Court in *Abela* also reversed the lower court ruling that the Michigan Lemon Law[5] precludes binding arbitration clauses in motor vehicle warranties. The Court held that the Federal Arbitration Act[6] overrides the lemon statute's prohibition on waivers of "rights and remedies provided" under the Lemon Law.[7]

While the Michigan Court is correct that the U.S. Supreme Court has found a number of state laws limiting arbitration clauses preempted by the FAA, the Court of Appeals may have overstated the rule. The Court says that "the FAA surmounts any state law which invalidates agreements to submit claims to binding arbitration." However, under the FAA legal principals that apply equally to all contract clauses can be applied to invalidate arbitration clauses.[8] Thus, fraud, coercion and unconscionability in the procuring, wording or effect of arbitration clauses have been held to invalidate the clauses in federal and state decisions, despite the FAA. Since the Lemon Law provision is a general anti-waiver statute, not directed at arbitration clauses, its even-handed application to arbitration clauses is arguably consistent with the FAA.

The Magnuson-Moss Warranty Act may still be useful to lawyers challenging arbitration clauses in some instances. Mag-Moss requires that warranty terms be disclosed "clearly and conspicuously . . . in a single document in simple and readily understood language."[9] In *Cunningham v Fleetwood Homes*[10], the Eleventh Circuit held that these disclosure requirements invalidated an attempt by the manufacturer to enforce an arbitration clause drafted by the selling dealer outside the warranty documents. Thus, while Mag-Moss is not, at least for the time being, a means to invalidate all binding arbitration clauses in warranties, at least it may be used to attack the some of the more obscure buried arbitration clauses.

Endnotes

1 ___ Mich App ___ (July 15, 2003).

2 15 USC 2301 et. seq.

3 40 Fed Reg 60168, 60210 (1975).

4 *Davis v Southern Energy Homes*, 305 F3d 1268 (11th Cir 2002); *Walton v Rose Mobile Homes*, 298 F3d 470 (5th Cir 2002).

5 MCL 257.1401 et. seq.

6 9 USC sec. 2.

7 MCL 257.1406.

8 *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20, fn 11 (1991).

9 16 CFR 701.3(a).

10 253 F3d 611 (11th Cir 2001).

Consumer Law Section Election Notice

2003 Annual Meeting Officer and Council Election
September 11, 2003, Lansing Center, 1:00 pm

Nominees:

Chairperson: Steven E. Goren
Chair-elect: Dani K. Liblang
Secretary: Laurin' Roberts Thomas
Treasurer: Lawrence J. Lacey

Council:

seats expiring 2006:
Gary Victor
John Roy Castillo
Clarence Constantakis

1 seat expiring 2005:
Terry Adler

Nominations will also be accepted from the floor.

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