Vol. 27, Issue 4 October 2024

SPOT Delivery®

A Monthly Legal Update for Auto Dealers and Finance Companies *from* CounselorLibrary®, *publisher of* CARLAW®

PRIVACY

Recent State and Federal Developments Regarding Collection and Use of Driver Data

By Frank H. Bishop, Jr.*

A lawsuit filed by the Texas attorney general and a letter from two U.S. senators to the Federal Trade Commission highlight the increased concern of the public and policymakers regarding the collection of driver data by major automakers and the sale of that data to third parties, including auto insurance companies, that use the data to determine whether to provide insurance coverage and the premiums they will charge consumers. The senators describe their initial investigation into this matter as "likely just the tip of the iceberg." We think that description is apt and predict that these practices are going to generate substantial state and federal litigation as well further regulatory scrutiny.

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STATE ENFORCEMENT

It Was a Cruel, Cruel Summer for Auto Dealers Selling Voluntary Protection Products

By Catharine S. Andricos*

How's the saying go? Good things come in threes? Not so this summer for several auto dealerships that were slapped with three enforcement actions in as many days by state attorneys general in Minnesota, Rhode Island, and Maryland. While the AGs alleged various claims against the dealerships, all three actions involved allegations that the dealers unlawfully added charges for voluntary protection products. Here's a closer look at the sales practices the AGs alleged to be deceptive.

The Minnesota AG had sued a used car dealer in April, alleging that the dealer illegally added expensive vehicle service contracts to consumers' purchases without their consent. On July 30, 2024, a Minnesota state court ordered the dealer to comply with certain demands from the AG, including that the dealer make clear and conspicuous disclosures about

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CounselorLibrary®

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Spot Delivery is published monthly except for a combined January/February issue (11 issues per year) by CounselorLibrary.com, LLC, 7037 Ridge Road, Suite 300, Hanover, MD 21076-1426; 877.464.8326.
Subscription is $349.00 per year.

Monthly issues, including all back issues, are also available online at www.counselorlibrary.com.

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On July 26, 2024, Senators Ron Wyden and Edward Markey wrote a letter to FTC Chair Lina Khan, urging the FTC to investigate the disclosure of consumer driving data by automakers to data brokers. The letter describes the investigation of these practices by the senators' staffs and provides information uncovered during the course of that inquiry. The investigation began when *The New York Times* published articles detailing the sharing of data from internet-connected automobiles by automakers to data brokers for resale to insurance companies. Senator Wyden's staff subsequently determined that at least three auto manufacturers (General Motors, Honda, and Hyundai) shared that data, including acceleration and braking data, with Verisk Analytics and other data brokers.

According to the senators, Verisk essentially acts as a credit agency for drivers. One of the company's products, which has apparently been discontinued, scored drivers on their safe driving habits using the information derived from their internet-connected cars. Verisk used this data to prepare Driving Behavior Data History Reports, which were sold to auto insurance companies (and also repackaged back to the automakers). The automakers reportedly either made it a requirement for a consumer to enroll in the data mining program or automatically enrolled all consumers in the program. The senators argue that the role of Verisk was obscured in the disclosures that the automakers provided to consumers.

For example, the letter alleges that GM failed to obtain informed consent from consumers before sharing their data and also used manipulative design techniques (also known as dark patterns) to coerce consumers into enrolling in its Smart Driver program. The senators argue that the information presented by the automaker before obtaining the consumer's opt-in did not disclose to consumers that their driving data would be shared with Verisk and others. Senator Wyden's office additionally learned that the automaker shared location data on all drivers who activated the internet connection for their car, even if they did not enroll in the Smart Driver program.

More specifically, the letter alleges that:

- General Motors shared consumer data from 8 million vehicles with data brokers;
- Hyundai shared data from 1.7 million cars with Verisk, which paid Hyundai $1,043,315.69 (61 cents per car); and
- Honda shared data from 97,000 cars with Verisk, which paid Honda $25,920 (26 cents per car).

The letter also alleges that the automakers misled consumers

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by advertising these programs as a way to lower their insurance bills, without disclosing that some insurers might charge some drivers more based on their telematics data. For instance, Honda described its program to consumers as a way to "get rewards for better driving" and stated that their information would be used to "determine … eligibility for insurance discounts." According to the senators, Verisk confirmed that its contracts with automakers and insurers did not require that driver telematics data only be used to provide discounts. In addition, the senators recount anecdotal reports of telematics data being used by an insurance company to increase rates in some cases. The letter also points out that only a handful of states prohibit the use of such data in setting premiums for consumers.

In conclusion, the senators take the position that companies should not be selling consumer data without the informed consent of the companies' customers. They argue that the FTC should hold senior company officials responsible for their alleged abuse of their customers' privacy. "The problematic practices we have uncovered and documented in this letter are likely just the tip of the iceberg," the senators write in the letter. "We focused our oversight efforts on automakers' relationship with one specific data broker in order to determine if there is a problem that warrants further oversight by federal regulators."

On August 13, 2024, Texas Attorney General Ken Paxton sued GM and OnStar for violating the Texas Deceptive Trade Practices – Consumer Protection Act, which prohibits false, misleading, or deceptive acts or practices in the conduct of trade or commerce. Under the Act, the AG can pursue a civil penalty of not more than $10,000 per violation, and if the act or practice was calculated to deprive a consumer who was 65 years of age or older when the act or practice occurred of money or other property, an additional amount of not more than $250,000. The AG may also seek reimbursement of attorneys' fees and court costs.

In the complaint, the AG alleges that, since 2015, GM has installed technology in its vehicles that can collect, record, analyze, and transmit data about the vehicle's usage. In addition, GM and OnStar have unlawfully sold the data to insurance companies and other third parties. The information collected and sold by GM was obtained from over 1.5 million vehicles owned by Texas residents, including 275,000 in 2023. The data collected included, among other things, the date, start time, end time, vehicle speed, driver and passenger seatbelt status, distance driven, fuel usage, and use of other GM products, including data from GM mobile apps.

GM allegedly hired Verisk, Wejo Limited, LexisNexis Risk Solutions, and Jacobs Engineering Group to use this data to build a database called a telematics exchange, the purpose of which was to calculate a customer driving score based on certain risk factors such as late night driving, failure to use a seat belt, and instances of sharp turns, hard breaking, quick acceleration, and driving in excess of 80 miles per hour. GM then entered into licensing agreements to provide car insurance companies and other third parties access to the telematics database and the driving scores. The insurers used the data to make decisions that impacted customers, including monthly premium increases, dropped coverage, and coverage denials. In exchange, GM received royalty payments and licensing fees from the insurance companies.

The AG alleges that GM engaged in misleading and deceptive acts and practices to obtain customer consent to enroll in OnStar products, such as connected vehicle services and GM and OnStar apps. As part of its onboarding process after selling or leasing a vehicle to a customer, GM electronically presented the customer with over 50 pages of disclosures about OnStar products. The disclosures described the customer benefits of the products and implied that the data collected by GM would be used primarily to improve the safety, functionality, and operability of its vehicles. According to the AG, the disclosures failed to inform customers that GM would sell any of their data or that it would be using that data to build a telematics database that would be sold or licensed to insurance companies. The AG also alleges that GM incentivized its dealership employees through commissions to enroll customers in the data collection program. In addition, if a customer attempted to decline to enroll in the OnStar program, the customer would be given various

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The common allegations evidence state enforcers' heightened scrutiny of dealers' sales practices, particularly when the sales involve add-on VPPs.

optional service contracts the dealer sells. The court's order also requires the dealer to: stop marketing and selling used cars as "certified"; disclose and honor warranties required by law; provide easy-to-understand "Buyer's Guide" disclosures; cease conducting business under an unregistered trade name that targets and exploits Spanish speakers; and provide disclosures and documents in Spanish whenever a sale is conducted in Spanish.

The same day, six Rhode Island dealerships filed Assurances of Voluntary Compliance in response to the state AG's allegations that they automatically charged, or attempted to charge, consumers fees for add-on theft deterrent warranties that were not included in the vehicles' advertised prices. The AG alleged that these fees violated Rhode Island law requiring dealers to honor advertised prices and prohibiting dealers from charging consumers fees for products without first obtaining their express, informed consent. The AG also alleged that some of the dealers suggested that their asking price was the manufacturer's suggested retail price when in fact their asking price was significantly higher than the MSRP.

Just two days later, on August 1, 2024, the Maryland AG filed charges against a dealer, alleging that the dealer engaged in unfair or deceptive trade practices by, among other things, deceptively charging consumers more for their vehicles than the prices for which they were advertised, including for already installed equipment and dealer markup, and by financing the sale of added voluntary protection products in an unlawful manner. The AG also alleged that the dealer deceptively packed vehicle sales transactions with unwanted equipment and products, charged consumers a fee that the dealer misleadingly called a "sales commission" and "optional," when the fee was not a commission and consumers were unaware of their option to not pay the fee, and failed to disclose and itemize all goods and services that consumers are paying for when they purchase a new vehicle and the cost of those services and products, as required under state law.

While the court filings and orders do not detail each dealer's precise sales practices, it is significant that all three actions raise concerns similar to those that the Federal Trade Commission has repeatedly expressed in its efforts to finalize the CARS Rule and that we have heard from other federal and state law enforcers over the last year or so. The common allegations evidence state enforcers' heightened scrutiny of dealers' sales practices, particularly when the sales involve add-on VPPs. If your dealership is not already taking steps to review and improve vehicle and VPP sales practices, it is high time for a tune up.

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warning messages stating that declining the services would result in deactivation of some of the vehicle's security features.

In an accompanying press release, Attorney General Paxton wrote: "Our investigation revealed that General Motors has engaged in egregious business practices that violated Texans' privacy and broke the law. We will hold them accountable. Companies are using invasive technology to violate the rights of our citizens in unthinkable ways. Millions of American drivers wanted to buy a car, not a comprehensive surveillance system that unlawfully records information about every drive they take and sells their data to any company willing to pay for it."

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ARBITRATION

District Courts Address Scope of Arbitration Provisions

By Latif Zaman*

Arbitration agreements can provide motor vehicle dealers, as well as subsequent assignees of motor vehicle retail installment sale contracts, significant protection against consumer lawsuits. However, obtaining the benefits of arbitration requires a carefully drafted agreement that is clear as to its scope, both as to the covered parties and covered issues. To this end, arbitration agreements should often include delegation clauses, expressly having the parties agree that threshold matters regarding the scope of the arbitration agreement will also be subject to arbitration. In two recent federal district court cases, the courts allowed assignees of motor vehicle RISCs to compel arbitration of lawsuits, despite the fact that those assignees were not parties to the related arbitration agreements.

In one case, the U.S. District Court for the District of South Carolina addressed a collection agency's motion to compel arbitration of a consumer's Fair Debt Collection Practices Act claim based on an arbitration provision in the consumer's motor vehicle purchase agreement. The consumer had purchased the vehicle from a dealer pursuant to a credit sale. The consumer later sued the dealer for allegedly furnishing inaccurate account information to consumer reporting agencies. At some point after the parties entered into a settlement agreement, the dealer assigned the contract to a collection agency. The consumer subsequently sued the collection agency for alleged violations of the FDCPA. The court granted the collection agency's motion to compel arbitration.

The court found that the delegation clause in the purchase agreement's arbitration provision required the claims to be submitted to arbitration. The arbitration provision stated: "Any claim or dispute, whether in contract, tort or otherwise (including the interpretation and scope of this clause and the arbitrability of any issue), between you and us or our employees, agents, successors or assigns, which arises out of or relates in any manner to the purchase, financing, or lease of your vehicle or any resulting transaction or relationship (including any such relationship with third parties who do not sign this Arbitration Agreement, such as an assignee of the Contract or Lease Agreement) shall, at your or our election (or the election of any such third party), be resolved by neutral, binding arbitration and not by a court action." The court concluded that this language required disputes, including disputes regarding arbitrability, related to the purchase or financing of the vehicle, including disputes between the consumer and an assignee of the dealer, to be sent to an arbitrator. Notably, the court also determined that the settlement agreement did not revoke the arbitration provision contained in the purchase agreement because it did not reference the arbitration provision. The court noted that the settlement agreement stated that it was "the entire, final, and complete agreement of the Parties relating to the subject of this Agreement." The court interpreted this language to limit the application of the settlement agreement to the parties to the agreement and to the lawsuit being settled.

… obtaining the benefits of arbitration requires a carefully drafted agreement that is clear as to its scope, both as to the covered parties and covered issues.

In another case, the U.S. District Court for the Central District of California also granted an assignee collection agency's motion to compel arbitration filed in a consumer class action lawsuit pursuant to the arbitration agreements signed in connection with the finance contracts. The court found that the collection agency provided sufficient evidence that it was the servicer and/or assignee of the finance contracts and, therefore, was entitled to enforce the arbitration agreements. It also found that the arbitration agreements specifically applied to claims or disputes between the plaintiffs and agents or assignees of the assigning dealer. Next, the court found that the plaintiffs' challenge to the arbitration agreements based on

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LEGAL COMPLIANCE

Pay Now or Pay Later, But Paying Later May Cost a Whole Lot More

By Eric L. Johnson*

The Consumer Financial Protection Bureau has long required that an institution within the scope of its supervision or enforcement authority, including both depository institutions like banks and non-depository consumer financial services companies like auto finance companies, develop and maintain a written, sound, and robust compliance management system, or CMS, that is integrated into the overall framework for a product's design, delivery, and administration across the institution's entire product and service lifecycle.

In the CFPB's view, a sound and robust CMS is how an institution, among other things, establishes its federal law compliance responsibilities and maintains legal compliance. Institutions are also expected to manage relationships with service providers to ensure that those providers effectively manage compliance with federal consumer financial laws applicable to the product or service being provided. The CFPB has routinely requested those that it supervises/examines and even those against which it has enforcement authority to provide it with a copy of the entity's CMS.

As a refresher, a CMS is how an institution: (1) establishes its compliance responsibilities; (2) communicates those responsibilities to employees; (3) ensures that responsibilities for meeting legal requirements and internal policies and procedures are incorporated into business processes; (4) reviews operations to ensure that responsibilities are carried out and legal requirements are met; and (5) takes corrective action and updates tools, systems, and materials as necessary.

The CFPB claims that an effective CMS commonly has two interdependent control components: (1) board and management oversight; and (2) a compliance program, which includes policies and procedures, training, monitoring and/or audit, and consumer complaint response. Mind you that this is a CFPB requirement to ensure an entity's compliance with federal consumer financial services laws and regulations.

I've heard from clients over the past year or so about a new and disturbing trend at the *state* level. State regulators have been speaking with their counterparts at the CFPB, and some have really beefed up their examination procedures. Prior to or during a state examination, some state regulators have been requesting that the licensee provide them with a copy of their CMS or compliance management program and other policies and procedures. What used to be a relatively simple and straightforward state exam with a request for a few reports and a questionnaire about a licensee's practices has turned into a near-hundred-item examination.

Plus, the state regulators are taking after their federal brethren and asking for a copy of the licensee's policies, procedures, and/or manuals relating to various aspects of the licensee's advertising; marketing; underwriting; originations; fair lending; servicing and collections; affiliates and related organizations; service providers; training policies and procedures; information technology and cybersecurity; written risk assessments; complaint management; monitoring; and internal and external audit reports. Sound familiar? It should; this sounds as though the state regulators are asking for a written, sound, and robust CMS from the licensee.

Some state regulators may simply request that the licensee provide a copy of its CMS or compliance management program and will just "check the box;" the licensee either has one or it doesn't. However, some state regulators take their roles and examinations very seriously and consider the failure to have a CMS as a major deficiency. If the licensee has to fess up and admit that it doesn't have a written CMS or compliance management program in place, then some state regulators will request the licensee to describe in great detail the procedures and methods that it uses to ensure that it's complying with the law.

If you don't have a written, sound, and robust CMS that meets the requirements identified by the CFPB, you can't hide from your duty any longer because state regulators could ask you to provide it as part of your state examination. So, you can either bite the bullet and pay the piper to have the CMS prepared now, or you can wait until you get that examination letter from

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either the CFPB or a state regulator demanding a copy of your CMS and policies and procedures and then have to quickly scramble to get everything in place before your examination.

Trust me; it's going to cost you a whole lot more time, effort, and money to get the CMS rushed into place when you do get that examination letter or Civil Investigative Demand (if it is even possible to do so in such a typically short window) than if you had put the CMS and policies and procedures in place when you were not on that tight deadline. The examination and CID demands also typically ask for other reports and documents, so will you actually have enough time to prepare a CMS that's integrated into the overall framework for a product's design, delivery, and administration across your company's entire product and service lifecycle AND get it approved by the Board of Directors before the examination date? Highly, highly doubtful.

Additionally, by rushing through things and slamming a CMS in place, you're likely to miss something, possibly something particularly important. Finally, hurrying to put your CMS and policies and procedures in place will be readily apparent to the federal and/or state regulator. The regulator is not likely to go easy on your examination (or enforcement) if it looks like you've scrambled to put something together before the examination.

Enhanced examination procedures appear to be a concerning trend at the state level, and we're sure to see more state regulators demand that a licensee provide a copy of its CMS. Take some time to speak with your friendly compliance lawyer about your CMS and policies and procedures before you get that examination letter or CID.

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The CFPB issued its annual report on agency activities related to the Fair Debt Collection Practices Act. For information on the report, see the **CFPB Watch** on page 15.

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unconscionability should be decided by an arbitrator pursuant to the delegation clause in the arbitration agreements, noting that the plaintiffs did not challenge the enforceability of the delegation clause specifically, only the enforceability of the arbitration agreements as a whole. Therefore, the court reasoned, any arguments concerning the arbitrability of the agreements, including unconscionability, must be determined by an arbitrator.

If you're concerned that your arbitration agreements are not up to snuff or haven't been reviewed recently, now would be a good time to have a discussion with competent counsel.

Queen-Gilbertson v. U.S. Auto Sales, Inc., 2024 U.S. Dist. LEXIS 109022 (D.S.C. June 20, 2024), and *Hueston v. Westlake Portfolio Management, LLC*, 2024 U.S. Dist. LEXIS 113825 (C.D. Cal. June 27, 2024).

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WARRANTY LAW

Restitution Amount Under California's Song-Beverly Consumer Warranty Act May Not Be Reduced by Amount Car Owner Recovered by Trading In or Selling Defective Vehicle

By Catherine C. Worthington*

California's Song-Beverly Consumer Warranty Act and other states' similar laws, often known as "Lemon Laws," protect buyers of certain consumer goods, including motor vehicles, in the event the goods purchased are defective. Remedies for Lemon Law violations vary, but one option is restitution, the purpose of which is to return the parties to their pre-sale positions. But what does restitution look like? A California case gives some insight.

Lisa Niedermeier bought a new Jeep Wrangler in 2011 for approximately $40,000. Over the years that she owned the Wrangler, Niedermeier brought it in for repair multiple times. In 2015, Niedermeier requested that FCA US LLC, the manufacturer, buy back the vehicle. When FCA refused, Niedermeier traded in the vehicle to a GMC dealership and received $19,000 off the purchase price of a GMC Yukon. Niedermeier later sued FCA for breach of express and implied warranties under the Song-Beverly Act. A jury found in favor of Niedermeier for breach of express warranty and awarded her damages of $39,584—$39,799 for the purchase price of the Wrangler, plus certain charges, taxes, fees, and $5,000 in incidental and consequential damages, minus $5,215 for her use of the Wrangler before first bringing it in for repair. The jury also awarded her a civil penalty of $59,377, representing 1½ times the damages. FCA filed a motion requesting that the court reduce the damages by $19,000 to reflect the amount Niedermeier received when she traded in the Wrangler and then recalculate the civil penalty to equal 1½ times the reduced damages. The trial court denied the motion. The appellate court reduced the damages as FCA requested and reduced the civil penalty, but not as much as FCA requested.

The Supreme Court of California reversed the appellate court's decision. The Song-Beverly Act permits new vehicle buyers who have been damaged by a manufacturer's failure to comply with the Act to sue under Section 1794 for the recovery of damages and other relief. The measure of a buyer's damages in such an action includes "replacement or reimbursement as set forth in subdivision (d) of Section 1793.2." If a manufacturer is unable to repair a new vehicle after a reasonable number of attempts, Section 1793.2, subdivision (d), requires the manufacturer to promptly replace the vehicle or promptly pay restitution "in an amount equal to the actual price paid or payable by the buyer," as specified. The manufacturer is entitled to reduce the amount of restitution by the "amount directly attributable" to the buyer's use of the vehicle prior to the time the buyer first delivered the vehicle for repair.

The state high court considered whether, in an action under Section 1794, the measure of restitution set forth in Section 1793.2, subdivision (d)(2), must be reduced by proceeds a buyer has received when trading in or selling a defective vehicle and, if so, whether the reduction should be assessed before or after penalties are calculated. (The high court noted that because Niedermeier traded in her vehicle, the issue before the appellate court was limited to whether the restitution remedy included the amount she recovered by trading in the vehicle. The high court agreed with FCA that the same analysis would apply to proceeds from the sale of a defective vehicle. Therefore, the high court's analysis encompasses cases in which the buyer trades in or sells a defective vehicle.) The appellate court concluded that the restitution remedy does not include the amount a plaintiff recovers after trading in a defective vehicle and, therefore, reduced Niedermeier's damages award by the trade-in amount. The high court disagreed. The high court concluded that the amount a car owner recovers by trading in or selling a defective vehicle does not reduce the restitution remedy set forth in Section 1793.2, subdivision (d)(2), at least where, as here, the owner has been forced to trade in or sell the defective

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The high court concluded that the amount a car owner recovers by trading in or selling a defective vehicle does not reduce the restitution remedy set forth in Section 1793.2, subdivision (d)(2), at least where, as here, the owner has been forced to trade in or sell the defective vehicle due to the manufacturer's failure to comply with the Song-Beverly Act.

vehicle due to the manufacturer's failure to comply with the Song-Beverly Act. Given this conclusion, the high court did not address the issue of when such a reduction, if it were authorized, should be assessed.

Obviously, the outcome of this case (and future cases like it) is not only fact-specific but also state law-specific. Before you're faced with a Lemon Law claim, consult your state law (and with your legal counsel) to understand the different remedies that may be available to the consumer so that you are in a better position to resolve the matter quickly and hopefully in advance of litigation.

Niedermeier v. FCA US LLC, 2024 Cal. LEXIS 1075 (Cal. March 4, 2024).

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The CFPB settled with a national bank over claims that the bank violated the Fair Credit Reporting Act and the Consumer Financial Protection Act. For more on the CFPB's allegations and the settlement terms, see the **CFPB Watch** on page 14.

When Is a Sale Final? Not Always as Early as You'd Like It to Be

By Eric D. Mulligan*

One of the first things I learned in my first-year contracts class in law school was the Uniform Commercial Code. Specifically, the class covered Article 2 of the UCC, which governs sales of goods, including motor vehicles. Though the UCC is (oddly enough) not entirely uniform among states, the differences among different states' versions of the UCC are usually small, and most of the basics are the same in every state.

Article 2 gives a buyer the right to reject goods that don't conform to the sale contract, and, in some cases, the buyer may even revoke an earlier acceptance. A buyer may revoke acceptance of an item whose nonconformity to the contract substantially impairs the item's value if the buyer has accepted the item on the reasonable assumption that the nonconformity would be cured but is not timely cured. In layman's terms, if something's wrong with the goods a buyer buys and the seller doesn't fix the problem, the buyer can go back on the purchase. Two recent cases illustrate how a buyer may revoke acceptance of a vehicle that doesn't work—and in one of them, the buyer revoked acceptance successfully even though the dealer hadn't provided a warranty.

In one case, Brent Mastrandrea bought a used car from Whaling City Auto Group, LLC. The retail installment sale contract that he signed to finance the purchase was assigned to Ally Financial, Inc. About a week after the vehicle purchase, Mastrandrea began experiencing mechanical problems with the vehicle. He brought the vehicle back to Whaling City to have it assessed and repaired, but Whaling City did not discover any problems with the vehicle. Mastrandrea then took the vehicle to another dealership, which identified the problem as a defective transmission. Mastrandrea took the vehicle back to Whaling City, but Whaling City refused to perform the repairs. Mastrandrea then attempted to revoke acceptance of the vehicle due to the defective transmission. Mastrandrea sued Whaling City and Ally Financial for breach of the implied warranty of merchantability, breach of express warranty, and revocation of acceptance under UCC Article 2. The Superior Court of Connecticut found in favor of Mastrandrea.

With respect to the breach of implied warranty of merchantability claim, the court found that Mastrandrea provided credible evidence that his vehicle was malfunctioning one week after the purchase. A technician with the dealership that found evidence of the defective transmission testified that the vehicle was in obvious need of repair and that transmission failure is characteristic of the particular model of vehicle that Mastrandrea bought. Because of the short period of time that passed between the time Mastrandrea bought the vehicle and the onset of the defect in the transmission, the court found that it was reasonable to infer that the defect existed at the time of sale. The court concluded that a vehicle with a defective transmission is not fit for the ordinary purpose for which vehicles are used—e.g., safe, sound, and reliable transportation—and that a defective transmission substantially impairs the value of a vehicle, rendering it unmerchantable.

With respect to the breach of express warranty claim, the court found that the dealership's warranty covered 100% of the cost of parts and labor for certain covered systems, including the transmission. Because the request for repair was made within the warranty period, the court concluded that the failure of Whaling City to inspect the transmission thoroughly to detect and repair its defect was a breach of its warranty.

The court then concluded that Mastrandrea's revocation of acceptance of the vehicle was proper. Finally, the court concluded that Ally Financial, as the assignee of the RISC and a holder in due course, was subject to all the claims Mastrandrea had against Whaling City. Accordingly, the court found in favor of Mastrandrea and awarded him compensatory damages.

In the other case, Sharon Dennis saw a Jeep advertised for sale by Cash Your Car, Inc., for a reduced price of $7,498 on CarGurus.com. She drove to the dealership, and William Lockmeyer, a Cash Your Car

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salesperson, presented her with a CARFAX report that confirmed the reduced price of $7,498. Lockmeyer also presented her with a sales "worksheet" that indicated a sales price of $8,643, which Lockmeyer stated included a $150 sales assistance fee and a $995 "dealer preparation" fee that covered the dealership's costs for a variety of pre-sale services. Dennis paid a $100 deposit and left the dealership.

When Dennis returned to the dealership a few days later, she was presented with a retail order sheet indicating a sales price of $10,036. She signed the retail order, two power of attorney documents that authorized Cash Your Car to obtain a vehicle title and registration on her behalf, an application for certificate of ownership, a 90-day powertrain extended warranty through Continental Warranty Inc., documents reflecting that the Jeep was being sold "as is," and a separate $1,899 Continental policy that provided coverage for 36 months or 36,000 miles.

After Dennis provided Cash Your Car with a certified check, as requested, the Jeep's dashboard warning lights lit up. Cash Your Car attempted to fix the issue by switching out the battery, but the warning lights remained on. Cash Your Car promised that it would fix the Jeep by the next day. Dennis refused to accept the Jeep and requested a refund, but Cash Your Car refused to acknowledge Dennis's revocation of the sale and continued to call her to request that she pick up the Jeep and reconsider her decision to cancel the purchase. Despite this standoff, Cash Your Car signed a Reassignment of Certificate of Ownership by Licensed New Jersey Dealer and paid $5 for a temporary tag and $131.50 to register and title the Jeep in Dennis's name. Consequently, Dennis was required to insure the Jeep, even though the Jeep, the Jeep's title, the certificate of ownership, and the license plates were not in her possession.

Dennis sued Cash Your Car under the UCC and various other state and federal laws. The trial court awarded Dennis $10,285.77 in damages for the purchase price of the Jeep and a $250 filing fee against Cash Your Car under the UCC. Cash Your Car appealed, and, deferring to the trial court's credibility determinations and "substantially for the reasons outlined in Judge Jeffrey B. Beacham's November 8, 2021 oral opinion," the Superior Court of New Jersey, Appellate Division, affirmed.

The appellate court agreed with the trial court that Dennis was entitled to revoke acceptance of the Jeep under UCC Article 2 and receive a refund where she reasonably notified Cash Your Car of her rejection because the dashboard's display of multiple warning signs rendered the Jeep nonconforming.

Why did these two buyers get to unwind their purchases after they'd already agreed to them? The short answer is that neither vehicle conformed to the contract for its sale. In other words, the buyers didn't get what they'd bargained for. Mastrandrea's car started malfunctioning a week after he bought it. The dealership at first couldn't even find the problem and later, after another dealer had identified the problem, refused to fix the car. The car's defective transmission made the car unfit for its ordinary purpose, which breached the warranty and caused the car not to conform to the contract, making revocation of acceptance proper. But Dennis's car didn't even come with a dealer warranty, so why did she get to revoke her acceptance as well? It's because Dennis never took possession of the Jeep, even though she'd paid for it. It wasn't working correctly when she came to pick it up, so she didn't take it home. In Article 2 parlance, Dennis rejected delivery of the Jeep. The court didn't elaborate on how the Jeep failed to conform to the contract, but we can guess that even an "as is" contract wouldn't call for delivery of a vehicle that had obvious problems at the time of delivery when the parties contracted for the sale of a functional vehicle. If Dennis had driven the Jeep off the lot, then the result might have been different.

The lesson from these two cases is that a sale may not be final as early as you'd like it to be, especially if the car has obvious problems.

Mastrandrea v. Whaling City Auto Group, LLC, 2023 Conn. Super. LEXIS 1801 (Conn. Super. July 5, 2023), and *Dennis v. Cash Your Car, Inc.*, 2023 N.J. Super. Unpub. LEXIS 1299 (N.J. Super. App. Div. July 27, 2023).

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WARRANTY LAW

Is a Customer Entitled to Timely Repairs Under a Manufacturer's Warranty?

By Kristen C. Yarows*

When a manufacturer promises that it will repair a vehicle's parts at no cost to the customer, does it need to make those repairs in a certain amount of time? Let's see what a federal appellate court decided in a case involving a recreational vehicle manufacturer's limited warranty and a consumer who waited months for an authorized dealership to complete repairs.

Gordon Wood bought an RV manufactured by Winnebago Industries, Inc., that came with a 3-year, 100,000-mile limited manufacturer's warranty. The warranty contained several steps that customers needed to take before they could claim that Winnebago breached its warranty obligations. These steps included presenting the RV to an authorized Winnebago service facility and providing the facility with a written list of repairs. If the customer felt that the repairs failed or were otherwise inadequate, the customer needed to contact Winnebago Owner Relations in writing with the list of defects and provide Winnebago an opportunity to repair the RV prior to claiming a breach of warranty.

Wood discovered several defects in his RV, so he took the RV to an authorized Winnebago dealership for repairs. After three months of waiting for the dealership to complete the repairs, Wood wrote a letter to Winnebago Owner Relations, listing the defects and claiming that the repairs were taking too long. Five months after dropping off his RV for repairs, Wood sent a second letter to Winnebago Owner Relations, outlining the RV's alleged defects, explaining that the dealership was taking too long to complete the repairs, and alleging that Winnebago breached its express and/or implied warranties by failing to manufacture the RV correctly and by failing to ensure that the dealership's repairs were promptly completed, which was an "essential purpose" of the warranty.

Over eight months after Wood dropped the RV off for repairs, the authorized dealer completed the repairs. A few weeks later, Wood concluded that the authorized dealer failed to fix the original defects and noticed several new ones. Wood sued Winnebago, alleging breach of warranty and violations of the federal Magnuson-Moss Warranty Act and the Nevada Deceptive Trade Practices Act. The trial court granted summary judgment for Winnebago, and Wood appealed.

The U.S. Court of Appeals for the Ninth Circuit affirmed the trial court's holding for Winnebago. The Ninth Circuit held that even if Wood complied with the warranty's pre-suit conditions by providing Winnebago with notice and an opportunity to cure the dealership's unreasonable delays, he did not establish that Winnebago had any legal obligation to ensure that the dealership's repairs were finished within a reasonable amount of time. The Ninth Circuit noted that a reasonable jury could find that Wood complied with the pre-suit conditions because he alleged that the repairs were taking an unacceptable amount of time, thus alleging that the repairs were "inadequate," and his second letter provided Winnebago with an opportunity to cure the inadequacy. The Ninth Circuit reasoned that neither the warranty's text nor Nevada agency law created an obligation to perform the repairs in a certain timeframe. The warranty contained one express guarantee: Winnebago promises to repair and replace covered parts at no cost to its customers. The warranty did not make any representations about the length of its authorized dealers' repairs. It merely stated that if a customer feels that the authorized dealer's repairs are inadequate, the customer must provide Winnebago an opportunity to repair the RV prior to claiming a breach of the warranty.

The Ninth Circuit analyzed whether an agency relationship between Winnebago and the dealership could make Winnebago responsible for the dealership's delays. The Ninth Circuit determined that there was not an agency relationship between Winnebago and the dealership under Nevada law because Winnebago did not exercise sufficient control over the dealership. Because Wood's warranty claims failed, the Ninth Circuit also concluded that the MMWA claims

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ODOMETER LAW

Odometer Fraud: It's More Common Than You Think

By Eric D. Mulligan

A federal jury recently convicted Hussein Ghzo, an Illinois resident, of conspiracy to commit securities fraud. The government proved at trial that Ghzo had conspired with two others to alter vehicles' odometer readings and falsify title documents to show the altered mileages. Ghzo allegedly bought vehicles at auction, altered their odometers, created false title documents, submitted the false documents to the Illinois Secretary of State, and then sold the vehicles for inflated prices. Ghzo received three warnings that the vehicles he was selling had altered odometer readings, but he reportedly continued to sell the vehicles, sometimes posing as other people to do so. Ghzo faces as many as five years in prison and will be sentenced on January 22, 2025.

This case is not the only recent case involving claims of odometer tampering. In July 2023, Andrew Elphic pleaded guilty in Georgia to conspiracy to commit securities fraud, also due to claims of odometer tampering. Like Ghzo, Elphic allegedly bought vehicles at auction, altered their odometers, falsified title documents, submitted the false documents to state officials, and sold the vehicles at artificially high prices.

Odometer tampering can also lead to steep civil penalties. Last summer, I reported on an Indiana lawsuit alleging odometer fraud. Indiana's attorney general, Theodore E. Rokita, alleged at least 40 instances of odometer rollbacks by an outfit named Flexible Auto Sales. The lawsuit could cost the dealer (or rather, ex-dealer—the state revoked Flexible's license for other violations) hundreds of thousands of dollars in penalties and restitution. As with the other two cases, Flexible allegedly bought the vehicles at auction and then altered the vehicles' odometers.

These cases are just three examples of federal and state governments going after odometer fraud. Though it is a fairly well-known federal crime, odometer fraud is more common than you may realize—according to the National Highway Traffic Safety Administration, more than 450,000 vehicles each year are sold with rolled-back odometers, and consumers collectively pay upwards of $1 billion more for those vehicles than they would pay if the odometer readings were accurate.

Needless to say, not committing odometer fraud is a good starting point for protecting yourself from odometer-related liability. It's not the whole story, though; you need to make sure that the vehicles you sell have accurate odometer readings. The NHTSA advises that checking a vehicle's title document, control pedals, tires, maintenance and inspection records, and vehicle history report can help you spot fishy odometer readings. If you learn that a vehicle you intend to sell has had its odometer reading altered, you must disclose that fact to the buyer. Don't be like the dealers discussed above—give your buyers accurate mileage readings on the vehicles they buy.

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failed. The Ninth Circuit additionally rejected the Nevada DTPA claims because they were based on representations that Winnebago made about the quality of its RVs in several brochures, and Wood failed to establish that those representations were fraudulent.

Even though Wood might have complied with the warranty's pre-suit conditions, the Ninth Circuit determined that nothing in the text of the warranty or Nevada agency law required the repairs to be completed in a specific amount of time. This case serves as a reminder that the exact phrasing of a warranty can make all the difference in determining if a manufacturer breached a warranty it extended to a customer.

Wood v. Winnebago Industries, Inc., 2024 U.S. App. LEXIS 13239 (9th Cir. (D. Nev.) June 3, 2024).

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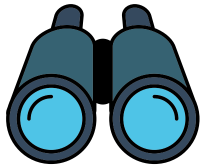

CFPB Watch

By Michael A. Benoit*

This article is designed to catch you up on the most recent Washington developments in the auto sales, financing, and leasing world. This month, we're covering developments from the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau.

Agencies Extend Comment Period for RFI on Arrangements Between Banks and Fintech Companies. The FDIC, FRB, and OCC extended until October 30, 2024, the comment period for their request for information on arrangements between banks and financial technology companies. The agencies published the RFI in the *Federal Register* on July 31, 2024. The RFI solicits input on the nature of bank-fintech arrangements, including their benefits and risks, effective risk management practices for these arrangements, and the implications of such arrangements, including whether enhancements to existing supervisory guidance may be helpful in addressing risks associated with these arrangements.

CFPB Settles FCRA Claims with National Bank. On September 11, the CFPB announced a consent order with a national bank, resolving allegations that the bank furnished information to consumer reporting agencies in violation of the Fair Credit Reporting Act and the Consumer Financial Protection Act. Specifically, the CFPB alleged that the bank furnished inaccurate or incomplete information to CRAs about

The FDIC, FRB, and OCC extended until October 30, 2024, the comment period for their request for information on arrangements between banks and financial technology companies.

consumers' credit card accounts. According to the CFPB's allegations, the bank and a third-party debt collector entered into an agreement under which the bank assigned the debt collector the right to collect a portfolio of charged-off credit card accounts. The debt collector sent the bank a monthly file showing the payments made by consumers, but the bank allegedly failed to enter that data into its system. As a result, according to the allegations, consumers' payments were not reflected when the bank furnished information to the CRAs concerning those accounts, including in instances in which consumers had settled or paid their accounts in full. The CFPB also alleged that the bank inaccurately reported the date of first delinquency ("DOFD") when it charged off certain credit card accounts by using the charge-off date as the DOFD, which allegedly made a delinquency on a consumer's account look as though it had occurred more recently than it had, in fact, occurred. According to the CFPB's allegations, this later date of delinquency could result in the delinquent information staying on the consumer's report longer than it should. In addition, it is alleged that the bank inaccurately calculated the commencement of the delinquency for purposes of the DOFD based on the cycle date of the account (when a new billing cycle begins) rather than the account due date, when a customer's monthly payment is due. The CFPB also alleged that the bank inaccurately furnished the account status of certain credit card accounts that had been voluntarily closed as current and open, rather than paid or closed with zero-dollar balances, and inaccurately furnished the date accounts were closed. Next, the CFPB alleged that the bank furnished inaccurate or incomplete information to CRAs about the bankruptcy status of consumers' credit

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card accounts. First, the bank allegedly furnished the accounts without indicating the status of the accounts in bankruptcy, such as petition filed, discharged, dismissed, or withdrawn, and failed to promptly correct the account information after it identified the issue. Second, the bank allegedly failed to accurately furnish the correct bankruptcy chapter for certain accounts that had been discharged through bankruptcy. Third, the CFPB alleged that data concerning certain credit card accounts in a discharged status was furnished repeatedly for several months, rather than only in the month in which the discharge occurred, thereby indicating to creditors or other users of the furnished information that a bankruptcy discharge occurred more recently than it, in fact, occurred. The bank also allegedly furnished information to CRAs about deposit accounts that it knew or suspected were fraudulent and then allegedly failed to promptly correct inaccuracies in the deposit account information it furnished. Finally, the CFPB alleged that the bank did not have sufficient processes in place to investigate consumers' disputes, failed to conduct reasonable and timely investigations of consumers' disputes, and failed to properly notify consumers after deeming a dispute frivolous or irrelevant. The bank did not admit any of the allegations. The consent order requires the bank to pay $7.76 million in redress to affected consumers and a $20 million penalty to the CFPB's victims relief fund.

CFPB Issues Annual FDCPA Report. On September 5, the CFPB issued its annual report summarizing its activities, as well as activities by other agencies, in 2023 related to the Fair Debt Collection Practices Act. The introductory portion of the report focuses on medical and rental debt collection. In particular, with respect to medical debt collection, the CFPB states that its research, along with consumer complaints, indicates that debt collectors are attempting to collect medical debt that is not owed, medical bills that have already been paid by or that are eligible for non-profit hospitals' financial assistance programs, and bills arising from patients' use of medical payment products that should not have been offered to patients without considering whether they may be eligible for financial assistance. With respect to rental debt collection, the CFPB states that its research and consumer complaints show that landlords and management companies may have engaged in illegal price-fixing by using "revenue management software" to collect improperly inflated amounts that ultimately end up in collection and have been adding "junk fees," including fees from rental payment processing servicers that are required as a condition for rent payment, that may not be allowed under the lease or local law. In addition to addressing medical and rental debt collection, the report offers background on the debt collection market, provides information on debt collection complaints received, discusses FDCPA violations identified during examinations, summarizes enforcement activities addressing debt collection activity brought by the CFPB and the Federal Trade Commission, identifies consumer education efforts undertaken by the CFPB, and reviews the CFPB's rulemaking, research, and policy initiatives relating to debt collection. The report concludes with the CFPB referring to the increased financialization of various consumer financial markets, through new or increased offering of financial products and services to consumers, as a "significant trend" and stating that these new financial products may result in debt collectors collecting amounts that are not actually owed or not properly verified, in violation of the FDCPA.

So, there's this month's report. See you next month!

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