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CONSUMER FINANCE LAW

QUARTERLY REPORT

Vol. 61 No. 4 Winter, 2007

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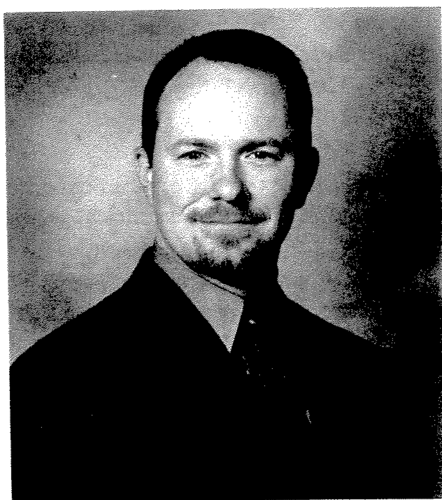
Can You "Spot Deliver" a Vehicle and Stay Out of Court?

By Eric L. Johnson



Eric L. Johnson is a shareholder with Phillips Murrah P.C. in Oklahoma City, Oklahoma. Mr. Johnson practices in the areas of: automotive finance law, banking, commercial, and consumer financial services law; financial institutions regulation; and e-commerce and information technology. Mr. Johnson teaches Consumer Law as an Adjunct Professor at Oklahoma City University School of Law and was selected as a Barrister for the Luther Bohanon American Inn of Court, 2005–2007. In 2007, Mr. Johnson was named to the *Journal Record*'s list of Achievers Under 40. Admitted to the Oklahoma Bar in 1994, he received his education from Oklahoma City University (J.D., 1994) and Oklahoma State University (B.S. in Accounting, 1991). Mr. Johnson is admitted to practice in all Oklahoma courts and the U.S. District Court, Northern and Western Districts of Oklahoma and is a member of: the American Bar Association (Business Law Section; Consumer and Commercial Financial Services Committees); the National Automotive Finance Association (Legal Committee, Chair 2006–present); the National Association of Dealer Counsel; the Payday Loan Bar Association; the Oklahoma Bar Association; and the Oklahoma County Bar Association.

I. "Spot Delivery"-- What is It?

A. National Consumer Law Center (NCLC) Definition

The consumer believes that a vehicle's installment sale or lease is final and the dealer gives the consumer possession of the car "on the spot." The dealer later tells the consumer to return the car because the financing has fallen through. If the consumer does not return the vehicle or agree to rewrite the transaction on less favorable terms, the dealer repossesses the vehicle or has the consumer arrested.

In this view, "spot delivery" is a premeditated sales tactic to squeeze more money out of the consumer by canceling the first contract in the hopes of reworking the terms in a way favorable to the dealer. This is also known as a "yo-yo" sale. NCLC believes that this abuse is widespread among automobile dealers, and that the "yo-yo" sale is standard operating procedure.

B. Author's Definition

In your author's view, "spot delivery" is a term commonly used in the automotive finance industry to refer to any new and/or used motor vehicle sale where the consumer takes delivery of the vehicle "on the spot," even if the financing arrangements are not complete. The sale is made contingent (via a condition precedent or condition subsequent) on the consumer obtaining financing for the vehicle purchase from the consumer's bank, credit union, finance company, or other financing source, or the dealer obtaining a buyer for the sales finance contract. Spot deliveries are convenient for the consumer, speed up the transaction, and are demanded by a consumer eager to begin enjoying his or her purchase.

Spot deliveries are an accommodation to these consumers, and can be most common in the evenings or on weekends when banks and finance companies are closed, and in cases of subprime borrowers who cannot easily obtain credit.

C. Comparison of Views

Both views are similar in terms of the mechanics of the transaction and, therefore, the legal implications. The views differ primarily as to the dealer's motivation, though presumably both would concede that the dealer wants to complete that sale. Since the dealer's motivation is not legally relevant in most cases, this leaves much common ground.

II. Common Claims in "Spot Delivery" Cases

A. Federal Causes of Action

Common allegations of Truth-in-Lending Act (TILA) or Regulation Z violations include:

- the dealer has included a processing fee in the amount financed instead of the finance charge, thereby understating the disclosed Annual Percentage Rate (APR);
- the dealer has charged interest before extending credit; and
- the dealer has failed to provide written disclosures and has not labeled estimates as such.

Plaintiffs also sometimes allege Equal Credit Opportunity Act (ECOA) violations including the failure to provide the ECOA adverse action notice,

and Fair Credit Reporting Act (FCRA) violations including a failure to provide the FCRA adverse action notice.

Notice that none of these claims are necessarily unique to spot delivery sales (though a spot delivery obviously involves the potential for a varied factual context). All or any of these allegations can be made with or without a spot delivery, and if correct will constitute a violation of law. So, these allegations do not suggest a problem with spot delivery as such.

B. State Causes of Action

State law allegations are often based on simple conversion, *e.g.*, as to:

- the consumer's trade-in;
- the down payment; and/or
- the title to the car purchased.

These arguments may include allegations that the dealer committed conversion by selling the consumer's trade-in before the spot delivery sale was complete, or by keeping the consumer's down payment when the spot delivery transaction falls through, or by retaining ownership of the spot delivered vehicle.

Allegations of Unfair and Deceptive Acts and Practices Act (UDAP) violations are also common, *e.g.*:

- misrepresenting that credit was approved;
- misrepresenting that the ownership was transferred to the consumer;
- failing to make federal or state-required odometer disclosures;
- not itemizing the charges on the buyer's order form;
- refusing to return the consumer's trade-in vehicle; and
- advertising goods with the intent not to sell them.

Other state causes of action may include: breach of contract; state retail installment sales act violations; fraud; breach of obligations under the Uniform Commercial Code (UCC) by using the false threat of arrest to seize the car from the consumer when there was no default; and conspiracy of multiple defendants to engage in the alleged violations.

These allegations are more likely unique to spot delivery sales, though none allege that spot delivery is illegal as such.

III. Can You Spot Deliver and Stay Out of Court?

A. Know the Applicable Law

What contract terms, form agreements, disclosures, and practices are required in your state? What contract terms, practices, representations, and policies are restricted? Several states have a separately required spot delivery form, often called a "Motor Vehicle Delivery Agreement," "Conditional Sale and Delivery Agreement," "Affidavit of Spot Delivery," "Spot Delivery Agreement," or similar nomenclature. As noted, many allegations in spot delivery cases are not unique to spot delivery transactions; they simply allege dealer behavior that is unlawful as a general manner. This simply means that caution should be exercised to comply with applicable laws as usual. For example, the TILA, ECOA, and FCRA requirements must be met in every consumer credit transaction, not just spot delivery sales. The difference is that a spot delivery may expose the dealer (and finance company) to an increased risk of buyer's remorse or other dissatisfaction, and therefore legal action, suggesting a heightened need for legal diligence.

B. Spot Delivery Issues

Some of the arguments in spot delivery cases are unique to such sales. Many of these are basic contract law and tort claims based on deception. The answer is equally simple: Use clear and accurate contract documentation. Have the consumer sign a sale and delivery agreement that complies with state laws, is clear and easy to read (plain English is preferred), and accurately sets forth the particulars. If permitted by applicable state law, the agreement can be incorporated into other documents. Make certain there are no conflicting terms and the terms do not indicate overreaching by the dealer. Explain the terms accurately to the consumer, so there is no misunderstanding.

C. Know Your State Attorney General's View On Spot Delivery

Obviously, spot delivery can become a media and political event. Though basically an accommodation to the customer, it can be misunderstood (and misrepresented, *e.g.*, in the media). And, as usual, a few bad examples can taint the entire practice. Therefore, some basic cautions are in order:

- Know and comply with the terms in the contract or delivery agreement;
- monitor dealer F&I (finance and insurance) and sales representative practices and policies;
- be careful about selling a trade-in before the deal is finalized;
- do not try to keep the consumer's down payment if the deal is canceled;
- avoid excessive fees, mileage, or repair charges if the deal is canceled and the vehicle is returned; and
- watch out for print media, news stories, web reports/consumer "alerts."

D. Know What Local Plaintiffs' Attorneys are Attacking in the Practice

What issues have the attention of the media, state and federal regulatory agencies, and the plaintiffs' bar? Examples may include:

- terms in the contract or delivery agreement;
- TILA or Regulation Z disclosure issues;
- UDAP or Consumer Protection Act issues;
- dealers' sales practices and policies;
- selling a trade-in before the deal is finalized;
- keeping the consumer's down payment;
- "excessive" fees, mileage, or repair charges; and/or
- print media strategies, *e.g.*, news stories, or seminars on how to sue.

E. Follow State Politics/Bills in Legislature

Interested parties should track bills in the state and surrounding states' legislatures. Which way is the wind blowing? Do local politicians crusade against dealers or spot delivery practices? If so, which ones? Are local consumer groups lobbying for harmful bills? Are punitive bills "sneaking up" on the industry?

F. Don't Get Greedy

Dealers and creditors should avoid obvious problem areas. Do not sell trade-ins before allowed by state law. Do not charge excessive fees, mileage charges, or repair costs. Make sure that terms and conditions are not one-sided and customers are not treated unfairly. Disclose the deal clearly to the consumer.

G. Develop a Consumer Complaint Resolution Process for Spot Delivery Complaints

Finally, designate a specific person in your office to handle spot delivery complaints. Develop an effective resolution process. Document consumer complaints and your responses. This may head off litigation before a suit is filed.

Sales Taxes Applicable to...

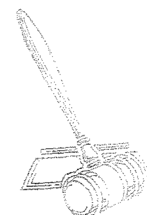
(Continued from page 771)

respondent (with the respondent retaining ownership of the pagers), a company in the business of providing telephone paging services and devices, was merely incidental to, and not the true object of the transaction. Section 1501 provides that the test in determining whether a transaction involves a sale of tangible personal property or a transfer of tangible personal property incidental to the performance of a service is one of the true object of the contract. Specifically at issue is whether the real object sought by the buyer is the service per se or the property produced by the service. If the true object of the contract is the service per se, the court held, the transaction is not subject to tax even though some tangible personal property is transferred.

Among a number of sales tax exemptions is an express exemption for occasional sales of tangible personal property as set forth in Rev. & Tax. Code section 6367. Pursuant to section 6006.5, an occasional sale includes a sale of property not held or used by a seller in the course of activities for which the seller is required to hold a seller's permit or would be required to hold a seller's permit if the activities were conducted in California. An occasional sale also includes any transfer of all or substantially all the property held or used by a person in the course of those activities when after the transfer the real or ultimate ownership of the property is substantially similar to that which existed before the transfer.

A question that frequently arises in connection with the occasional sales exemption is whether a retailer's gross receipts derived from those retail sales that are incidental and casual are exempt. In *Bigsby v. Johnson*[2] the plaintiff, a retailer in the printing business, sold used printing equipment at retail as a part of his business operations. The plaintiff claimed an occasional sales exemption on the basis that his sale of the equipment was not the kind of retail sale ordinarily made by him. The California Supreme Court held that, although most jurisdictions imposing sales taxes specifically exempt casual or isolated sales, a majority of them hold that the exemption does not include casual retail sales made in the course of business operations by one who is engaged in the retail sales business. The Court further held that the plaintiff sold the personal property in question at retail as a part of his business operations and that such sale was subject to sales tax.

Subsequently, in *Ontario Community Foundation, Inc. v. State Bd. of Equalization*,[3] the California Supreme Court found little precedential value in the *Bigsby* holding, specifically noting that Rev. & Tax. Code sections 6006.5 and 6367, adopted subsequent to *Bigsby* in 1947, currently provide the statutory exemption lacking in *Bigsby*. The plaintiffs in *Ontario Community Foundation*, operators of two hospitals, had engaged in certain activities for which they were required to hold seller's permits. Specifically, the plaintiffs each (1) operated a food service facility which sold meals to patients and nonpatients, (2) sold miscellaneous personal items from its supply unit, and (3) operated a pharmacy. The food service facility, supply department and pharmacy were all operated at the same location as the hospitals. The plaintiffs subsequently transferred hospital furnishings and equipment, as part of the sale of the total assets of the hospitals. However, the equipment in question was never used in the course of such activities. The Court determined that the hospital equipment and furnishings sold by the hospitals were used in rendering medical and nursing services, and that at no time was such property used by the hospitals in the course of activities for which they were required to hold a seller's permit. The Court accordingly held that Rev. & Tax. Code section 6006.5 was designed to exempt from sales tax a one-time sale of tangible personal property which is not held or used by a seller in the course of activities for which it is required to hold a seller's permit. Further, the Court held that CA Regulations section 1595, relied upon by the Board of Equalization in this case, abridged the statutory right to a tax exemption for an occasional sale, and was therefore invalid.



2. 18 Cal. 2d 860 (Cal. 1941).

3. 35 Cal. 3d 811 (Cal. 1984).