"SPOT DELIVERY" IS ANTICIPATORY THEFT AND ALWAYS VIOLATES THE TRUTH IN LENDING ACT

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Yo-Yo/Spot Delivery. The scenario is the same in all so-called spot deliveries, otherwise called yo-yo transactions. The consumer visits an auto dealer, takes a test drive, signs a credit application, is told her credit is marginal, then signs up to twenty documents prepared by the dealer. Among the papers signed are a buyer's order, a yo-yo form, and a RISC which may contain a"Seller's Right to Cancel" or a "Limited Right to Cancel."

Regardless of the euphemism, such forms and provisions are flatly illegal; contrary to TILA, the FCRA, the ECOA, UDAP and in many cases result in actual theft.

Material language in a "Seller's Right to Cancel" appearing in many RISCs:

> [A 2008 Florida RISC] Seller's Right to Cancel (in pertinent part)
>
> . . . You understand that it may take a few days for Seller to . . . locate financing for you on the exact terms shown on the front of this contract, and assign this contract to a financial institution . . You agree that if Seller is unable to assign this contract. . . to any one of the financial institutions with whom Seller regularly does business under an assignment acceptable to Seller, Seller may cancel this contract.
>
> If Seller elects to cancel . . . In that event, you may have the option of negotiating and signing a new contract with different financing terms (for example, a larger down payment, a higher annual percentage rate, a required cosigner, etc.).
>
> If you do not immediately return the vehicle, Seller may use any legal means to take it back (including repossession) and you will be liable for all expenses incurred by Seller in taking the vehicle from you,. . .
>
> While the vehicle is in your possession, all terms of this contract, including those relating to use of the vehicle and insurance for the vehicle, are in full force and you assume all risk of loss or damage to the vehicle.
>
> The terms of this Seller's right to cancel survive Seller's cancellation of this contract.

Translation. The phrase **"you may have the option of signing a new contract with different financing terms"** means that the RISC terms are meaningless and used only to take the buyer out of the market (the *bait),* while the dealer decides whether to *switch* the buyer to a more profitable RISC using the incorporated bait and switch language, "you may have the option of negotiating and signing a new contract with different financing terms. . . (what "negotiations"? The buyer must either comply with the dealer's demand or lose her new car.)

The phrase **"if seller is unable to assign this contract to any one of the** (many) **financial institutions"** is an intentional misrepresentation because the dealer is in fact able to assign any RISC by opting for full or limited recourse with the assignee, and has the unfettered ability to do so.

Further, the phrase **"assign this contract to any one of** (many) **financial institutions"** means that in addition to the dealer pulling the buyer's credit report, the third parties will also pull the buyer's credit report, all of them in violation of the FCRA as none of them is a creditor in such assignment transactions; the dealer is by law the only creditor but, by having no intention of extending the credit disclosed in the RISC, it too violates the FCRA at §1681b.

The phrase **"under an assignment acceptable to seller"** means that the dealer will not assign a RISC if the potential assignee will not buy the contract at the dealer's built in profit and the dealer will not agree to a recourse assignment, preferring instead to defraud the buyer.

Collateral yo-yo forms contain similar terms to the same end, and in every case such forms either expressly or implicitly disclaim that the dealer is a creditor.

In most yo-yo cases, defense counsel almost always cite the same bad case law including *Janikowski v. Lynch Ford, Inc.,* 210 F.3d 765 (7th Cir. 2000); *Leguillou v. Lynch Ford, Inc.,* 2000 WL 198796 (N.D. Ill. 2000); *Scroggins v. LTD, Inc.,* 251 F.Supp.2d 1277 (ED. Va. 2008). These cases' yo-yo provisions are as follows:

> *Janikowski v. Lynch Ford, Inc.* If financing cannot be obtained within 5 business days for Purchaser according to the proposal in the retail installment contract executed between Seller and Purchaser, either Seller or Purchaser may cancel the Agreement shown on the face of this Order and the retail installment contract.
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> *Leguillou v. Lynch Ford, Inc.* Failure to Obtain Proposed Financing. Seller and Purchaser intend that the retail installment contract for ordered motor vehicle executed between Seller and Purchaser will be assigned to a sales finance agency of the Seller's choice. If financing cannot be obtained within 5 business days for purchaser according to the proposal in the retail installment contract executed between Seller and Purchaser, either Seller or Purchaser may cancel the agreement shown on the face of this Order and the retail installment contract.
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> *Scroggins v. LTD, Inc.* This sale is conditioned upon approval of your proposed retail installment sale contract as submitted to or through the dealer. If that proposed retail installment sale contract is not approved under the terms agreed to

with the dealer, you may cancel this sale and any down payment and/or trade-in you submitted will be returned to you.

A **"conditional sales contract"** is the RISC itself. It is not the combination of a yo-yo form and a RISC, or a document that is entitled a RISC but which contains a "right to cancel". A motor vehicle RISC cannot be conditioned. The yo-yo clauses set forth above are fabricated excuses for the dealer to defraud consumers.

Groupthink (from a website). Group think occurs when groups are highly cohesive and when they are under considerable pressure to make a quality decision. Some negative outcomes of groupthink include:

- Examining few alternatives.
- Not being critical of each other's ideas.
- Not examining early alternatives.
- Not seeking expert opinion.
- Being highly selective in gathering information.
- Not having contingency plans.

Some symptoms of groupthink are:

- Having an illusion of invulnerability.
- Rationalizing poor decisions.
- Not expressing your true feelings.
- Maintaining an illusion of unanimity.

Some solutions include:

- Using outside experts.
- Holding a "second chance meeting" to offer one last opportunity to choose another course of action.

Have you ever observed the audience laughing on a TV comedy show, e.g., The Daily Show. Half of Jon Stewart's "funny" observations do not evoke anything more than a smile from the viewers at home, yet the studio audience erupts in raucous laughter. Why? Because they do not want to appear out of step with the other audience members who they believe "get" the humorous implications of what Jon Stewart said. They are going along with the group to get along with the group.

In dealer financing transactions groupthink results from an usupported subjective belief that some third party is the creditor who rejected the buyer's credit; that the dealer is not a creditor. The case of *Gill v. Byers Chevrolet, LLC,* 2006 WL 2460872 (S.D. Ohio 2006), perhaps best demonstrates this phenomenon. Byers Chevrolet's first RISC was at 5.59%. Later the dealer called Gill back to the dealership telling him that the finance company would not buy his contract at the

5.59% interest rate, and to either return the new car or sign a second RISC at 10.95%. Gill reluctantly signed the second RISC. The court ruled against buyer Gill, finding that –

> "Gill's (sic) claims that Byers Chevrolet initially attracted him with a low interest offer that it never meant to go through with only to switch his contract to a less favorable interest later looks very much like the bait and switch or spot delivery techniques presented in *Clark (v. Troy and Nichols, Inc.,* 864 F.2d 1261, 1264 (5th Cir. 1989)) and *Janikowski (v. Lynch Ford, Inc.,* 210 F.3d 765 (7th Cir. 2000)). ***The consensus is in favor of holding that this type of practice does not constitute a violation of TILA.***" (Emphasis added.)

Byers Chevrolet's illegal profit from its 5.36% interest raise, assuming an amount financed of $15,000 over 48 months, was $1,850.

The court in *Gill* using the "consensus" specie of groupthink drew the conclusion that the numerically superior court decisions win regardless of whether they are wrong, though it appears that the court had its reservations.

Two particularly interesting cases involving groupthink by *obiter dictum* without any analysis of the consequences, are *Muro v. Hermanos Auto Wholesalers, Inc.,* 514 F.Supp.2d 1343 (S.D. Fla. 2007), and *Singleton v. Stokes Motors, Inc.,* 595 S.E.2d 461 (S.C. 2004).

Muro v. Hermanos Wholesalers, Inc. The district court correctly held that the defendant was the creditor in the transaction and for the most part follows the injunction that TILA be liberally construed in favor of the consumer, and cites *Riviere v. Banner Chevrolet, Inc.,* 184 F.3d 457 (5th Cir. 1999), and *Ellis v. GMAC,* 160 F.3d 703 (11th Cir. 1998), both of which held that the car dealer is the creditor. Then in dictum the court compromised its otherwise excellent opinion with the following at page 1350:

> It bears emphasizing that this decision does not prevent car dealers like Defendant from conditioning car sales on the later acceptance of a potential buyer's credit. If Defendant wants to engage in such a conditional credit agreement in the future, however, it must, as it could have here, clearly indicate that fact in the credit agreement documents.

Thus, with no basis in law and entirely contrary to TILA the court adopted "conditional RISC" groupthink, i.e., a law school recollection that any contract can be conditioned resulting in a misapplication of the law to motor vehicle RISCs.

Singleton v. Stokes Motors, Inc., concluded likewise in dictum after emphatically finding that the dealer's practice of obtaining customers' signatures on an unambiguous RISC and on a conditional so-called bailment agreement violated the South Carolina Unfair Trade Practices Act as a matter of law. "Therefore, we hold that (1) outright deception concerning credit approval and (2) the practice of having customers sign both an unconditional sales contract and a conditional bailment agreement constitute SCUTPA violations." *Id.* at 468.

This correct decision was compromised by the court's false observation at page 468:

> Stokes, and other car dealerships, could easily cure the unfairness of such practices by (1) including language in the sales agreement that the sale is conditional upon the buyer obtaining financing and (2) telling customers the truth about their credit.

The courts in both *Muro* and *Singleton* believed that if the consumer is actually made aware that the dealer is conditioning the RISC, then there is no violation of TILA and no UDAP violation. This is the "actual notice" specie of groupthink and it is wrong.

As of today, a major aspect of this groupthink is the body of bad case law that finds nothing wrong with yo-yo forms. There is a snowball effect.

Part of the courts' groupthink include the cases that wrongly rely upon TILA, 15 U.S.C. §1634, a section that deals only with "certain residential mortgages and variable rate transactions, refinancings, assumptions, and variable rate adjustments, and circumstances where early disclosures are rendered inaccurate prior to the date of consummation." *Begala v. PNC Bank Ohio, NA.,* 163 F.3d 948, 951 (6th Cir. 1998), *cert. den.,* 528 U.S. 868, 120 S.Ct. 166 (1999), wherein the Sixth Circuit correctly held that §1634 does not apply to motor vehicle closed end credit contracts. This is also made obvious by simply reading the relevant sections of TILA and Regulation Z, but neither the consumers' lawyers nor the courts do their due diligence.

But ***Janikowski v. Lynch Ford*** remains the case most adversely affecting consumers because it is a federal appellate decision that is blindly followed by courts around the country in the mistaken belief that a federal appellate decision must be right. *Janikowski* clearly demonstrates the bait and switch aspect of "spot delivery":

Plaintiff Janikowski signed a RISC prepared by Lynch Ford with a 5.9% APR. The following day she was called back to the dealership and was told that she was approved at 11.9%, not at 5.9%. Janikowski signed the second contract which, evidently, Lynch Ford then assigned to some third party.

The Seventh Circuit affirmed the district court's summary judgment in favor of Lynch Ford finding that the 5.9% APR "was not an estimate – it *was* the contractual rate, albeit a condition to the parties' duty to perform. It was an accurate disclosure for that contract, and the 5.9% did not and could not vary under its terms. If the financing condition had been satisfied, Janikowski would be able and obligated to purchase the car at 5.9%. However, when Janikowski did not receive approval of financing at 5.9%, she could have cancelled the contract and refused to purchase the Escort. Either way, the disclosed rate was a set rate, not an estimate." *Id.* at 768.

The Seventh Circuit panel clearly did not read the RISC or TILA and it accepted without question Lynch Ford's contention that it could make its RISC contingent upon its desire to sell it to a third party. The court did not stop to analyze Lynch Ford's contention because, in fact, Lynch Ford was claiming that there is no creditor and there is no consummation unless and until some third party buys the deal; the third party being the creditor. In other words, Lynch Ford contends that it never has any TILA obligations other than to insert illusory numbers in the TILA boxes; that TILA applies only if and when some third party accepts assignment, and then TILA obligates the third party, not Lynch Ford. If Lynch Ford does not sell its RISC there is no creditor and no consummation.

Lynch Ford's TILA "disclosures" were the *bait* offered only to ensnare Ms. Janikowski into acquiescing to the 11.9% contract (the *switch)* after being told that the 5.9% financing had been rejected. But who rejected financing? The court assumed without question that it must have been some third party and thereby ruled *sub silentio* that Lynch Ford itself was not the creditor in the transaction and that TILA does not govern it actions.

"Nonsensical interpretations of contracts, as of statutes, are disfavored. Not because of a judicial aversion to nonsense as such, but because people are unlikely to make contracts, or legislators statutes, that they believe will have absurd consequences." *Futuresource, LLC v. Reuters Limited,* 312 F.3d 281, 284-85 (7th Cir. 2002).

The decision was precipitated by a lack of analysis of TILA, Reg. Z, and the RISC itself as the 5.9% RISC disclosed Lynch Ford as the creditor. This is necessarily so because TILA mandates that the creditor is the named seller if the seller is the one who prepares the credit disclosures. 15 U.S.C. §1602(f); §1638(a)(1); 12 C.F.R. §226.2(a)(17); §226.17(a); §226.18. Once a creditor always a creditor until assignment is legally perfected. But the panel in Janikowksi believed that some third party was the creditor, which belief was contrary to the law and the evidence.

Lynch Ford's illegal profit from its 6 point increase, assuming an amount financed of $15,000 over 48 months, was $2,050.

That is called **theft.** It is a criminal violation of every state's criminal code. In Florida, for example, theft of either $1,850 or $2,050 is grand theft of the third degree punishable by a term of imprisonment not exceeding five years. §812.014(1)(c), 775.082(3)(d), Florida Statutes.

This is exactly what the "Seller's Right to Cancel" or any other yo-yo form is used for: **"If Seller elects to cancel, you may have the option of negotiating and signing a new contract with different financing terms, e.g., a larger down payment, a higher annual percentage rate. . .)"**

Translation. If on attempted assignment the dealer cannot maintain the profit factored into the contract, dealer will revoke the RISC in favor of a second RISC to either achieve its profit margin or to increase it. If buyer does not sign the second RISC, dealer takes the car back and sells it at retail to another consumer. This despite the dealer having the option of a recourse assignment which would obviate any dealer illegality.

Under TILA an assignee is not a creditor. The credit-offering seller is the only creditor. An assignee is an entirely separate entity who assumes the creditor's rights under a RISC if it chooses to accept assignment. If an assignee rejects assignment, the creditor continues to be liable under the RISC. *Official Staff Commentary on Reg. Z,* 12 C.F.R. §226.2(a)(17)(i). *Assignees.*

> 2. *Assignees*. If an obligation is initially payable to one person, that person is the creditor even if the obligation by its terms is simultaneously assigned to another person. For example:
>
> > • An auto dealer and a bank have a business relationship in which the bank supplies the dealer with credit sale contracts that are initially made payable to the dealer and provide for the immediate assignment of the obligation to the bank. The dealer and purchaser execute the contract only after the bank approves the creditworthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.

The following quote is another good example of how *Janikowksi* becomes mainstream reasoning as the Fourth Circuit did not remotely question its correctness. *Tripp v. Charlie Falk'sAuto Wholesale, Inc.,* 290 Fed. Appx. 622, 629 (4th Cir. 2008):

> The Seventh Circuit case of *Janikowski v. Lynch Ford, Inc.,* 210 F .3d 765 (7th Cir. 2000), is also instructive on this point. There, the court affirmed the entry of summary judgment to the dealer where the plaintiff entered into a new contract to buy a vehicle at an 11.9% interest rate, when the dealer could not obtain financing at the initial contract rate of 5.9%. The court rejected plaintiff's argument that the 5.9% interest rate was an estimate, stating that it was not an estimate but rather, the contractual rate, and thus an "accurate disclosure for that contract" since it "could not and did not vary under its terms." The court went on to explain that had the financing condition been satisfied, the plaintiff would have been obligated to purchase the vehicle at the ***5.9%*** interest rate. The plaintiff could have canceled the contract and refused to purchase the vehicle, but "[e]ither way, the disclosed rate was a set rate, not an estimate."

The Fourth Circuit panel also concluded that "[c]onsummation has still occurred with the signing of the ***unfunded credit contract*** by the Tripps." *Tripp* at 629-30. (Emphasis added.)

This too is a failure of analysis. There is no such thing as an unfunded credit contract. In all cases involving a dealer initiated RISC, the creditor-seller is the entity who offers the credit terms and, upon the buyer signing the offered terms, the RISC is "consummated"; completed; nothing left to be done. The buyer has the car. The seller has the RISC. The RISC expressly provides that the dealer is the creditor and the secured party who, unless assigned, is obligated to honor the credit terms and to accept the monthly payments, at the conclusion of which the dealer issues the title to the buyer. The following clear and unambiguous language appears in the opening paragraph of a typical motor vehicle RISC:

> You, the Buyer (and Co-Buyer, if any) may buy the vehicle below for cash or on credit. ***By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract. You agree to pay the Creditor-Seller (sometimes "we" or "us" in this contract) the Amount Financed and Finance Charge according to the payment schedule below.*** We will figure your finance charge on a daily basis. The Truth in Lending Disclosures below are part of this contract.

If the dealer wants to assign its right to collect payments which include a finance charge and get paid immediately, it can assign the RISC. In that regard, it is the dealer alone who holds the keys to assignment of its RISCs. It can easily effect assignment regardless of the financial terms by simply choosing a limited recourse contract with the assignee. Most RISCs have a box at the bottom of the front page that the dealer can check: "☐ Assigned with limited recourse".

Consideration, a contract requirement.

The dealers argue that its combination of a RISC with a so-called "Bailment Agreement for Vehicle Spot Delivery" and/or a "Seller's Right to Cancel" is a contract containing disclosures that comply with TILA and the MVRSFA. They are wrong.

Neither the defendant nor the courts in *Scroggins* and in the other cases dealerships rely upon considered the fact that the dealers' conditioning of their credit contract upon later assignment lacked consideration, a fundamental requirement for a contract. The court in *Johnson Enterprises, Inc. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1311-12 (11th Cir. 1998), addressed this issue:

> It is a fundamental principle of contract law that a promise is not enforceable unless it is supported by consideration. See *Restatement (Second) of Contracts* §17 (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). In a bilateral contract, the exchange of promises by both parties constitutes consideration:
>
> [T]he courts in general require that before mutual promises will be enforced, each as the consideration of the other, each party must promise to do something which will yield a benefit or advantage to the other, or which will result in a detriment or dis-advantage to himself in exchange for the other promise. Whatever may be the character of the thing promised, as a general rule it cannot serve as consideration

> unless it is binding. . . . [M]utual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, will qualify as consideration sufficient to support one another.

Perhaps even more clearly, the court in *Rosenberg v. Lawrence*, 541 So.2d 1204, 1206 (Fla. 3d DCA 1988), observed:

> When one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound. "One who in words promises to render a future performance, if he so wills or desires when the future time arrives, has made no real promise at all." 1 *Corbin on Contracts* §149 (1963). . ." An illusory promise is no promise at all as that term has been . . . defined. (Citations omitted.)

And, *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So.2d 216, 218 (Fla. 2d DCA 1981):

> A binding contract requires consideration. In a bilateral contract, the promise of one party constitutes the sole consideration for the promise of the other. If one party has the unrestricted right to terminate the contract at any time, that party makes no promise at all and there is no sufficient consideration for the promise of the other.

Also, *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4, 5 (Fla. 1984) ("[A] contract which is not mutually enforceable is an illusory contract.")

Profit. It is the amount of profit that dictates a dealer's desire to assign its RISCs. Assignment is entirely within the dealer's control. It is the dealer alone who chooses not to assign a RISC, refusing to lower its profit if an assignee refuses to pay the dealer the amount sought. Limited recourse would permit the assignee to look to the dealer in the event the buyer defaulted at some point during the contract term. Instead of limited recourse, the dealer unilaterally and illegally revokes the buyer's RISC in favor of a second RISC in order to maintain its profit margin. In other words, the dealer chooses to defraud the buyer rather than opt for recourse assignment.

There can be no **"condition precedent"** or **"condition subsequent"** to a dealer's credit obligation in a motor vehicle RISC. A TILA creditor-seller cannot condition its performance in any way once the RISC is consummated. All motor vehicle RISCs must be unambiguous, fully-integrated contracts binding on both the buyer and the seller.

When the consumers' lawyers, the dealers' lawyers, and the judges share the same misconceptions to any degree, especially with reference to bad case law, the conclusion is pre-ordained. As in *Janikowski,* the opinion is written to fit that which the judges and the lawyers themselves believed, instead of that which is unambiguously expressed in the RISC, in TILA, and in Reg. Z.

TILA requires sellers to adhere to its purpose whether they reside in Florida, Illinois, Virginia, or California. Any form or pre-printed provision such as a "Seller's Right to Cancel" which purports to disclaim the seller's creditor status is illegal and is a flatly deceptive, unfair, and unconscionable trade practice contrary to the public policy enacted by TILA. As the Supreme Court observed in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697,65 S.Ct. 895, 900-01 (1945):

> A statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.

And in *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982):

> Not only does TILA contemplate a public interest in the enforcement of individual rights, but the public must rely largely on the efforts of individual consumers acting as "private attorneys general" to achieve the disclosure system envisioned by the Act. *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978). If these private attorneys general are permitted to waive TILA claims in circumstances such as those presented in this case, the public interest in deterring inconsistent and undecipherable lending practices would be greatly hampered. The significance of this possibility becomes clearer when we consider that the confusion, and perhaps ignorance, that has led consumers in the past to accept draconian credit terms leaves them equally vulnerable when the lender gives them a general release of prospective claims to sign.