

# TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

## Legal Assistance Note

### The Spot Delivery: A Deceptive Auto Sales Technique<sup>1</sup>

While the vast majority of auto dealers do business in an ethical manner, some engage in deceptive practices to increase sales or profit margins. One of these practices, occurring more and more frequently, is the “spot delivery.” The spot delivery, also known as the “gimme back sale,”<sup>2</sup> occurs in the following manner: a soldier goes to a car dealership, chooses one, signs all of the sale and loan papers apparently necessary to purchase the car, and drives it off the lot. Six weeks or two months later, the dealer contacts the soldier claiming that the deal fell through for one reason or another. One common reason given is that financing was not approved and that the soldier needs another loan (at a higher interest rate of course) or he must return the car. If the soldier traded in his old car as part of the sale, the dealer often claims that the trade-in has already been sold.<sup>3</sup>

This practice note provides legal assistance attorneys with a number of legal bases and arguments to help the soldier or family member victimized by “spot delivery” practices. Widespread reports of this practice within the auto sales industry led the National Consumer Law Center (NCLC), as part of the 1999 Cumulative Supplement, to add Section 5.4.4.9a, “Spot Delivery Abuses” to their Unfair and Deceptive Acts and Practices Manual.

Despite the fact that legal assistance practitioners rarely, if ever, represent a legal assistance client in a judicial action, this information can be part of a preventative law program or used to assist legal assistance clients.<sup>4</sup> The following legal arguments and consumer protection laws can assist legal assistance attorneys in obtaining substantial settlements for their clients: the Unfair and Deceptive Acts and Practices (UDAP),<sup>5</sup> Equal Credit Opportunity Act (ECOA),<sup>6</sup> the Truth in Lending Act (TILA),<sup>7</sup> various state retail installment sales acts (RISA), state auto titling laws, and state laws focused on preventing “spot delivery” abuses.<sup>8</sup>

Another method to challenge “spot delivery” relates to the dealer’s disposal of the customer trade-in vehicle. The auto dealer assumes that the asserted sale of the trade-in increases the pressure on the customer to accept a more expensive financing deal (or possibly a higher renegotiated sale price) instead of just returning the newly purchased auto. One of the initial steps in assisting a client is to determine whether the dealer has sold the trade-in vehicle. If the trade-in has been sold, “[I]f the sale is truly contingent and has not been finalized, then the dealer ha[d] no right to sell the trade-in because the dealer does not own the trade-in.”<sup>9</sup>

In those states with laws governing retail installment sales transactions, a legal assistance attorney can determine whether making the sale contingent on financing is a violation of those

1. See Jon Sheldon, *Spot Delivery as Widespread Dealer Abuse*, 5 CONSUMER ADVOCATE 17 (Mar.-Apr. 1998); *New Spot Delivery Decisions*, 18 NAT’L CONSUMER L. REP., DECEPTIVE PRACTICES AND WARRANTIES ED. 2 (July-Aug. 1999); Elizabeth Renuart & Tom Domonoske, *Applying The Truth In Lending Act and Other Laws To ‘Spot Delivery,’* CONSUMER L. CENTER, NOV. 7, 1999 at 1.

2. Renuart & Domonoske, *supra* note 1, at 1.

3. NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES MANUAL 307 (4th ed. 1997).

4. The NCLC reports that:

A number of consumer attorneys report that spot delivery abuses lead to individual consumer settlements in the \$7500 to \$10,000 range, and even as high as \$80,000. A settlement strategy can be to report the case to the state agency regulating the dealer, because dealers are concerned with protecting their license.

NCLC, UNFAIR AND DECEPTIVE ACTS AND PRACTICES, 1999 CUMULATIVE SUPPLEMENT, 97 (1999) [hereinafter NCLC SUPPLEMENT].

5. 15 U.S.C.A. § 45(a)(1) (West 1999). A UDAP argument might be successful when the dealer fails to clearly make it known to the customer that the sale is conditioned on final credit approval and lets the customer leave the dealership believing he owns the car. In that situation, “the dealer’s attempt to undo a binding credit agreement is unfair, deceptive, and wrongful, leading to potential UDAP, fraud, and breach of contract claims.” NCLC SUPPLEMENT, *supra* note 4, at 93.

6. 15 U.S.C. § 1691.

7. 15 U.S.C. §1601. For a primer on TILA to “spot delivery,” arguments, see Renuart & Domonoske, *supra* note 1. Some of the bases they describe include: whether the credit contract is actually conditional in nature, and determining TILA was violated during the sale (that is, whether it is possible to learn how much credit was actually extended to the customer, irregularities in delivery or transfer of the title, and failure to inform the customer that the requisite financial disclosures were in fact only estimates). Renuart & Domonoske, *supra* note 1, at 1-12.

8. *Id.* at 93-97. See ADMINISTRATIVE AND CIVIL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-265, CONSUMER LAW GUIDE, 1-16, ch. 3, (June 1999). A number of states specifically regulate “spot deliveries,” including North Carolina, Virginia, and Washington. All of these states have large military populations who are potential legal assistance clients. NCLC REPORTS, *supra* note 1, at 3.

laws. In many “spot delivery” transactions, “[t]o firm up their legal position, dealers increasingly use a separate contingency agreement stating that the deal is subject to financing being approved.”<sup>10</sup> At least one state appellate court held that use of a separate document to make the “spot delivery” transaction contingent violated that state’s installment sales act.<sup>11</sup> Moreover, the dealer practice of not signing the installment sales contract can also violate the state installment sales act.<sup>12</sup> When the dealer offers the customer a previously completed contract,<sup>13</sup> that presentment of the contract is the offer and the customer’s signature is the acceptance.<sup>14</sup>

Additionally, the federal courts are hearing customer suits arising out of “spot delivery” transactions where there are alleged violations of TILA and UDAP.<sup>15</sup> This is a bargaining position when representing a client victimized by a dealer’s “spot delivery.” If the legal assistance attorney cannot get a favorable result for the client, including ensuring that no adverse information relating to the transaction is placed in the credit report, consider referring the client to a civilian attorney. In many cases, civilian attorneys may take a “spot delivery” abuse case, even where the actual damages are viewed as being limited, due to the potential for award of attorneys’ fees.<sup>16</sup>

Legal assistance attorneys must ensure that clients put the dealer and finance company on written notice of any dispute regarding the termination of the transaction or return of the car in a “spot delivery” case. The dealer may sometimes report the car’s return as a repossession. Under the Fair Credit Reporting

Act,<sup>17</sup> the creditor (that is, a supplier of information to the credit reporting agency) is required to report the debt as a disputed matter, if at all, pending resolution of the dispute.<sup>18</sup>

In most spot delivery transactions, the dealer fails to comply with the detailed state laws governing transfer of title, use of dealer plates, and insurance.<sup>19</sup> The legal assistance attorney should be aware that “unless the seller explicitly retains title in the vehicle, delivery of the car passes title to the consumer, even if the seller makes the sale contingent on financing.”<sup>20</sup> However, if the dealer only retains a security interest in the vehicle, the dealer is then required to comply with UCC Article 9 repossession, notice, and disposition requirements.<sup>21</sup> Legal assistance attorneys should avoid being overly quick in advising a client to allow voluntary repossession of a newly purchased vehicle. Assist clients in ensuring that dealer’s comply with the applicable enactment of UCC Article 9. The requirement to comply with UCC Article 9 should be asserted even if the dealer contends the repossession is based on termination of the sale transaction.

In summary, warnings about deceptive trade practices in “spot deliveries” by auto dealers should be incorporated into preventive law programs. As part of such a preventative law program, encourage soldiers and their families to consult a legal assistance attorney before signing purchase contracts or financing agreements for automobiles, especially before executing a new financing agreement on a car that has already left the dealer’s lot.<sup>22</sup> Major Jones.

9. NCLC SUPPLEMENT, *supra* note 4, at 96.

10. *Id.*

11. NCLC REPORTS, *supra* note 1, at 2 (citing *Scott v. Forest Lake Chrysler-Plymouth-Dodge*, 598 N.W. 2d 713 (Minn. Ct. App. 1999)).

12. *Id.*

13. *Id.*

14. *Id.*

15. <sup>5</sup> *Id.* at 2 (citing *Janikowski v. Lynch Ford, Inc.*, 1999 U.S. Dist. LEXIS 3524 (N.D. Ill. Mar. 12, 1999)). In *Janickowski*, the court denied Lynch Ford’s motion to dismiss the claims under the TILA and UDAP arising out of the spot delivery transaction between it and Janikowski).

16. An excellent way to identify civilian attorneys in your local area and obtain assistance with issues in the area of automobile fraud is to join the National Consumer Law Center, “autofraud” electronic mail group. For information on joining contact [Jsheldon@nclc.org](mailto:Jsheldon@nclc.org) or [Dloonin@nclc.org](mailto:Dloonin@nclc.org). Once you are a member you can ask questions and obtain answers from experienced practitioners. It can also be useful in identifying civilian attorneys in your area that specialize in consumer law cases representing the consumer.

17. 15 U.S.C.A. § 1681 (West 1999).

18. JA 265, *supra* note 8, at 9-44.

19. NCLC REPORTS, *supra* note 1, at 2-3.

20. *Id.* at 3 (citing *Johnson v Imported Cars of Maryland, Inc.* 230 B.R. 466 (Bankr. D.C. 1999)).

21. *Id.*

22. If you are unable to obtain any of the references cited in this article and are dealing with a spot delivery case please free to email: [Kevin.Jones@hqda.army.mil](mailto:Kevin.Jones@hqda.army.mil) for assistance. Also joining the NCLC Autofraud email group is an invaluable free resource in the autofraud and consumer law area. The NCLC has email groups for other consumer law areas, such as debt collection and credit reporting email groups.

## ***Reserve Component Note***

### **Fiscal Year 2000 National Defense Authorization Act Impacts Army Reserve Boards of Inquiry for Officers**

Congress passed some helpful legislation in the Fiscal Year 2000 Department of Defense Authorization Act.<sup>23</sup> It amended 10 U.S.C. § 14906(2), which previously required that members of Reserve Officer Boards of Inquiry be above the grade of lieutenant colonel or commander and be senior in grade and rank to any officer considered by the board.<sup>24</sup> The requirement that these boards must consist of three colonels was very burdensome for Reserve commands.<sup>25</sup> While the board members must still be senior in rank and grade to the respondent, Congress eliminated the "above lieutenant colonel" requirement. The new legislation provides that "each member of the board shall hold a grade above major or lieutenant commander, except that at least one member of the board shall hold a grade above lieu-

tenant colonel or commander."<sup>26</sup> These requirements do not appear in *Army Regulation 135-175, Separation of Officers*, which has not been updated since 1971.

At least one member of the board must also be an active status member of the same service as the respondent.<sup>27</sup> The United States Army Reserve Command (USARC) Staff Judge Advocate's office opined that this active status member may be active Army, or active Guard Reserve, or a drilling Reservist on active status, such as when performing annual training or "Active Duty for Special Work."<sup>28</sup>

Finally, remember that USARC has not withdrawn their directive that respondents be notified of their right to request a minority board member within fifteen days upon receipt of their notice of their Board of Inquiry.<sup>29</sup> Lieutenant Colonel Conrad.

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23. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 504 (b), 113 Stat. 591 (1999). This note does not address Active Guard and Reserve officers, who are separated under *Army Regulation 600-8-24*.

24. 10 U.S.C.A. § 14906 (West 1999). See Lieutenant Colonel Paul Conrad, *Changes for United States Army Reserve Component Involuntary Separation Boards*, ARMY LAW., Jan 1998, at 127.

25. *Id.*

26. National Defense Authorization Act for Fiscal Year 2000, § 504(b)(2).

27. U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS, para. 2-25a(1) (22 Feb. 1971).

28. Electronic mail with Lieutenant Colonel James Wolski, USARC SJA Office (Feb. 25, 1999).

29. Conrad, *supra* note 24.