Old Whine in a New Bottle

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Two recent events got me thinking.

The first was a new car purchase. Finally persuaded that the newer cars had safety features that were truly life-saving and accident-reducing, my wife and I opted to replace the old bus with new wheels.

As I have several times, I boogied on down to my favorite dealership and picked out a new chariot. I spent a couple of hours deciding which options I wanted and then sat down with the dealership's F&I specialist to determine what additional products and services we wanted. The F&I fellow offered us several packages of additional vehicle-related services, telling us the basic cost of the vehicle with nothing added, as well as the price for each more-inclusive package. We eschewed the proffered service contract and dealer protection products but opted only for the discounted prepaid maintenance. Our salesperson slapped on a temp tag, and off we went.

Then, a few weeks later, I came across a paper written by Adam J. Levitin, a professor at Georgetown University Law Center. Titled "The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses," the 71-page paper purports to identify abuses "rife" in the dealer financing of vehicles.

Style points for a cute title, although "usury" is a term dealing with the loan of money, not the credit sales that dealers engage in with car buyers. Dealers engage in credit sales-they don't make loans. These distinctions are not fine legal points, but are basic, and understanding the differences between loans and credit sales is crucial to understanding the auto financing marketplace. Levitin frequently ignores those differences, and his article suffers for it.

For example, a consumer who arranges financing from a bank or a credit union, and who signs a promissory note and security agreement in the process, may find that those documents contain cross-default clauses, cross-collateralization clauses, a grant to the lender of the right to set off the borrower's deposit accounts against the borrower's car debt, and other creditor remedies not typically found in retail installment contracts used in dealer financing. Because loans and retail installment contracts are frequently governed by different state laws, a direct loan might have other legal disadvantages as well, such as higher late charges, shorter grace periods, or even a higher maximum finance charge. And, depending on the relationship between the dealership and the third-party finance source, the buyer could lose the protection against the creditor offered by the Uniform Commercial Code and the Federal Trade Commission's Preservation of Consumer Claims and Defenses Rule. The author blows by these disadvantages and differences by equating direct with indirect financing, stating that a loan is "technically a retail installment contract."

It's not. Technicalities matter. But I digress.

As a GULC grad, I looked forward with anticipation to reading a rigorous academic treatment of a topic I follow closely, written by a GULC scholar. I was disappointed. Professor Levitin has brought nothing new to the field but has simply rehashed a handful of previous arguments advanced by consumer advocates.

It hasn't yet been quite a decade since the FTC held its auto sales, leasing, and financing "Roundtable" events featuring consumer advocates, academics, regulators, car dealers, finance companies, and other participants representing interests in the field. The events created a bit of a stir but, with a couple of exceptions, did not result in significant changes in dealer and financing practices.

To give you a feel for the Roundtables, here's an excerpt from an article I wrote for *Spot Delivery* shortly after they concluded:

The consumer advocates were unable to offer data about the frequency of dealer transgressions, but began and interspersed their presentations time again with something like, "I see this _____ [fill in the blank with whatever bad thing a crooked dealer did to an elderly person or a student or a member of the military], and this type of behavior happens all the time." They would then go on to describe some egregious practice that violates 417 federal and state laws and regulations that already apply to dealers and that already prohibit the described conduct.

These consumer advocates are, for the most part, good, honest folks who are not misrepresenting their day-to-day experiences. I'm certain that they do see abusive dealer practices. As one of our panelists pointed out, dentists see a lot of people with tooth problems. It isn't exactly a "stop the presses" revelation to hear that a lawyer whose specialty is representing consumers who are suing car dealers hears a lot of stories about dealers violating the law.

The industry representatives were quick to acknowledge that there are dealers who violate the law. I can't speak for the rest of the industry panelists, but my view is that there are some, but very few, dealers who intentionally violate the law, and many of the unintentional legal violations that occur are due to the complexity and incredible scope of the laws and regulations that govern auto sales, finance, and leasing activities.

These same thoughts came to mind as I read Levitin's article. The four abuses that he identifies-current dealer financing transactions result in overcharges to consumers, dealer financing is "particularly susceptible to discriminatory pricing," dealers engage in payment packing, and dealers engage in "yo-yo scams"-have been floated before.

The study positing the first argument was widely discredited after Elizabeth Warren adopted the "overcharged consumer" theme as one of her talking points. Even without looking at the study, there's a question of whether dealer financing practices decried by the consumer advocates are abusive at all. Dealers, after all, sell vehicles, and they sell financing. Absent prohibited discrimination, who is to say that a dealership, or any retailer, must offer its products and services at one cost to all comers?

It drives the consumer advocates nuts to hear it, but differential pricing is not illegal unless a law, like

the Equal Credit Opportunity Act, says it is illegal. Airline passengers can pay wildly different prices for adjoining seats on the same flight. A jeweler may charge you $10,000 for one diamond and charge me $9,000 for an identical one. The painter charges me $5,000 to paint my house, while my neighbor pays $5,500 for the identical job on his identical house. That's the marketplace at work. That's business. Absent some pricing discrimination prohibited by law, it's not illegal, immoral, or fattening.

As for illegal discrimination by dealers in setting finance charge rates, Professor Levitin's charges don't reflect changing industry practices. In the last decade or so, companies that buy retail installment contracts from dealers have significantly narrowed gaps between "buy rates" and rates charged to consumers. Many dealers, encouraged by the National Automobile Dealers Association, have adopted "best practices" in setting the amount of dealer participation. I would suggest that change has resulted in reduced dealer discretion in setting a buyer's financing rate and reduced opportunities for illegal discrimination, but Levitin makes no mention of this development.

The dealer abuses that Professor Levitin identifies bear no resemblance to my own recent car-buying experience, and they do not reflect the operations of the dealerships that we advise or the best practices recommended to dealerships by other industry lawyers and by the dealership trade associations. Nor is there any mention of emerging technologies, such as docuPAD and SecureClose, designed to deliver uniform and compliant closing experiences to car buyers.

Yes, there are dealers who engage in payment packing, and, at some dealerships, spot delivery abuses occur. Again, I suggest that commonly adopted dealership best practices in selling voluntary protection products and services have widely curtailed payment packing. As Professor Levitin acknowledges, both payment packing and abusive spot delivery procedures are illegal under current laws and regulations.

"But Tom," I can hear you saying, "you don't know how many 'bad' or 'good' dealers there are. As long as there are any bad ones, why not adopt measures to curb these bad practices?"

You'd be right. I don't know how many rotten apples are in the barrel. But neither does Professor Levitin. You can search his article high and low without finding hard numbers for the frequency of many of the abuses he identifies.

Instead, you will find the same sorts of unsupported anecdotal claptrap that consumer advocates have been spouting for years. Take the statement "dealers will sometimes falsely represent that these add-ons are required as a condition of the loan or that loan pricing will increase if they are not purchased." "Sometimes?" How often does this occur? Once in every 10 deals, or once in every 10 million deals? The article is loaded with footnotes providing the sources of various assertions. No footnote tells us how often "sometimes" is.

That's followed by a long paragraph describing "yo-yo scams" (that is the term consumer advocates use to refer to abusive spot deliveries). You'll look in vain for any citation to any source indicating the frequency with which abusive spot deliveries take place. One deal in 100? One deal in 100 million? Judging from the lack of authority for the statement, I'm betting that the author doesn't know.

I don't know either, but I'm also not the one proposing that car buyers be provided "a three-business day waiting period before delivery of the vehicle for consumers who do not have a bona fide third-party financing offer" and "a fee-free right of rescission for the loan (sic) during this period."

That's an awful lot of sand to throw into the gears of a system that has been in place for decades and that, from my vantage point, seems to work pretty well. Consumer advocates have pushed for years for various rescission rights in connection with car purchases and financing, but industry has been successful in blunting these efforts whenever they have arisen.

Will this time be different? Unless Professor Levitin can provide some proof for his abuse pudding, I'm suspecting not.

When I need a "sanity check" on a topic or position I'm taking, I have several go-to folks whose brains I like to tap. One of these folks is Paul Metrey, the Vice President of Regulatory Affairs of the National Automobile Dealers Association. I asked Paul to critique this article for me.

His response? "If I tell you it's 10 degrees below zero, I can probably convince you to wear a winter coat. If I tell you the UV Index is high, I can probably convince you to wear sunscreen. Either way, the recommendation presupposes the threat, and, without the threat, there is no basis to follow the recommendation. So it is with Professor Levitin's flawed market analysis and widely discredited 'studies' to support the so-called need for more untested, governmental intervention in an otherwise efficient marketplace."

Wish I'd said that.

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

www.hudsoncook.com