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Time for an Alignment?

May 1, 2016 | Thomas B. Hudson

We frequently do reviews of dealer deal jackets to get a feel for the dealer's compliance with state and federal law. When the dealer's deal jacket arrives, the first document I look at is the retail installment sale contract. That's because the RISC is so often a predictor of problems that I'll find in the other deal documents.

Frequently I see a state-of-the-art form, correctly completed, with all "t"s crossed and "i"s dotted. Sometimes, however, I see a contract that is outdated and woefully out of compliance. And occasionally I'll see a form with problems that jump off the page.

One such problem is the misalignment that occurs between the software and hardware that the dealer uses to populate the data points in the RISC. Usually the data points are just a smidge off, and there is no doubt that an entry was intended to appear in the blank just below, above, or beside it. Other times, though, the entry error is so bad that a consumer lawyer can make a credible argument that the entry is missing or that a box was not checked. A recent case illustrates the problem.

Elisa Franco bought a vehicle from A Better Way Wholesale Autos, Inc., and signed a retail installment sale contract to finance the vehicle. The RISC included a $60 charge for vendor's single interest insurance that was disclosed as part of the amount financed, not as a finance charge.

The Truth in Lending Act requires creditors to disclose all finance charges. TILA provides that charges for insurance do not constitute finance charges and, therefore, do not need to be disclosed as such when "a clear and specific statement in writing is furnished by the creditor to the person to whom credit is extended setting forth the cost of insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained."

In this case, the RISC permitted the parties to add terms to the contract by checking a box next to a particular provision. The provision in the RISC concerning VSI insurance, which stated that VSI insurance was required and that the buyer could obtain this insurance herself or elect to buy the insurance through the creditor, was not checked. An "xx" appeared above and to the left of the VSI insurance provision check-box, in a margin between two other contractual provisions.

The dealer argued that the "xx" constituted checking the box for the VSI insurance

provision. Predictably, Franco disagreed.

Franco sued A Better Way and BCI Financial Corp., the assignee of the RISC, for violating TILA, alleging that the RISC did not disclose the VSI insurance as a finance charge and did not incorporate the VSI insurance provision notifying her that she could obtain VSI insurance from a person of her choice.

Both sides moved for summary judgment. The parties agreed that the charge for VSI insurance must be disclosed as a finance charge unless the VSI insurance provision applies. The parties also agreed that the charge for VSI insurance was not disclosed as a finance charge. Therefore, the U.S. District Court for the District of Connecticut had to determine whether the placement of the "xx" incorporated the VSI insurance provision into the RISC.

According to the court, whether a box has or has not been checked is usually a factual question to be resolved by the jury, not a question of law to be resolved on summary judgment. However, this case presented an exception because the factual dispute was not genuine. The court found that the box "simply wasn't checked."

According to the court, the "mark has no clear significance and appears to be a stray mark." The court added that, applying state law principles of contract interpretation, any ambiguity would be construed against the drafter. Therefore, the court concluded that no reasonable juror could find that the stray "xx" constituted a "clear and specific statement" providing Franco with notice that she "may choose the person through which the insurance is to be obtained."

Accordingly, A Better Way was liable for the TILA violation. BCI, as the assignee, would not have been liable for the violation but for the fact that the violation was apparent on the face of the RISC.

A forms completion problem like this is especially dangerous because it affects every deal - a class action lawyer's dream. So, if your deal completion software and hardware have hit a pothole and have developed alignment problems, it's time for some repairs.

Franco v. A Better Way Wholesale Autos, Inc., 2016 U.S. Dist. LEXIS 26130 (D. Conn. March 1, 2016).

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