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State of Wisconsin  
Office of Commissioner of Banking

131 West Wilson Street • Madison, Wisconsin 53707

Date: October 30, 1989  
To: All Wisconsin Motor Vehicle Dealers  
Re: Illegal Contractual Practices:  
1) Conditional Delivery Agreements/Bailment Agreements  
2) Financing of Downpayments

This office regulates motor vehicle financing pursuant to Section 218.01 and Chapters 421 through 427 of the Wisconsin Statutes. It has come to our attention that certain motor vehicle dealers are engaged in illegal contractual practices with respect to the sale and financing of motor vehicles. Those practices are referenced above.

CONDITIONAL DELIVERY AGREEMENTS/BAILMENT AGREEMENTS

An increasing number of motor vehicle sales transactions involving dealer financing have been found where the transaction is evidenced by a retail installment sales contract and a separate conditional delivery agreement/bailment agreement. The dealer requires the customer to sign both the installment sales contract and the conditional delivery agreement while the dealer will only sign the conditional delivery agreement. It is apparently thought that the retail installment contract thereby subjects the customer to liability but exempts the dealer until such time as a representative of the dealer signs the contract.

Under the terms of the conditional delivery agreement/bailment agreement, the seller grants temporary use of the vehicle while attempting to obtain financing. If financing cannot be obtained, the agreement requires that the customer must either return the vehicle and pay any costs of damage or certain costs for use of the vehicle, or pay the cash price and retain the vehicle.

The practice described above would violate Sub-sections 218.01(6)(c) and 422.303(1) of the Wisconsin Statutes. Sub-section 218.01(6)(c), Wis. Stats., provides that:

"An exact copy of the installment sale contract and any note or notes given in connection therewith shall be furnished by the seller to the buyer at the time the buyer signs the contract. The buyer's copy of the contract shall contain the signature of the seller identical with the signature of the original contract."  
(emphasis added)

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The dealer's signature must be on the installment sales contract when presented to the customer.

Sub-section 422.303(1) of the Statutes provides that in a consumer credit sale the customer's obligation to pay the total of payments must be evidenced by a single instrument. An installment sale contract and a conditional delivery agreement would constitute two separate documents evidencing the same purchase. It should also be noted that the conditional delivery/bailment agreements do not comply with the disclosure requirements of the Wisconsin Consumer Act. Consequently, a conditional delivery agreement may not be used in connection with an installment sales contract which has been signed by the customer.

A problem resulting from the use of conditional delivery or bailment agreements is illegal repossession. When dealers find that they cannot place financing, they attempt to recover the vehicles. Procedures that have been used have included immediate repossession without following sub-chapter 2 of Chapter 425 of the Wisconsin Consumer Act covering the enforcement of a merchant's rights. Any non-judicial enforcement or attempt to repossess a motor vehicle in violation of the statutes can result in the transaction becoming void pursuant to Section 425.305, Wis. Stats. In such a transaction, the customer is entitled to retain the motor vehicle without an obligation to pay any amount. In addition, the customer is entitled to recover any sums paid to the dealer pursuant to the transaction.

#### SIDE LOANS FOR DOWNPAYMENTS

Another device being used by certain dealers in an attempt to obtain financing for potential customers, is a side loan. The problem results when the dealer, separately from the retail installment sales contract, agrees to finance or carry on open-account for a portion or all of the downpayment. When a portion of a cash downpayment is payable in one or more installments after the date the installment sales contract is signed, the cash downpayment is improperly disclosed on the retail installment sales contract because the cash downpayment was not the actual amount paid by the customer as of that date. This is a misrepresentation to both the financial institution and the customer. This type of payment is not considered a pickup payment which would be allowed by Truth-In-Lending, if properly disclosed in the retail installment sales contract. Sub-section 218.01(3)(a)9 and 11, Wis. Stats., provide that a motor vehicle dealer's license can be denied, suspended or revoked when fraudulent misrepresentations are made or unconscionable practices are used. The improper disclosure of a downpayment is also in violation of Sub-section 218.01(6)(b), Wis. Stats., and could be termed an unconscionable practice pursuant to Section 425.107 of the Wisconsin Consumer Act.

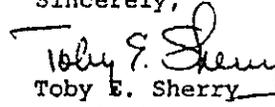
As in the use of the Conditional Delivery or Bailment Agreement, financing or carrying the downpayment in a side agreement violates the single instrument requirement of Sub-section 422.303(1) of the Wisconsin Statutes.

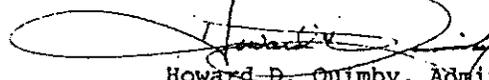
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PENALTIES

Serious penalties can arise from violations of the referenced statutes. As related in the comments on illegal repossession, a transaction could be declared void and the customer allowed to retain the vehicle with no obligation to pay any amount and recover any sums paid. In addition, Sub-section 218.01(6)(h) of the Wisconsin Statutes provides that all transactions which constitute consumer transactions under Section 218.01, Wis. Stats., are subject to the Wisconsin Consumer Act. A violation of the Wisconsin Consumer Act could result in a civil penalty of not less than \$100 nor more than \$1,000 for each violation. If a person knowingly or willingly violates the Wisconsin Consumer Act, a civil penalty of not less than \$1,000 nor more than \$10,000 for each violation may be recovered in a civil action. Violations of these types, discovered as occurring after receipt of this letter, will be considered willful. If you have any questions regarding the matters related above, please contact our office.

Sincerely,

  
Toby E. Sherry  
Commissioner

  
Howard D. Quimby, Administrator  
Division of Consumer Credit