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Digital Sales and Financing in the Auto Market

Automotive Intelligence Summit

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Introduction



Agenda

- > Electronic contracting and document delivery
- > Online sales
- > Servicing and collection



1. Electronic Contracting and Document Delivery



Electronic Signatures in Global and National Commerce Act

- > Framework for electronic signatures and electronic records
 - Electronic signature = process
 - Electronic record = record that is electronically created, generated or stored, must be able to be accurately reproduced
- > Preempts state law, other than when state law constitutes an enactment of UETA or provides alternatives that are consistent with E-Sign(15 U.S.C. § 7002(a))
 - California Electronic Transactions Act, Civil Code 1633.3 (applicability)



E-Sign Act

- > Special rules for consumer transactions
 - **Element 1:** Affirmative consent to use electronic records
 - Customer may later withdraw consent
 - Allows standard TILA/Reg. Z disclosures to be electronically delivered
 - **Element 2:** Deliver statutory disclosures related to consent
 - **Element 3:** Consent must “reasonably demonstrate” consumer’s ability to receive electronic records
- > An enabling law without a private cause of action
- > Failure to comply is not without risk
 - Consider *Grays v. Auto Mart USA, LLC*, No. 18-CV-01761-MSK-NYW, 2020 WL 6268630 (D. Colo. Oct. 26, 2020).



E-Sign Act Consent

> Consent must describe:

- Right to paper contract
- Right to withdraw consent and consequences
- Scope → a specific transaction or all records/transactions?
- Procedure to withdraw consent
- How to obtain a paper copies
- Hardware/software requirements to access and retain records

> Workable for computers, dated for mobile devices



Uniform Electronic Transaction Act

- > Model law published by Uniform Law Commission
- > Adopted by every state but one
 - Illinois adopted UETA in June 2021
 - New York has not adopted UETA, but has a statute that recognizes enforceability of electronic signatures
- > Recognizes:
 - Legal effect of electronic signatures
 - Enforceability of contracts signed by electronic signatures



Customer Experience

- > Electronic delivery of statutorily required content (e.g., TILA), but provide opportunity to print
- > Placement of E-Sign consent within user experience
- > Vendor integration



Identity Verification

- > E-Sign and UETA provide framework to create a binding agreement, but do not address attribution
- > Validation information
 - Credit report information
 - Out-of-wallet questions
 - Multi-factor authentication
 - Two-step authentication
 - Signature within online environment after establishing and verifying account
- > No method is perfect

Identity Verification

> Evidentiary requirements

- Writing must be authenticated before admitted as evidence
- Courts have refused to admit evidence when signature could not be established as an “act” of the signing party (*Ruiz v. Moss Bros. Auto Group*, 232 Cal. App. 4 th 836 (Dec. 23, 2014))
- Consider evidence rules for electronic signatures (*See* Cal. Civ. Code 1633.9(a))
 - May be shown in any manner, including the efficacy of a security procedure to determine the person to which the electronic record or signature was attributable



Electronic Vault & Control

- > Information system to store electronic signatures and electronic records
- > UCC § 9-105 establishes rules for digital securities as electronic chattel-paper for non real estate assets
- > UETA standards for integrity of the record include:
 - Single authoritative copy of the record
 - Maintained by the person asserting control or its custodian
 - Each copy of the authoritative copy is identifiable as a copy that is not the authoritative copy
 - Any revision to the authoritative copy is readily identifiable as authorized or unauthorized



Electronic Vault & Control

> Article 9 of the UCC

- Secured party has control of electronic chattel paper if the system that evidences the transfers reliably establishes the secured party as the assignee
- System standards are consistent with UETA (UCC § 9-105(b))
- Key elements of the UCC safe harbor include:
 - Single authoritative record
 - Uniquely identifiable
 - Cannot be altered

> UCC leaves it to the marketplace to develop systems and procedures



Enforceability

- > Information and disclosures effectively presented?
 - Consider screen and text size, scrolling requirements
 - Ability to save/print a copy prior to signature
- > Courts scrutinize presentation
 - Stanfield v. Tawkify, Inc., 517 F. Supp.3d 1002 (N.D. Cal. 2021)
(discussing differences between “clickwrap” and “browsewrap”)
- > CFPB to study effectiveness of electronic disclosures on mobile devices



2. Online Transactions

Sourcing Sales and Marketing

Regulation Z Credit Advertisement Framework

Does the advertisement include any of this information?	If it does:	Include all of this information:
The amount or percentage of any downpayment		The amount or percentage of the downpayment
The number of payments or period of repayment		The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment
The amount of any payment		The “annual percentage rate,” using that term, and, if the rate may be increased after consummation, that fact
The amount of any finance charge		



Sourcing Sales and Marketing

- > Triggering term framework
 - Consider digital presentation in various screen sizes
- > Term triggering additional disclosures may be accompanied by a link to the additional information (12 C.F.R. 1026(c)(1))
- > FTC guidance for online advertising and marketing:
 - *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*
 - *Advertising and Marketing on the Internet: Rules of the Road*



Targeted Advertisement

- > Equal Credit Opportunity Act protections based on race, color, religion, national origin, sex or marital status
- > Regulation B prohibits statements, including advertisements, that would *discourage* on a prohibited basis
- > Compliance considerations with targeted marketing campaigns
 - Facebook and HUD settlement
 - “Lookalike” platform to select recipients of credit advertisement
 - Vet marketing algorithm and attributes for targeted campaigns → eliminate those that rely on protected status



Targeted Advertisement – California Consumer Privacy Act

> California AG Enforcement Case Examples

- “Sale” of information where contracts with service providers lack adequate protections
- Failure to identify third-party online trackers on website as service providers
- Collection of data not covered by Gramm-Leach-Bliley Act



User Experience Executing Contract

- > Website design and impact on enforceability
 - Hyperlinks to obtain E-Sign consent → color, placement
 - Font size
- > Whether terms and content have been reasonably communicated
- > Apply a reasonably prudent person standard
- > Consider presentation and clarity of text:
 - Clear - “By clicking [Agree], you indicate that you have read and agree to [Contract]”
 - Unclear – “Click [Next].”



FTC Auto Sales Report

- > FTC Staff Report of the Bureau of Consumer Protection, *Buckle Up: Navigating Auto Sales and Financing* (July 2020)
- > Identifies customer concerns with digital process to review and sign contracts
 - Some technology-agnostic (e.g., lengthy process, dealer rushing)
- > Electronic documents review
 - Lack of time to scroll and read iPad or tablet
 - Difficulty following online process
 - Speed prevented time to review documents



State Law

- > Cross-border transactions and choice of law
 - Dealer licensure
 - Sale disclosures
 - Credit agreement
 - Titling



Dealer Licensure

- > New vehicle dealer licenses tied to having a contract or franchise relationship with manufacturer
 - License is required for company to have this relationship in a specific state
- > Used vehicle sales are more common in digital market
- > Test is whether the dealer is selling a vehicle in a particular state
 - California, for example, recently acknowledged Vehicle Code does not address or prohibit online sales of vehicles (*Online Vehicle Sales and Off-Site Delivery*, OLIN 2020-04)
- > Relationship between dealer licensure and choice of law in RIC
- > State law does not provide clarity or certainty

Digital Overlay

- > Digital sales value a dynamic user experience
- > Compliance challenges that require disclosure of certain items prior to sale and execution of RIC
 - California Civil Code 2982.2 (Disclosures for conditional sale contracts)
 - A description and the price of each item sold (service contract, debt cancellation agreement, etc.) if the contract includes a charge for the item;
 - The sum of all of these charges, labeled “total”;
 - The amount that would be calculated under the contract as the regular installment payment if charges for the items disclosed are not included in the contract. The amount disclosed pursuant to this subdivision shall be labeled “Installment Payment EXCLUDING Listed Items”; and
 - The amount that would be calculated under the contract as the regular installment payment if charges for the items disclosed are included in the contract. The amount disclosed pursuant to this subdivision shall be labeled “Installment Payment INCLUDING Listed Items.”



Choice of Law

- > For indirect auto finance, study retail installment sale law
- > Retail installment contract often defined as:
 - Agreement “entered into this state” (Ariz. Rev. Stat. § 44-281, Fla. Stat. 520.02)
 - Agreement “signed by the buyer in this state” (Mass. Gen. Laws ch. 255B § 1)
 - Contract “reflecting a sale made pursuant [to], entered into, or performed in this state” (Nev. Stat. § 97.105)
- > Where is the electronically signed contract “entered into?”

Choice of Law

- > States that have adopted the Uniform Consumer Credit Code
 - Study territorial and jurisdictional authority
 - Guidance on when a transaction is made in the state
- > Consider Colorado:
 - A written agreement evidencing the obligation or offer of the consumer is received by the creditor in this state; or
 - A ***consumer who is a resident of this state*** enters into the transaction with a creditor who has solicited or advertised in this state by any means, ***including*** but not limited to mail, brochure, telephone, print, radio, television, ***internet***, or any other electronic means.



3. Servicing & Collection



State Delivery Requirements

- > E-Sign and UETA authorize electronic delivery of content that must be provided in writing
- > Some state laws specify delivery
 - Certified mail
 - Registered mail
- > Case law is not developed
- > In practice, most companies do not rely on electronic delivery of right to cure and repossession notices

Regulation F (FDCPA)

- > Creditor collecting for itself is not subject to rulemaking, but rule may guide compliance strategy
- > Final rulemaking recognized electronic communications
 - Borrower's "written request" for collector to cease communication may be delivered electronically
 - Collector may send debt validation notice or other statutorily required disclosures electronically only if it has obtained consumer consent in accordance with E-Sign
 - Declined to address whether consent must be obtained directly from consumer or if it can be transferred from creditor



Regulation F (FDCPA)

- > Provided certainty that routine collection communications may be sent by email
- > Collector to implement procedures to avoid a bona fide error in sending email to a third party using any of the following:
 - Direct communication with the consumer;
 - Creditor communication with the consumer; or
 - Prior debt collector communication with the consumer
- > Creditor communication option is burdensome and onerous on the creditor

Regulation F – Bona Fide Error Reliant Upon Creditor Participation

> Five part test:

- The creditor obtained the email address from the consumer;
- The creditor used the email address to communicate with the consumer about the account and the consumer did not ask the creditor to stop using it;
- Before the debt collector used the email address to communicate with the consumer about the debt, ***the creditor sent the consumer a written or electronic notice that clearly and conspicuously disclosed the information required under Regulation F (including the right to opt out of email communications)***;
- The opt-out period has expired and the consumer has not opted out; and
- The email address has a domain name that is available for use by the general public (e.g. @gmail.com), unless the debt collector knows the address is provided by the consumer's employer.



Online Auction and Disposition

- > Increase demand for online disposition
- > UCC 9-610 (Disposition of Collateral)
 - Every aspect must be commercially reasonable
 - Official Comment 2:

Although [9-610(b)] permits public and private dispositions, including public and private dispositions conducted over the Internet, “every aspect of a disposition...must be commercially reasonable.”



Online Auction and Disposition

- > Leading providers require a wholesale or dealer license to bid through online auction
 - Challenges with public sale states
- > Auction will show “Pre-Sale Inventory” at a physical auction lane
 - Condition report, VIN, photos of the vehicle exterior and interior
- > Simulcast that allows participants to bid from any location, subject to gatekeeping issues
- > How to comply with state law public sale requirements or inspection right?



4. Industry Trends



Auto Finance Lending Disruptors

- > Seventy-eight percent of consumers start their car purchase process on independent sites (Car Buyer Journey, Cox Automotive)
 - Few make it to dealer or manufacturer websites, much less financing sources
- > Significant growth with online used car sales
- > Consumers seek alternative financing other than dealer
 - Consider disruptors like Zuto, Smava and Kiva



CFPB Interest

- > Notice requesting comment on electronic disclosure on mobile devices
 - Step 1 before requesting OMB approval for formal study
- > Will conduct studies rooted in psychology and behavioral economics
- > Comment period closed on September 10, 2021
 - Only three comments
 - Two from banking industry encouraging their engagement, not just consumer participation

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