CONSUMER PROTECTION LAW
PRACTICE IN ARIZONA
Choi & Fabian, PLC
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WHAT WE SEE			WHAT WE USE	REMEDIES
Bad Cars				
	New			
		Lemon	Arizona Lemon Law, ARS §§44-1261 – 1267, if within 24,000 miles or 24 months, whichever is earlier	Arbitration Repurchase Fees
		Warranty	Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d).	Damages Equitable remedies Fees
	Used			
		Implied Warranty	Arizona Used Car Lemon Law, A.R.S. § 44-1267	Damages, capped at purchase price Fees (refer back to Magnuson-Moss)
			U.C.C. warranty in connection with the sale of any goods by a merchant, A.R.S. § 47-2314	Damages, capped at purchase price Fees (refer back to Magnuson-Moss)
		Omission of adverse history	Consumer Fraud Act, A.R.S. §§ 44-1521 – 1532 For example, A.R.S. § 28-4422 (requiring dealers to disclose prior sale of a "new" vehicle)	Actual damages Punitive damages Fees (?)
		Odometer Rollback	the Motor Vehicle Information and Cost Savings Act (49 U.S.C. § 32701 *et seq.*) ("Odometer Act")	3 x actual damages Statutory damages ($11,956.00) Fees
Bad Car Deals				
	Delay			
		Trade payoff	Breach of Contract Consumer Fraud Act "the Holder Liability Rule" 16 C.F.R. 433.2	Actual damages Punitive damages Fees (?)
		Failure to Transfer Title	Breach of Contract Consumer Fraud Act "the Holder Liability Rule" 16 C.F.R. 433.2	Imputed liability against finance company, capped at amount financed, Fees (?)
		Yo-Yo Sales	Breach of Contract	Actual damages Fees

	Vehicle Service Contract			
		Coverage Denial	Breach of Contract But read A.R.S. § 20-1095.06 Insurance Bad Faith	Actual damages Punitive damages Fees (?)
		Failure to Fund	Breach of Contract Consumer Fraud Act	Actual damages Punitive damages Fees (?)
		Repossession	Must send Notice of Intent to Resell Vehicle. A.R.S. § 47-9611	Statutory Damages A.R.S. § 47-9625(c) Fees
Houses				
	Solar			
		Bad Promises	Breach of Contract (Agency) Consumer Fraud Act "the Cooling-Off Rule", 16 C.F.R. § 429 "the Holder Liability Rule"	Actual damages Punitive damages Rescission Imputed Liability Fees (?)
		Bad Performance	Breach of Contract "the Holder Liability Rule"	Actual damages Imputed Liability Fees (?)
		Bad Loan Servicing	Breach of Contract FCRA	Actual damages Punitive damages Fees
	AC			
		Bad install	Refer to Registrar of Contractors Breach of Contract	Actual damages Fees
Credit				
	Bad Terms			
		Online Financing	TILA the Holder Liability Rule	
		Car Repairs	TILA the Holder Liability Rule	
		Car Purchases	TILA the Holder Liability Rule	
	Bad Reporting		FCRA	
Debt				
	SOL			

SELECTED ARIZONA CONSUMER PROTECTION LAW

ARIZONA MOTOR VEHICLE WARRANTIES ACT aka “LEMON LAW”
ARS §§ 44-1261 – 1267

MAGNUSON-MOSS WARRANTY ACT.
15 U.S.C. §§ 2301-2312

LEMON LAW - USED CAR
A.R.S. § 47-2314

UCC IMPLIED WARRANTY
A.R.S. § 47-2314

AZ CONSUMER FRAUD ACT
A.R.S. §§ 44-1521 – 1532

THE FEDERAL TRADE COMMISSION’S (“FTC”) RULE REGARDING THE PRESERVATION OF CONSUMERS’ CLAIMS AND DEFENSES, 16 C.F.R. 433.2 (“THE HOLDER LIABILITY RULE”)

PRIORITY OF INTEREST IN CASE OF TITLE TRANSFER FAILURE

YO-YO SALES

VEHICLE SERVICE CONTRACT

REPOSSESSION

COOLING OFF RULE
16 C.F.R. § 429

FAIR CREDIT REPORTING ACT
15 U.S.C. §§ 1681 - 1681u.

TRUTH IN LENDING ACT and HOEPA
15 U.S.C. §§ 1601 et seq., and Regulation Z, 12 CFR Part 1026.

MISC. TOOL BAG

ARIZONA MOTOR VEHICLE WARRANTIES ACT aka "LEMON LAW"
ARS §§ 44-1261 – 1267

Arizona does have a "lemon law" presumably designed to protect the buyers of new cars from certain problems. It is codified as Arizona Revised Statutes, Title 44, Chapter 9, Article 5, Motor Vehicle Warranties (A.R.S. § 44-1261, et seq.)

History of Arizona's Lemon Law

However, the law is not very consumer friendly. Arizona's legislature enacted our lemon law in 1984 after the Arizona Supreme Court's decision *Seekings v. Jimmy GMC*, 130 Ariz. 596, 638 P.2d 210 (1983). A while ago, I had privilege to speak with attorney Jim Fein, the lawyer who represented Mr. and Mrs. Seekings. He believes the Arizona automobile dealers' lobby pressured to the legislature to allow the dealers to escape the liability imposed upon it by the *Seekings* case.

Seekings case said buyer can use A.R.S. 47-2608 (then 44-2371) to revoke acceptance against dealer or manufacturer. *Seekings* case also said a valid disclaimer of warranty did not prevent revocation pursuant to A.R.S. 47-2608. Revocation available for breach of warranty or "whenever good sold fail to conform to the seller's representation of the goods if the nonconformity "substantially impairs" the value of the goods to the buyer." After revocation, incidental and consequential damages were available. A.R.S. 47-2715. In *Seekings* case, Plaintiff won $15,000 in loss of use damages. After *Seekings* case, the legislature passed Arizona's Lemon Law. At the same time, the legislature also amended A.R.S. 47-2608 to exclude from U.C.C. new motor vehicles which are subject to the lemon law. A.R.S. 47-2608(D). Thus, new car buyers have less right than merchants in at-arm lengths-negotiations.

When Does Lemon Law Apply?

A new car typically qualifies as a "lemon" when it has a defect that substantially affects its use, safety, or value. In Arizona, it is presumed that a car is a lemon when it spent more than 30 days at repair shops, or a substantial problem cannot be repaired after 4 or more repair attempts, within 24,000 miles or 24 months, whichever comes first. Safety related problems such as steering problems, car not starting (this is a safety problem in 115 weather), or brake problems will qualify as substantial problems. However, manufacturers will contest and claim problems with radio, noise, etc. will be considered minor. There is no bright line rule, and this is one aspect that is not consumer friendly.

In Arizona, lemon laws apply to vehicles that have gross weight of less than 10,000 lbs. Thus, most passenger vehicles, including SUVs and non-commercial trucks will fall under the lemon law. Arizona's lemon laws do not apply to the dwelling portion of RVs.

How Do I Make a Lemon Law Claim?

In most cases, you should be able to handle a lemon law claim without a lawyer. However, for expensive cars or defects involving dangerous situations, a lawyer's help may be to your advantage.

If you wish to handle a lemon law case without a lawyer, you should first carefully read your warranty manual. Most of large manufacturers have arbitration program (usually through Better Business Bureau) that is mandatory before filing of a lawsuit under the lemon law. The warranty manual will provide contact information for initiating arbitration. Once you request an arbitration, you will receive a detailed instructions from BBB or the arbitrating organization. It is very important to read and follow the steps outlined in the brochure.

Lemon Law Remedies

Once arbitration is initiated, many manufacturers will attempt to settle through a variety of methods: discount on a future purchase, extended warranty, or exchange for a lesser model. Manufacturers do not want to be ordered to repurchase a car. In that case, the manufacturer must label the car as a lemon buy back and take a big loss in reselling the car.

If you do not settle, the arbitrator will make a decision on whether the car is lemon. Arizona's lemon law requires the manufacturer to buy back a lemon vehicle for the full price paid, "less a reasonable allowance for the consumer's use of the vehicle." A.R.S. §44-1263(1).

Even if you were lucky enough to convince the BBB or some other arbitration forum that your car is indeed a lemon, you are still far from getting a fair remedy.

As far as I know, BBB and all other arbitration forums calculate the "reasonable allowance" based on the outdated assumption that life of a vehicle is 100,000 miles. That means if lemon vehicle has 25,000 miles at the time of buy back, you will get only 75% of the price paid. For many people – especially if you did not make substantial down payment – this means you have to pay to have the manufacturer buy back your lemon vehicle.

This method is flawed and unfair for the following reasons:

1. The useful life of modern vehicles are far more than 100,000 miles. The buy back formula still used by BBB and most other arbitration forums, however, is outdated and does not account for the facts that vehicles are now expected to last over 150,000 miles. As far back as 2006, the National Highway Traffic Safety Administration's study determined that a typical passenger car traveled a lifetime mileage of 152,137 miles. *See* DOT HS 809 952 Technical Report titled "Vehicle Survivability And Travel Mileage Schedules." Light trucks are expected to last 179,954 miles. These numbers shoulder be higher now because vehicles are generally better made.

2. Manufacturer may argue that you should pay more for use of a newer car – use of a car while it is newer has higher value than at the end of its life. This argument makes superficial sense. However, keep in mind that you have been paying interest (or forgoing the time value of money) on the newer value of the vehicle.

3. For a $30,000 vehicle (typical new car price), 100,000 base figure results in mileage charge of $.30 for every miles. Typical lease for a $30,000 vehicle, however, only charges $.15 for excess mileage.

4. You should not be charged for mileage accumulated while you were dealing with defects and problems. A reliable vehicle is paramount in Arizona. You need a reliable vehicle to go to work, take your kids to school, etc. With our dismal public transportation, having a reliable car is vital. By the time a vehicle is found to be a lemon, you have suffered repeated breakdowns, often stranding you, been without a car for many days, and suffered inconveniences. You should not have to pay for use of the vehicle that involved such frustration.

Other Remedies Are Available

While the manufacturer must comply with the arbitrator's decision, you don't have to. You can reject the arbitrator's decision and file a lawsuit.

Aside from lemon laws, you can also bring a lawsuit under the warranty. For example, if your car comes with 5year /60,000 miles powertrain warranty, that means the manufacturer promises to repair any defects in engine and transmission if the problem first surfaced within 5 years or 60,000 miles, whichever comes first.

Of course, you must give a notice and opportunity for the manufacturer to repair first. In fact, you should give manufacturer a reasonable chance to repair. If manufacturer is unable to repair, then you can bring a lawsuit. What is reasonable opportunity to repair depends on the nature of the defect. Again, the issue is safety. If the brake fails, then you shouldn't have to risk your life by giving manufacturer many chances to repair. However, if the defect is cosmetic in nature, then manufacturer should be given ample opportunity to perform repair.

Keep Good Records

If you believe your car is a "lemon" vehicle, it is important to keep good records. Dealers and manufacturers know lemon laws and try to avoid their application. That may include not giving you a repair receipt or giving you incomplete repair receipt. Make sure all of your complaints are documented in the repair receipt.

One of the problems is that the dealers do not always document all of your complaints. Be sure that all complaints are documented in the repair estimate and repair invoice each time you take in your car for repairs.

In addition to the dealer's record, you should also keep your own records. Documentation is crucial. Without proper documentation, even the best claim can fail. Keep a record of any trouble with your vehicle, starting with the very first repair. Make a note of the odometer reading when your car goes in for repairs, and the date and time when you take the car in and get it back. When you talk to service people, or the manufacturer's customer service representatives, record the date, the person's name, and make a note of what they said. Get copies of any warranty repair orders, and get an invoice for every car repair (even when there is no charge for the repair). If the dealership or manufacturer won't give you paperwork, record that fact. If you send letters to the dealer or manufacturer, or receive letters from them, keep a copy in your file. When you make a claim with the manufacturer or apply for arbitration, make sure you keep a copy of any letters or forms you submit.

Maintain Your Vehicle

Make sure you also maintain your vehicle. Keep copies of your maintenance records, including all oil changes. Manufacturers often try to avoid responsibility for lemon vehicles by blaming the problems on the purchaser.

Things to Remember

Does not have to be for consumer use only, could be business use. A.R.S. § 44-1261(a). But, most warranties exclude business use. *Knopick v. Jayco, Inc*., 895 F.3d 525 (7th Cir. 2018).

Leases are tricky. *Parrot v. DiamlerChrysler Corp*., 130 P.3d. 530 (Ariz., 2006).

Only applies to passenger cars and pickup trucks. Excludes most of RVs. A.R.S. § 44-1261(c)

Must give notice and opportunity to cure. A.R.S. § 44-1262(A)(1), A.R.S. § 44-1264(C)

Replace or refund if unable to repair after a reasonable number of repair attempts and the defects substantially impairs the use and value. A.R.S. § 44-1263(A)

"Substantial impairment" not defined. Jury question.

"Reasonable number of repair attempts" – presumptively unreasonable if before 2 yrs or 24,000 miles, whichever is earlier,

The same defect cannot be cured after 4 repair attempts, or Car is out of service for more than 30 or more days. A.R.S. § 44-1264(A)

Must go through arbitration first if manufacturer has such a program. A.R.S. § 44-1265(A).

The arbitration must meet the requirements of 16 CFR 703. 44-1265(A).

BBB Autoline Program may not meet the requirements because it fails to allow all remedies available under state law. *Muller v. Winnebago Industries, Inc.*, 318 F.Supp.2d 844 (Ariz. 2004)

SOL – 6 months after 2 yrs or 24,000 miles, whichever is earlier. A.R.S. § 44-1265(B)

Mandatory fee shift provision. A.R.S. § 44-1265(B). But $715.00 fee award affirmed in *Moedt v. General Motors*, 204 Ariz. 100, 60 P.3d 240 (App. 2002).

MAGNUSON-MOSS WARRANTY ACT.
15 U.S.C. §§ 2301-2312

Magnuson-Moss Warranty Act ("Mag-Moss") is a remedial statute designed "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams*, 899 F.2d 1315, 1317 (2d. Cir. 1990) (quoting 15 U.S.C. § 2302(a)); *see also Hillery v. Georgie Boy Mfg., Inc.,* 341 F. Supp. 2d 1112, 1114 (D. Ariz. 2004. To achieve its goals, Magnuson-Moss permits "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with . . . a written warranty [or] implied warranty . . . [to] bring suit for damages and other legal and equitable relief." 15 U.S.C. § 2310(d)(1); *Pyskaty v. Wide World of Cars, LLC*, 856 F.3d 216, 222 (2nd Cir. 2017).

Broadly speaking, Magnuson-Moss creates two different sets of causes of action. First, it provides a cause of action for violations of specific obligations imposed under the Act. For example, Magnuson-Moss requires that certain disclosures and substantive requirements be met if a manufacturer or other warrantor chooses to give a warranty on a consumer product. 15 U.S.C. § 2302. Second, it allows a consumer to assert a cause of action based on a breach of a warranty, either express or implied, arising out of state law. 15 U.S.C. § 2310(d)(1).

The only requirement that Magnuson-Moss adds to a claim for breach of a state warranty is that the warrantor must be given the opportunity to cure. 15 U.S.C. § 2310(e); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (Magnuson-Moss claims "stand or fall with . . . express and implied warranty claims under state law"); *Anderson v. Gulf Stream Coach, Inc*., 662 F.3d 775, 781 (7th Cir. 2011) (Magnuson-Moss "allows [consumers] to bring federal claims premised on state law violations, but also requires them to give [the defendant] a reasonable opportunity to cure."); *Shoner v. Carrier Corp*., 30 F.4th 1144, 1146 (9th Cir. 2022); *see also Lemons v. Showcase Motors, Inc.*, 207 Ariz. 537, 539, ¶ 7 (App. 2004) ("The Act provides a cause of action to a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under the Act or under a written warranty, implied warranty, or service contract.")

If a consumer prevails on a claim for breach of implied warranty, Magnuson-Moss authorizes an award of attorneys' fees and costs. Although an award of fees is not mandatory under Magnuson-Moss, "[w]here a statute or contractual provision authorizes a fee award, such an award becomes the rule rather than the exception, and should be awarded routinely as are costs of suit." *Engel v. Teleprompter Corp.*, 732 F.2d 1238, 1241 (5th Cir. 1984).

Consumer is also entitled to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred. 15 U.S.C. § 2310(d)(2).

Highlights of Magnuson-Moss Remedies

Major components

1. Mandates form of disclosure of warranty. 15 U.S.C. § 2302 and 2303, 16 CFR 701.

2. Federal Minimum standards. 15 U.S.C. § 2304
3. Remedies for breach. 15 U.S.C. § 2310

Most effective against manufacturer. Can also be used against dealer in certain circumstances. A dealer cannot disclaim implied warranties, if "at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product." 15 U.S.C. § 2308(a).

Dealers claim they are "vendors" of service contract and therefore can disclaim implied warranties. *Priebe v. Autobarn, Limited*, 240 F.3d 584 (7th Cir. 2001)

SOL - express warranty – 4 yrs. *Hillery v. Georgie Boy Mfg., Inc.*, 341 F.Supp. 2d 1112 (Ariz. 2004)

Remedies under the Magnuson-Moss Warranty Act are essentially the same as under the state lemon law, except longer SOL, and no presumption.

LEMON LAW - USED CAR
A.R.S. § 47-2314

Substantive Rights.

15 days/500 miles, whichever is earlier. Cannot disclaim implied warranty of merchantability prescribed in § 47-2314 or limit the remedies for a breach of that warranty except under limited circumstances.

Must give a written statement printed in bold-faced ten point or larger type set off from the body of the agreement:

The seller hereby warrants that this vehicle will be fit for the ordinary purposes for which the vehicle is used for 15 days or 500 miles after delivery, whichever is earlier, except with regard to particular defects disclosed on the first page of this agreement. You (the purchaser) will have to pay up to $25.00 for each of the first two repairs if the warranty is violated.

An attempt to exclude, modify or disclaim the implied warranty of merchantability or to limit the remedies for a breach of that warranty, except as otherwise provided in this section, in violation of this subsection renders a purchase agreement voidable at the option of the purchaser.

For the purposes of this section, the implied warranty of merchantability is met if the motor vehicle functions in a safe condition as provided in title 28, chapter 3, article 16 (equipment standard - very minimal) and is substantially free of any defect that significantly limits the use of the motor vehicle for the ordinary purpose of transportation on any public highway.

The maximum liability of the seller under this section is limited to the purchase price paid for the used motor vehicle.

Procedure.

The purchaser shall give reasonable notice to the seller.

Before the purchaser exercises any U.C.C. remedies, the seller shall have a reasonable opportunity to repair the vehicle.

A purchaser of a used motor vehicle may waive the implied warranty of merchantability described in this section only for a particular defect in the vehicle only through written disclosure.

Any purchaser or seller who is aggrieved by a transaction pursuant to this section and who seeks a legal remedy shall pursue any appropriate U.C.C. remedies but must follow U.C.C. requirements.

Open Questions.

What constitutes defect that significantly limits the use?

What is reasonable opportunity to repair?

Continuing duty to repair?

Highlights of State Lemon Law - Used Cars

Not very consumer friendly.

Applies to all used cars sold by licensed dealer. A.R.S. § 44-1267(B)

A licensed dealer cannot disclaim implied warranty of merchantability for the first 500 miles or 15 days, whichever is earlier. A.R.S. § 44-1267(B)

Implied warranty of merchantability is met if "substantially free of any defects that significantly limits the use of the motor vehicle for the ordinary purpose of transportation on any public highway. A.R.S. § 44-1267(C)

Buyer must give notice and chance to cure. A.R.S. § 44-1267(E)

Maximum liability of the dealer is the purchase price. A.R.S. § 44-1267(F)

Must disclose the warranty. Can also make specific disclosure of a problem and exclude it from the warranty. A.R.S. § 44-1267(G) & (H).

UCC IMPLIED WARRANTY

A.R.S. § 47-2314

These two warranties (used car lemon law and UCC implied) are interrelated, but not identical.

The UCC warranty provides:

> Unless excluded or modified (section 47-2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

A.R.S. § 47-2314. The standard for a UCC warranty claim is that goods:

1. Pass without objection in the trade under the contract description; and

2. In the case of fungible goods, are of fair average quality within the description; and

3. Are fit for the ordinary purposes for which such goods are used; and

4. Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

5. Are adequately contained, packaged, and labeled as the agreement may require; and

6. Conform to the promises or affirmations of fact made on the container or label if any.

A.R.S. § 47-2314(B). The UCC warranty may be disclaimed with words such as "as-is", "with all faults" or "other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." A.R.S. § 47-2316(C).

The Lemon Law warranty arises only in the sale of a used motor vehicle by a motor vehicle dealer. A.R.S. § 44-1267(B). The statute prohibits a motor vehicle dealer from disclaiming the UCC warranty on a used motor vehicle within the first 15 days, 500 miles after a sale. A.R.S. § 44-1267(B). Thus, with limited exceptions, in Arizona there is always an implied warranty of merchantability for the first fifteen days or five hundred miles, whichever comes earlier, after a dealer's sale of a used motor vehicle. *Lemons v. Showcase Motors, Inc.*, 207 Ariz. 537, 539, ¶ 8 (App. 2004). ("As a general rule, an 'as is' sale excludes [the UCC] warranty after the statutory fifteen-day and 500-mile limits.")

Because A.R.S. § 44-1267 precludes a dealer from disclaiming the UCC warranty, it would be logical if the standard for the implied warranties of merchantability to be identical in both statutes. However, the Lemon Law warranty has a slightly different standard: "The implied

warranty of merchantability is met if the motor vehicle functions in a safe condition as provided in title 28, chapter 3, article 16 [A.R.S. §§ 28-921 – 28-966, setting forth equipment requirements for vehicles driven on a highway] and is substantially free of any defect that significantly limits the use of the motor vehicle for the ordinary purpose of transportation on any public highway." A.R.S. § 44-1267(C). In addition, A.R.S. § 44-1267(E), requires that the consumer give the dealer the opportunity to repair the vehicle.

Because the standard for each warranty is slightly different, the two claims were submitted to the jury separately. However, there can be no question that both claims are implied warranties arising under state law.

Implied Warranty of Merchantability under Uniform Commercial Code (A.R.S. § 44-2314) requires privity. *Flory v. Silvercrest Industries*, 129 Ariz. 574, 633 P.2d 383 (1981); *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 678 P.2d 427 (1984).

Highlights of UCC Warranty Remedies

The written limited warranty creates a contract between the manufacturer and the consumer. *Seekings v. Jimmy GMC of Tucson*, Inc., 130 Ariz. 596, 601, 638 P.2d 210, 215 (1981).

Warrantor who issues a limited warranty must perform repairs after given a reasonable opportunity to do so, and if the warrantor fails to perform such repairs within a reasonable time, a plaintiff may seek other damages such as revocation of acceptance. *Roberts v. Morgensen Motors*, 135 Ariz. 162, 659 P.2d 1307, 1311 (1982).

AZ CONSUMER FRAUD ACT
A.R.S. §§ 44-1521 - 1532

Arizona's Consumer Fraud Act ("AzCFA") prohibits the "act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby." A.R.S. § 44-1522. AzCFA is a broadly drafted remedial provision designed to eliminate unlawful practices in consumer-merchant transactions. It provides injured consumers with remedy to counteract disproportionate bargaining power often present in consumer transactions. *Madsen v. Western American Mortg.* Co., 143 Ariz. 614, 694 p.2d 1228 (App. 1985); *Holeman v. Neils*, 803 F.Supp. 237 (D.Ariz. 1992); *Waste Mfg. & Leasing Corp. v. Hambicki*, 183 Ariz. 84, 900 P.2d 1220 (App. 1995). The burden of proof for AzCFA claim is Preponderance of the Evidence. *Dunlap v. Jimmy GMC of Tucson*, 136 Ariz. 338, 666 P.2d 83 (App. 1983).

Plaintiff needs not show that her reliance on Defendant's misrepresentations was reasonable. Plaintiff needs only show that she did rely on Defendant's misrepresentations. *Kuehn v. Stanley*, 208 Ariz. 124, 91 P. 3d 346 (App. 2004). In the sale of goods, especially those sales involving automobile, it is the consumer who relies upon the skill, knowledge and expertise of the salesman and dealer when making the purchase. Indeed, consumer reliance is expected. Thus it is, arguably, up to the seller to show that a consumer did not rely on the conduct of the seller. *Heltzel v. Mecham Pontiac*, 152 Ariz. 58, 61, 730 P.2d 235, 238 (1986).

A Plaintiff who has been damaged by a merchant's violation of the AzCFA may recover actual damages and punitive damages, if warranted. Revised Arizona Jury Instructions ("RAJI") (Civil) 7th, Commercial Torts 22, Consumer Fraud (Measure of Damages). The burden of proof for consumer fraud is the preponderance of evidence. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 666 P.2d 83 (App. 1983).

A remedial statute is entitled to liberal construction. *Special Fund Div. v. Industrial Comm'n of Arizona*, 191 Ariz. 149, 953 P.2d 541 (1998); *Bartning v. State Farm Fire & Casualty Co.*, 162 Ariz. 344, 783 P.2d 790 (1989). Accordingly, the ACFA must be liberally construed so as to effectuate its intent to protect those entitled to protection—the consumer. *See Western Asbestos Co. v. TGK Constr. Co., Inc.*, 121 Ariz.388, 391, 590 P.2d 927, 930 (1979).

To establish a viable consumer fraud claim, Plaintiff must prove:

1. Defendants concealed, suppressed, or omitted a material fact;

2. Defendants intended that Plaintiff rely on the concealment, suppression, or omission in connection with entering into the Franchise Contract;

3. Plaintiff suffered damages as result of reliance on Defendants' concealment, suppression, or omission of a material fact; and

4. Plaintiff's damages.

RAJI (7th), Commercial Torts 21, Consumer Fraud (Elements of Claim).

Examples of AZCFA Cases:

Damage to Vehicle: A.R.S. § 28-1304.03. Seller must disclose, in writing, any damage repair exceeding 3% of the MSRP as calculated at the rate of the dealer's authorized warranty rate for labor and parts. Exclude damages to glass, tires or bumper.

Monroney Sticker: 15 U.S.C. 1232 requires that auto manufacturers affix a label, the so-called "Monroney sticker," on each new automobile, disclosing information such as the suggested retail price, the price for each accessory or optional equipment, and transportation charges.

Vehicle repurchased pursuant to a court order or arbitration decision must have "written notification" affixed. A.R.S. § 44-1266

Non-disclosure of lemon buyback status. Vehicles repurchased pursuant to arbitration decision or court order must have "written notification" affixed. A.R.S. § 44-1266

Where can you find it?

How many cars are repurchased pursuant to arbitrator's decision or court order?

BBB Autoline encourages settlement.
Courts encourage settlement.

Lemon vehicles from other states

Non-disclosure of salvage status

AZ issued 80,000 salvage titles in 2004
75,000 became restored salvage tile
Improper repairs severely compromise safety cell. Structural integrity is critical in case of an accident.

Arizona law requires that the owner of a "salvage" vehicle obtain a salvage title to that vehicle. A.R.S. § 28-2091(T)(3) defines a "salvage vehicle" as:

> a vehicle, other than a nonrepairable vehicle, of a type that is subject to titling and registration pursuant to this chapter and that has been stolen, wrecked, destroyed, flood or water damaged or otherwise damaged to the extent that the owner, leasing company, financial institution or insurance

company considers it **uneconomical to repair** the vehicle.

No definition of "uneconomical to repair" in Arizona. California, in *Martinez v. Enterprise Rent-A-Car*, 119 Cal. App. 4th 46, 13 Cal. Rptr. 857 (2004), found that "uneconomical to repair" in the context of defining a "**total loss** salvage vehicle" means that the retail cost to repair must exceed the retail value of the vehicle.

Rental car companies are self-insured. Sell wrecked cars at auction. Title not branded.

Yo-Yo Sales

Dealer sells consumer vehicle prior to final approval of credit. One month later, dealer calls consumer and says financing has not gone through and consumer has to 1) sign a contract with higher interest terms or a larger downpayment or 2) return the car.

Heltzel v. Mecham Pontiac, 152 Ariz. 58, 60, 730 P.2d 235, 237 (1986). Court upheld conversion claim for repossession of new vehicle where dealer represented that financing was completed and had sold trade-in.

Cavazos v. Holmes Tuttle Broadway Ford, Inc., 456 P.2d 910 (Ariz. 1969). - Court held that seller could cancel contract in yo-yo situation if there was a condition precedent in any of the contractual paperwork but that seller's failure to return trade-in constituted conversion.

Practical Point: Always advise client to return newly purchased vehicle if there is a condition in any of the contractual paperwork.

Arizona law prohibits the sale of a trade-in prior to the completion of financing. A.R.S. § 44-1371.

Punitive Damages: Pattern and Practice Evidence. The requisite state of mind necessary for an award of punitive damages can be inferred from circumstantial evidence. Such circumstantial evidence can include proof that Defendant's conduct was outrageous and/or criminal in nature. The requisite state of mind can also be inferred by a showing that Defendant had a pattern and practice of similar deceptive or unfair practices. The pattern and practice evidence need not be substantially similar. *Bradshaw v. State Farm Mut. Auto Ins.*, 157 Ariz. 411, 758 P.2d 1313 (Ariz. 1998) (outrageous conduct); *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 733 P.2d at 1082 (pattern and practice); *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 343, 666 P.2d 83, 88 (App. 1983) (same); *Lee v. Hodge*, 180 Ariz. 97, 882 P.2d 408 (1994) (same).

"Conscious evil of such behavior is obvious."

a) *Howell v. Midway Holding Company*, 362 F.Supp. 2d 1158, 1165 (D.Ariz. 2005) - "Forgery and deception are not alternative remedies to avoidance of a voidable contract, and the conscious evil of such behavior is obvious."

b) *Palmer v. Web Industries*, 2007 WL 45927 (D.Ariz. 2007) "Fraud and misrepresentation are not acceptable business practices, and the conscious evil of such behavior is obvious."

THE MOTOR VEHICLE INFORMATION AND COST SAVINGS ACT ("ODOMETER ACT")
(49 U.S.C. § 32701 *ET SEQ.*)

Very specific requirements in 49 C.F.R. § 580.3.

Any violation accompanied by "intent to defraud" will result in statutory damages of three times the actual damages or $11,956.00, whichever is greater, plus reasonable attorneys' fees and costs. 49 U.S.C. § 32710; 49 CFR 578.6(f)(2).

THE FEDERAL TRADE COMMISSION'S ("FTC") RULE REGARDING THE PRESERVATION OF CONSUMERS' CLAIMS AND DEFENSES, 16 C.F.R. 433.2 ("THE HOLDER LIABILITY RULE")

> "**ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."**

Under Arizona law, when parties bind themselves by a lawful contract, the terms of which are clear and unambiguous, a court must give effect to the contract as written. *Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, ¶ 12, 138 P.3d 1210, 1213 (App. 2006). The purpose of contract interpretation is to determine the parties' intent and to enforce that intent. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). "Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto." *Mining Inv. Group, L.L.C. v. Roberts*, 217 Ariz. 635, 639, ¶16, 177 P.3d 1207, 1211 (App. 2008), quoting *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966). Under standard rules of contractual interpretation, the court must avoid an interpretation of a contractual provision that leads to an absurd and unreasonable result. *Aztar Corp. v. Fire Ins. Co.*, 223 Ariz. 463, 477, ¶ 48, 224 P.3d 960, 974 (App. 2010).

Because the contractual language is clear and unambiguous, a review of the purpose of the Holder Liability Rule is unnecessary. Nevertheless, a review of its purpose reinforces the result that the Superior Court misinterpreted the Holder Liability Clause. Under Arizona law, remedial statutes are entitled to liberal construction to carry out the intent of the statute. *Williams v. Williams*, 23 Ariz. App. 191, 194, 531 P.2d 924, 927 (App. 1975) The Holder Liability Rule was designed to protect consumers and not creditors.

The purpose of the Holder Liability Rule is to abrogate the "holder in due course" doctrine, which separates the consumer's obligation to pay for goods from the seller's corresponding obligation to keep his promises under the contract. FTC Guidelines on Trade Regulation Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20022 (1975). Under the holder in due course doctrine, "[t]he creditor may assert his right to be paid by the consumer despite misrepresentation, breach of warranty or contract, or even fraud on the part of the seller, and despite the fact that the consumer's debt was generated by the sale." FTC Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed. Reg. 53506, 53507 (1976). The FTC found this result to be unfair because "it places the [entire] risk of a seller's misconduct on the party least able to bear the burden - the individual consumer." *Id.* at 53509.

A financial institution "is in a better position [than the consumer] both to protect itself and to assume the risk of a seller's reliability." *Id.* On the front end, a creditor can protect itself because "the volume of consumer sales-finance transactions is such that creditors have a full opportunity to detect and predict the incidence of consumer sales abuse on a statistically

reliable scale." *Id*. at 53518. On the back end, the creditor "may have full recourse agreement with the seller." Id. at 53509. "As a practical matter, the creditor is always in a better position than the buyer to return seller misconduct costs to sellers, the guilty party." *Id.* at 53523.

Latest Developments: January 18, 2022 FTC advisory Opinion; *Pulliam v. HNL Automotive, Inc.,* 13 Cal. 5th 127 (2022), cert. denied sub nom.

PRIORITY OF INTEREST IN CASE OF TITLE TRANSFER FAILURE

The Entrustment Provision of the UCC provides:

> Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

A.R.S. § 47-2403(B).

"Entrusting" is defined by A.R.S. § 47-2403(C) as:

> Any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

A "buyer in ordinary course of business" is defined by A.R.S. § 47-1201(B)(9) as:

> [A] person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind.

The Entrustment Provision favors "the good faith purchaser over the aggrieved seller" by giving the defaulting buyer "the power to transfer title to a good faith purchaser even though he lacks the right to do so." *First Nat'l Bank v. Carbajal*, 132 Ariz. 263, 266 (1982), citing to *General Elec. Credit Corp. v. Tidwell Industries*, 115 Ariz. 362, 365 (1977). The purpose of the Entrustment Provision, like the UCC in general, is to promote the free flow of commerce. The Indiana Court of Appeals observed the Entrustment Provision

> was intended to determine the priorities between the two innocent parties: (1) the original owner who parts with his goods through fraudulent conduct of another and (2) an innocent third party who gives value for the goods to the perpetrator of the fraud without knowledge of the fraud. By favoring the innocent third party, the UCC endeavors to promote the flow of commerce by placing the burden of ascertaining and preventing fraudulent transactions on the one in the best position to prevent them, the original seller.

Madrid v. Bloomington Auto Co., 782 N.E.2d 386, 397 (Ind. App. 2003), citing *Mowan v. Anweiler*, 454 N.E.2d 436, 439 (Ind. App. 1983). The Oregon Court of Appeals further explained:

> In most cases the equities between the entruster-owner and the buyer in the ordinary course are equal, and the balance is tipped in favor of the latter because that frees the marketplace and promotes commerce. This goal, called 'security of transactions[,]'

> is an ideal of the commercial law. The protection of property rights * * * is not an ideal of the commercial law. * * * On the assumption that both the entruster and buyer have been equally victimized by the dishonesty of the merchant-dealer, section 2-403(2) resolves the issue so as to free the marketplace, rather than protect the original owner's property rights.

Thorn v. Adams, 865 P.2d 417, 420 (Or. App. 1993), citing to 2 Hawkland, UCC Series 2.403:07 (1992).

Not only does the Entrustment Provision promote the free flow of commerce, but the equities also favor the buyer in ordinary course of business. As the Arizona Supreme Court reasoned:

> When one of two persons must — under these circumstances — bear the loss, it should fall upon the one whose business is the handling of such transactions, rather than upon the one who enters into an isolated purchase of an automobile. By this rule we shift the risk of loss to the one who has the necessary expertise to protect himself, the facilities to make continuous inquiry about the credit and moral character of the dealer, and the ability to charge for the loan of his money a sufficient fee to enable him to absorb an occasional loss out of the profits from many other successful deals.

Price v. Universal C. I. T. Credit Corp., 102 Ariz. 227, 231 (1967). Similarly, the Arizona Court of Appeals explained "[w]here one of two innocent parties must suffer through the act or negligence of a third person, the loss should fall upon the one who by his conduct created the circumstances which enabled the third party to perpetuate the wrong or cause the loss." *Sears Consumer Fin. Corp. v. Thunderbird Prods.*, 166 Ariz. 333, 337 (App. 1990), citing to *Al's Auto Sales v. Moskowitz*, 224 P.2d 588, 591 (Okl. 1950).

In order to qualify as a "buyer in ordinary course of business," the buyer must act in "good faith" and "without knowledge that the sale is in violation of the rights of another." A.R.S. § 47-1201(B)(9).

YO-YO SALES

Relevant Case Law in Arizona.

i. *Heltzel v. Mecham Pontiac*, 152 Ariz. 58, 730 P.2d 235 (Ariz. 1986), where car dealer represented that financing was complete and held trade-in, dealer was estopped from cancelling the sale and subsequent repossession of new vehicle was conversion.

ii. *Cavazos v. Holmes Tuttle Broadway Ford, Inc.*, 456 P.2d 910 (Ariz. 1969) (Dealer's failure to return trade-in upon cancellation of the sale was conversion).

iii. *Childress Buick v. O'Connel*, 198 Ariz. 454, 11P.3d 413 (App. 2000) (Requirement that dealer be able to assign contract to outside lending institution was condition precedent).

b. **Arizona Statute.** A.R.S. 44-1371 prohibits sale of customer's trade-in before financing is final. Sale of customer's trade-in before funding of the loan is conversion.

c. **Federal Law.** Equal Credit Opportunity Act. 15 U.S.C. §§ 1691a - 1691f. Requires written notice of adverse action where creditor declines financing.

d. Other Relevant Case Law.

i. *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 380-381,595 S.E.2d 461, 467-468 (S.C. 2004).

The consumer believes a vehicle's installment or sale is final and the dealer gives the consumer possession of the car "on the spot." The dealer later tells the consumer to return the car because the financing has fallen through. If the consumer does not return the vehicle or agree to rewrite the transaction on less favorable terms, the dealer repossesses the vehicle. National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 316 (5th ed.2001).

Yo-yo sales are unlawful in at least seven states and several other states have issued regulations and administrative interpretations to car dealers on the subject. *Id.* at 317. Such transactions are fundamentally unfair because they give all of the power to the dealer, and none to the customer: On the one hand, once the customer drives the car off the lot, the consumer is locked into the sale. The dealer does not want the consumer to think about the deal overnight – it wants the deal closed on the spot while the consumer has just undergone hours of sales pressure. On the other hand, the dealer wants to retain its options when the consumer drives off the lot with the car. It does

not want to be rushed into a hasty deal. It wants time for its personnel to review the profit margin, the consumer's credit rating, and the chances of selling the vehicle to someone else. It wants time to reflect on whether it can squeeze more out of the consumer or whether it is better off selling the vehicle to someone else. Usually, the dealer will want to hide the one-sided nature of the transaction. It does not want consumers to think that they can get out of a deal just because the dealer can. So the dealer will not disclose that the deal, from the dealer's point of view, is not final.

VEHICLE SERVICE CONTRACT

Arizona law defines “insurance” as a “contract by which one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.” A.R.S. § 20-103.

20-103. Definition of insurance; exceptions

A. For the purposes of this title, except as otherwise provided, "insurance" is a contract by which one undertakes to indemnify another or to pay a specified amount on determinable contingencies.

B. Private ambulance service contracts or private fire protection service contracts are not insurance, and this title does not apply to those contracts.

C. Charitable gift annuities that are issued pursuant to section 20-119 are not insurance and, except as provided in section 20-119, this title does not apply to agreements for those annuities.

D. Collision damage waivers are not insurance, and this title does not apply to those waivers.

E. Direct primary care agreements as defined in section 44-1799.91 are not insurance, and this title does not apply to those agreements.

F. Guaranteed asset protection waivers are not insurance, and this title does not apply to those waivers. For the purposes of this subsection, "guaranteed asset protection waiver" means a contractual agreement that is a part of or an addendum to a borrower's finance agreement wherein a creditor agrees for a separate charge to cancel or waive all or part of the amount due on the borrower's finance agreement in the event of a total physical damage loss or unrecovered theft of a motor vehicle.

The VSC is insurance. *See Jim Click Ford, Inc. v. City of Tucson*, 154 Ariz. 48, 739 P.2d 1365 (App. 1987); *Guaranteed Warranty Corp., Inc. v. State ex rel. Humphrey*, 23 Ariz. App. 327, 533 P.2d 87 (Ariz. Ct. App. 1975).

Read exclusions. 2018 SB 1381; 2021 HB 2443 amending ARS § 20-1095.06

REPOSSESSION

Article 9, Part 6 governs rights and remedies of parties to secured transactions upon default – Amended in July 1, 2001.

Potential Claims Arising During Repossession

Default

In order to repossess, there must be a default under the Contract. A.R.S. § 47-9609(A)

The U.C.C. does not define default; instead defined under the Contract.

Examples: failure to make payment, failure to maintain insurance, substantial damage to the vehicle, failure to garage at address listed on contract, etc.

Waiver: Creditor can waive default if it continues to accept payments under the Contract. *Browne v.* Nolin, 117 Ariz. 73, 570 P.2d 1246 (1973).

Breach of the Peace

Once there is a default, creditor can self-help repossess as long as no breach of the peace. A.R.S. § 47-9609(B)(2)

Examples of Breach of the Peace

1. Impersonation of police officer.

2. Presence of actual police officers. *Walker v. Walthall*, 121 Ariz. 121, 588 P.2d 863 (App. 1978)

3. Breaking and entering.

4. False Imprisonment.

Potential Claims Arising After Repossession.

1. Failure to Send Notice of Intent to Resell Vehicle. A.R.S. § 47-9611.

2. Contents of Notice specified by Code. A.R.S. § 47-9614 (consumer transaction).

3. Failure to pay over surplus after resale of vehicle A.R.S. § 47-9615.

Creditor entitled to reasonable expenses incurred in retaking, holding, preparing for disposition, and disposing of the vehicle plus attorneys fees to the extent provided for by the contract.

4. Failure to Send Explanation of Surplus or Deficiency. A.R.S. § 47-9616(b).
Triggered by creditor seeking deficiency.
or, within 14 days of debtor's written request.

5. If Consumer has paid over 60 percent of the cash price, creditor must sell within 90 days. A.R.S. § 47-9620.

6. Failure to return personal property left in repossessed vehicle can constitute conversion.

Statutory Damages

Certain violations provide for statutory damages in the amount of the finance charge plus ten percent of the cash price. A.R.S. § 47-9625(c)

Upheld even if there are no actual damages. *Gulf Homes, Inc. v. Goubeaux,* 136 Ariz. 33, 664 P.2d 183 (1983).

Only one set of minimum statutory damages per secured transactions.

Supplemental statutory damages of $500.00 for other violations. A.R.S. § 47-9625(e).

COOLING OFF RULE
16 C.F.R. § 429

FTC's Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations ("the Cooling-Off Rule"), 16 C.F.R. § 429, it is unfair and deceptive practice for you to fail to (1) furnish consumer with a fully completed copy of the contract (16 C.F.R. § 429.1(a)); (2) attach to that contract two copies of a written notice of cancellation (16 C.F.R. § 429.1(b)); and (3) orally inform consumer of the applicable cancellation rights at the time the contract is signed (16 C.F.R. § 429.1(e)).

> to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regards to the confidentiality, accuracy, relevancy, and proper utilization of such information. 15 U.S.C. § 1681(b).

Claims Against Credit Reporting Agency

FCRA requires CRAs to have reasonable procedures to "assure maximum possible accuracy." 15 U.S.C. §1681e(b): Private action almost impossible.

- Upon receiving a dispute from a consumer, a credit reporting agency must conduct a reasonable reinvestigation of any item in the file. 15 U.S.C. § 1681i(a).

- A credit reporting agency must also provide the credit furnisher with all of the relevant information it received from the consumer regarding the dispute. 15 U.S.C. § 1681i(a)(2).

- Cannot simply rely on furnisher's verification of debt if 1) the consumer has alerted the [cra] to the possibility that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable and 2) possible harm to the consumer outweighs the cost of verifying the accuracy of the source. *Cushman v. Trans Union Corporation*, 115 F.3d 220 (3rd Cir. 1997); *Betts v. Equifax Credit Information Services, Inc.*, 245 F. Supp. 2d 1130 (9th Cir. 2003); *Henson v. CSC Credit Services*, 29 F.3d 280 (7th Cir. 1994).

Claims Against Furnishers of Credit

- Analogous duty of reinvestigation

- If CRA notifies furnisher (such as NMAC) of a consumer dispute regarding the completeness or accuracy of information contained in the consumer's credit report, the furnisher must conduct its own investigation of the disputed information. 15 U.S.C.§1681s(b)

- Investigation must be reasonable. *Johnson v. MBNA America Bank, NA,* 357 F.3d 426 (4th Cir. 2004).

Impermissible Access. *Uhlig v. Berge Ford Inc.*, 257 F.Supp.2d 1228 (D. Ariz. 2003).

Dispute Mechanism.

A. Consumer Entitled to One Free Credit Report Per Year.

1. www.annualcreditreport.com.

2. Include a copy of driver's license.

B. Consumer Should Dispute Inaccurate Item with TransUnion, Experian, & Equifax.

1. Dispute should include

a) Full Name

b) Current address and other addresses held within the previous two years

c) DOB

d) Telephone number

e) Social Security Number

f) Name of consumer's spouse

g) Current employment information

h) Clear description of item being disputed

i) Explanation of why consumer is disputing item (i.e. - "this debt should show as 0 because it was discharged in bankruptcy.")

j) Request that the agency delete the item

k) Supporting paperwork (bankruptcy paperwork)

2. Send by certified mail, return receipt requested.

3. Send copy to creditor.

C. Upon receiving a dispute from a consumer, a credit reporting agency must conduct a reasonable reinvestigation of any item in the file. 15 U.S.C. § 1681i(a).

1. Exceptions.

a) Frivolous and irrelevant: 15 U.S.C. § 1681i(a)(3).

b) Or if cra chooses to delete. 15 U.S.C. § 1681i(a).

D. Creditor must forward dispute the credit furnisher and requesting verification within 5 days. 15 U.S.C. § 1681i(a)(2)(A)

E. A credit reporting agency must also provide the credit furnisher with all of the relevant information it received from the consumer regarding the dispute. 15 U.S.C. § 1681i(a)(2)(B).

F. If CRA cannot verify accuracy within thirty days (i.e. no response from creditor), CRA must delete from credit report. 15 U.S.C. § 1681i(a)(1)(A).

1. 15 day extension available if consumer provides new information. 15 U.S.C. § 1681i(a)(1)(B).

G. CRA cannot rely only on furnisher's verification of accuracy of the debt if 1) the consumer has alerted the cra to the possibility that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable and 2) possible harm to the consumer outweighs the cost of verifying the accuracy of the source. *Cushman v. Trans Union Corporation*, 115 F.3d 220 (3rd Cir. 1997); *Betts v. Equifax Credit Information Services, Inc.*, 245 F. Supp. 2d 1130 (9th Cir. 2003); *Henson v. CSC Credit Services*, 29 F.3d 280 (7th Cir. 1994).

II. Damages.

A. Negligent Violation - Any person that negligently violates the FCRA is liable to a consumer for actual damages, costs and attorneys fees. 15 U.S.C. §1681o.

B. Willful Violation. - Any person that willfully violates the FCRA is liable to a consumer for actual damages or statutory damages $100 - $1,000, punitive damages, costs and attorneys fees. 15 U.S.C. §1681n.

C. Actual Damages.
1. Out-of-pocket losses such as finance charges, insurance premiums, employment, your reputation
2. Emotional Distress. Fischl v. GMAC, 708 F.2d 143 (5th Cir. 1983).

D. Punitive Damages.

1. Standard: Plaintiff must show Defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others," but need not show "malice or evil motive." Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986) (punitive damages).

1. Statute of Limitations: 2 years from the consumer's discovery of the violation, but must be brought within five years of violation regardless of discovery. 15 U.S.C. § 1681p.

TRUTH IN LENDING ACT
15 U.S.C. §§ 1601 et seq., and Regulation Z, 12 CFR Part 1026

The United States Congress enacted the Truth in Lending Act ("TILA") to promote the informed use of credit and to strengthen the competition among firms engaged in the extension of consumer credit. 15 U.S.C. § 1601(a).

In applying TILA and its implementing regulations, the 9th Circuit Court of Appeals "require[s] absolute compliance by creditors." *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir.2009). "[E]ven technical or minor violations of the TILA impose liability on the creditor." *Jackson v. Grant*, 890 F.2d 118, 120 (9th Cir.1989).

"The legal inquiry about the quality of disclosure is not directed at whether the credit consumer was actually confused or misled." *Jenkins v. Landmark Mortgage Corp. of Virginia,* 696 F. Supp. 1089, 1095 (W.D.Va.1988). Rather, "[t]he court must engage only in an objective inquiry into the violation of specific provisions of TILA requirements." (*Id*.)

TILA (Truth in Lending Act)

Defines what charges must be included in finance charge	15 U.S.C. §1605
Requires disclosure of finance charge, etc.	15 U.S.C. §1638
Provides right to cancel/rescind	15 U.S.C. §1635
Provides damages and attorneys fees	15 U.S.C. §1640
Provides for limited assignee liability	15 U.S.C. §1641
Right to rescind against any assignee	15 U.S.C. §1641(c)

HOEPA (Home Ownership and Equity Protection Act)

Requires special disclosures for high rate/high fee loans	15 U.S.C. §1639
Defines high rate/high fee	15 U.S.C. §1602(aa)
Prohibits prepayment penalties in very limited cases	15 U.S.C. 1639 (c)
Prohibits higher interest rate after default	15 U.S.C. 1639(d)
Prohibits balloon payments in very limited cases	15 U.S.C. 1639(e)
Prohibits negative amortization	15 U.S.C. 1639(f)
Prohibits more than 2 payments from loan proceeds	15 U.S.C. 1639(g)
Prohibits pattern/practice of disregard to ability to pay	15 U.S.C. 1639(h)
Prohibits payments directly to contractors	15 U.S.C. 1639(i)
Provides enhanced damages	15 U.S.C. §1640(a)(4)
Assignee liable for all claims up to amount of the debt	15 U.S.C. §1641(d)

Violation can lead to rescission (limited) statutory damages of up to $4,000.00 and reasonable attorneys' fees and costs pursuant to 15 U.S.C. § 1640(a).

MISC. TOOL BAG

These are Arizona cases and statues I came across in my practice. This list is not by any means comprehensive. If you have any cases or statutes to add, please send them to me at hyung@choiandfabian.com.

YO-YO CASES

Heltzel v. Mecham Pontiac, 152 Ariz. 58, 730 P.2d 235 (Ariz. 1986). Court upheld conversion claim for repossession of new vehicle where dealer represented that financing was completed and had sold trade-in. Court held the dealer was estopped from cancelling the sale and subsequent repossession of new vehicle was conversion. The Arizona Supreme Court said:

> In the sale of goods, especially those sales involving automobile, it is the consumer who relies upon the skill, knowledge and expertise of the salesman and dealer when making the purchase.

Id. at 61, 238.

Cavazos v. Holmes Tuttle Broadway Ford, Inc., 456 P.2d 910 (Ariz. 1969). Court held that dealer could cancel contract in yo-yo situation if there was a condition precedent in any of the contractual paperwork. Dealer's failure to return trade-in upon cancellation of the sale was conversion.

Childress Buick v. O'Connel, 198 Ariz. 454, 11P.3d 413 (App. 2000). Held that the requirement that dealer be able to assign contract to outside lending institution was condition precedent.

A.R.S. 44-1371. Prohibits sale of customer's trade-in before financing is final. Does not provide (or prohibit) private cause of action.

COMMON LAW FRAUD CASES RE: HISTORY

Lutfy v. R.D. Roper & Sons Motor Co., 57 Ariz. 495, 115 P.2d 161 (1941). The plaintiff sought damages from the defendant for fraudulent misrepresentation that the automobile purchased by plaintiff was a 1937 model, when in fact it was a 1936 model. The written contract negated any representations or warranties other than those in the written contract. The Arizona Supreme Court approved the action of the trial court in allowing plaintiff to testify as to the oral representations made by defendant concerning the year and model of the automobile "because parol evidence is always admissible to show fraud, and this is true, even though it has the effect of varying the terms of a writing between the parties",

Smith v. Don Sanderson Ford, Inc., 7 Ariz. App. 390, 439 P.2d 837 (App. 1968). Suit by buyers of automobile against seller for fraud. The Superior Court granted defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial after jury had awarded

compensatory and punitive damages. Plaintiffs appealed. The Court of Appeals held that buyers who failed to offer evidence that automobile was less valuable because of defects failed to show any actual damages arising from alleged fraudulent misrepresentations by seller and thus could not recover in suit for fraud in view of fact that a 'new' automobile, with 3,000 miles on it, worth $4,100 was no more valuable than a 'used' automobile worth $4,100.

Sarwark Motor Sales, Inc. v. Husband, 5 Ariz. App. 304, 426 P.2d 404 (App. 1967). The Court of Appeals held that where purchaser requested to see automobile represented in newspaper advertisement as having 'very low mileage' and he was shown the automobile, used car dealer's agent acknowledged that low mileage was material factor with at least 50% Of purchasers and there was clear and convincing evidence establishing that odometer mileage reading had been altered from in excess of 80,000 to 22,836 miles, buyer was entitled to rely on representation, notwithstanding fact that buyer signed contract expressly negativing any warranty as to mileage

Lutfy v. R. D. Roper & Sons Motor Co., 57 Ariz. 495, 115 P.2d 161 (1941). The provision in written contract for purchase of automobile that it was agreed between parties that written contract contained complete contract, and that in entering into it buyer relied solely on his own independent investigation of automobile and placed no reliance on or acted upon representations made by seller, did not "waive" any misrepresentation made by seller as to year model of the automobile.

Schmidt v. Mel Clayton Ford, 124 Ariz. 65, 601 P.2d 1349 (App., 1979). Purchasers of truck brought action against seller for common-law fraud. The Superior Court entered summary judgment in favor of seller, and purchasers appealed. The Court of Appeals held that genuine issue of material fact existed as to whether truck, which had been previously sold to another buyer who returned it to seller after experiencing engine problems, which carried a new truck warranty, and for which no prior application for title had been processed, was "new" as represented by seller, precluding summary judgment in favor of seller on buyers' fraud claim. Under Arizona law, whether a vehicle " 'is "new" is an issue to be decided by the trier of facts under the particular circumstances of each case and not by a mechanical application of the Motor Vehicle Laws."

COMMON LAW FRAUD CASES RE: PRIOR WRECK

King v. O'Rielly Motor Co., 16 Ariz. App. 518, 494 P.2d 718 (App. 1972). Evidence in automobile buyer's action against dealer, including evidence that dealer's agents had induced buyer to buy on representation that automobile was in "like new" condition and had been used only as demonstrator, whereas automobile had been wrecked while being driven by agent who participated in sale and repaired by dealer, would support finding of misleading representation or fraudulent concealment rather than of mere nondisclosure.

Madisons Chevrolet, Inc. v. Donald, 109 Ariz. 100, 505 P.2d 1039 (1973). Automobile buyer who contended that automobile had been damaged and that it had been represented to her as

a "new" executive demonstrator could maintain action against seller for false and fraudulent misrepresentation. Evidence, in action by buyer of automobile, which allegedly had been damaged and repaired, to recover from seller, which purportedly had represented automobile to be a "new executive demonstrator," warranted imposition of punitive damages.

Dodge City Motors, Inc. v. Rogers, 16 Ariz. App. 24, 490 P.2d 853 (App. 1971). Buyer signed blank contract. Buyer claimed final contract was different than what was told to him. Other frauds. Vague legal theories. Compensatory and punitive damages allowed.

CONSUMER FRAUD ACT

***Madsen v. Western American Mortg.* Co.,** 143 Ariz. 614, 694 p.2d 1228 (App. 1985). The Arizona Consumer Fraud Act is a broadly drafted remedial provision designed to eliminate unlawful practices in consumer-merchant transactions. It provides injured consumers with remedy to counteract disproportionate bargaining power often present in consumer transactions.

***Dunlap v. Jimmy GMC of Tucson*,** 136 Ariz. 338, 666 P.2d 83 (App. 1983). Burden of Proof is preponderance of the evidence as opposed to clear and convincing for common law fraud.

***Flagstaff Medical Center, Inc. v. Sullivan*,** 773 F.Supp. 1325 (D.Ariz. 1991). Plaintiff does not need to prove Defendant intended to deceive them, Plaintiff needs only show that Defendant intended to do the act involved. Source:

Kuehn v. Stanley, 208 Ariz. 124, 91 P. 3d 346 (App. 2004). Plaintiffs need not show that their reliance on Defendant's misrepresentations was reasonable. Plaintiffs need only show that they did rely on Defendant's misrepresentations.

A.R.S. § 28-1304.03. Mandates disclosure of Damages to new vehicles. Seller must disclose, in writing, any damage repair exceeding 3% of the MSRP as calculated at the rate of the dealer's authorized warranty rate for labor and parts. Exclude damages to glass, tires or bumper.

A.R.S. § 44-1261(A)(3). The Arizona Law does not define "new vehicle" but it does define "used vehicle". A "used vehicle" is one

> that has been sold, bargained, exchanged or given away or the title to which has been transferred from the person who first acquired the vehicle from the manufacturer, importer or dealer or agent of the manufacturer or importer and that has been placed in bona fide consumer use.

A.R.S. § 28-4301(33). Defines "bona fide consumer use" to mean:

actual operation by an owner who acquired a new motor vehicle both:
(a) For use in the owner's business or for pleasure or otherwise.
(b) For which a certificate of title has been issued or that has been registered as provided by law.

A.R.S. § 44-287. Arizona Motor Vehicle Time Sales Disclosure Act.

A.R.S. § 44-1266(B). "A motor vehicle dealer, broker, wholesale motor vehicle dealer or wholesale motor vehicle auction dealer as defined in A.R.S. § 28-4301 who offers for sale a motor vehicle that has been replaced or repurchased pursuant to this article or the repair or replace laws of another state shall provide the purchaser with the manufacturer's written notification indicating that the motor vehicle has been replaced or repurchased before completion of the sale."

PUNITIVE DAMAGES

Heltzel v. Mecham Pontiac, 152 Ariz. 58, 730 P.2d 235 (1986); *Acheson v. Shafter*, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971). Conversion of a vehicle is a proper basis for punitive damages.

Howell v. Midway Holdings, Inc., 362 F.Supp.2d 1158 (D.Ariz.,2005). Midway's unilateral alteration of the Lease Agreement is sufficient evidence for a triable issue of fact on punitive damages. That evidence is that Midway secretly altered the Lease Agreement - a fraud on both the Howells and NMAC - and assigned the altered document to NMAC knowing that NMAC would rely on the alternation and might make claims against the Howells beyond what they ever agreed to. Forgery and deception are not alternative remedies to avoidance of a voidable contract, and the conscious evil of such behavior is obvious. Punitive damages are available for Plaintiffs' claim under the Arizona Consumer Fraud Act.

Palmer v. Web Industries Inc., 2007 WL 45927 (D.Ariz.,2007). Plaintiff has presented evidence that the dealership's representatives intentionally provided her with a false history of the Jeep in order to convince her to buy it at an over-inflated price, resulting in a dealership profit of $10,000. Fraud and misrepresentation are not acceptable business practices, and the conscious evil of such behavior is obvious.

Lee v. Hodge, 180 Ariz. 97, 882 P.2d 408 (1994). Evidence of similar unfair practices admissible for purposes of punitive damages

Dunlap v. Jimmy GMC of Tucson, Inc., 136 Ariz. 338, 343, 666 P.2d 83, 88 (App. 1983). Evidence of other deceptive sales practices relevant to whether those practices are currently used and to issue of punitive damages.

BREACH OF CONTRACT

The S Development Company v. Pima Capital Management Company, 201 Ariz 10, 31 P.3d 123 (App 2001). In keeping with the covenant of good faith and fair dealing, Seller has a contractual obligation to disclose the material information.

Howell v. Midway Holdings, Inc., 362 F.Supp.2d 1158 (D.Ariz.,2005). Midway's unilateral alteration of the Lease Agreement is a breach of the implied covenant of good faith and fair dealing, which is implicit in every Arizona contract.

A.R.S. § 47-1203 provides that "every contract or duty within this title imposes an obligation of good faith in its performance or enforcement."

A.R.S. § 12-341.01. Fee shifting statute for cases that arises out of contract.

ODOMETER ACT

Carrasco v. Fiore Enterprises, 985 F.Supp. 931 (D.Ariz.,1997). Ultimate purchaser of truck which had been transferred multiple times sued prior owners, alleging violation of Federal Odometer Act. Defendants moved for judgment on the pleadings, or alternatively to dismiss, based on statute of limitations. The District Court held that: (1) cause of action for violation of Act belongs to each purchaser of vehicle on which odometer was tampered, who may bring cause of action against all prior owners who violated Act, and (2) statute of limitations begins to run on claim under Act against any prior owner who violated Act only when plaintiff, and not any other purchaser of automobile, discovers or constructively discovers violation by a prior owner.

Palmer v. Web Industries Inc., 2007 WL 45927 (D.Ariz.,2007). No cause of action for non-mileage related violations of federal odometer act.

Bodine v. Graco, Inc., 9th Cir. Case No. 06-16271, argued March 5, 2008, Decision Pending. Challenging District Court's ruling that there is no cause of action for non-mileage related violations of federal odometer act.

TRUTH IN LENDING ACT

Slover-Bercker v. Pitre Chrysler Plymouth Jeep of Scottsdale, Inc., 409 F.Supp.2d 1158 (D.Ariz. 2005). Dealer's Failure to disclose negative equity in RISC not a TILA violation.

A.R.S. § 33-702(A). *Shelton v. Cunningham*, 109 Ariz. 225, 508 P.2d 55 (1973)(home); *Merryweather v. Pendleton*, 91 Ariz. 334, 372 P.2d 335 (1962)(stock); *Coffin v. Green*, 21 Ariz. 54, 185 P. 361 (1919) (land) Real Property Transfer to Secure Performance of Another Act Is a Mortgage.

FAIR CREDIT REPORTING ACT

Uhlig v. Berge Ford Inc., 257 F.Supp.2d 1228 (D.Ariz., 2003). Car buyer brought action against car dealership, alleging violation of the Fair Credit Reporting Act (FCRA). Parties filed cross-motions for summary judgment. The District Court, Holland, J., held that: (1) parties could contractually agree that there was no permissible purpose for obtaining credit report, and (2) summary judgment affidavit of car salesman was insufficient to establish that buyer did not enter into an agreement that dealership would not request credit report.

Cairns v. GMAC Mortg. Corp., 2007 WL 735564 (D.Ariz.,2007). In determining the state of mind necessary to establish punitive damages under FCRA, if defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1085 (9th Cir.2006) The conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights."

A.R.S. §44-1695. Any user of information that is grossly negligent in the use of a consumer report or who acts willfully and maliciously with intent to harm a consumer is liable to the consumer for actual and punitive damages.

TITLE DISPUTES

A.R.S. § 28-4409 prohibits a dealer from offering for sale or selling a motor vehicle until the dealer has obtained a certificate of title for the motor vehicle. The only exception is if the title is being held by a financial institution as defined in § 28-4301 or a subsidiary of the financial institution pursuant to an inventory financing arrangement.

Price v. Universal C.I.T. Credit Corporation, 102 Ariz. 227, 427 P.2d 919 (1967). The purpose of A.R.S. § 28-4409 is to prevent evils arising out of automobile thefts and automobile frauds by making it as difficult as possible to cheat innocent purchasers.

A.R.S. § 47-2312.

> Subject to subsection B there is in a contract for sale a warranty by the seller that:
> 1. The title conveyed shall be good, and its transfer rightful; and
> 2. The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

REPOSSESSION

A.R.S. § 47-9609(A). In order to repossess, there must be a default under the Contract. The U.C.C. does not define default; instead defined under the Contract. Examples: failure to make payment, failure to maintain insurance, substantial damage to the vehicle, failure to garage at address listed on contract, etc.

A.R.S. § 47-9609(B)(2). Once there is a default, creditor can self-help repossess as long as no breach of the peace. Examples of Breach of the Peace: 1) Impersonation of police officer; 2) Presence of actual police officers. *Walker v. Walthall*, 121 Ariz. 121, 588 P.2d 863 (App. 1978); 3) Breaking and entering; 4) False Imprisonment.

Browne v. Nolin, 117 Ariz. 73, 570 P.2d 1246 (1973). Waiver: Creditor can waive default if it continues to accept payments under the Contract.

A.R.S. § 47-9611. Requires creditor to send notice of intent to resell vehicle.

A.R.S. § 47-9614. Specifies Contents of Notice for consumer transaction.

A.R.S. § 47-9615. Creditor must pay over surplus after resale of vehicle. Creditor is entitled to reasonable expenses incurred in retaking, holding, preparing for disposition, and disposing of the vehicle plus attorneys fees to the extent provided for by the contract.

A.R.S. § 47-9616(b). Creditor must Send Explanation of Surplus or Deficiency. This requirement is triggered by creditor seeking deficiency or, within 14 days of debtor's written request.

A.R.S. § 47-9620. If Consumer has paid over 60 percent of the cash price, creditor must sell within 90 days.

A.R.S. § 47-9625 (C). Certain violations provide for statutory damages in the amount of the finance charge plus ten percent of the cash price.

Gulf Homes, Inc. v. Goubeaux, 136 Ariz. 33, 664 P.2d 183 (1983). Statutory damages available even if there are no actual damages.

A.R.S. § 47-9625(e). Supplemental statutory damages of $500.00 for other violations.

A.R.S. § 13-1813. Failure to return a vehicle constitutes class 6 felony if: 1)Person fails to make payments for more than 90 days; 2) Secured creditor notifies owner in writing, by certified mail, that the owner is 90 days late; and 3) Original contract contains appropriate disclosure regarding potential penalty.

Unconscionability. *Maxwell v. Fidelity Financial Services, Inc*., 184 Ariz. 82, 86, 907 P.2d 51, 55 (1995).