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## BARGAIN AVOIDANCE IN A COMPETITIVE BARGAIN MARKET: THE CAR SALES CONUNDRUM

*Stephen A. Plass\**

Americans love their cars, sometimes above everything else.<sup>1</sup> But buying a car is probably the most distasteful consumer transaction.<sup>2</sup> There are few events more stressful and troubling than a trip to a car dealership.<sup>3</sup> It seems that the average car buyer, despite research and

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1. A recent survey done by an insurance company showed that Americans' affection for their cars runs very deep. Progressive, at <http://www.progressive.com/media-relations/lovmeycar.htm> (Jan. 31, 2000). Of the survey respondents, 12% said they would buy their car a Valentine's Day gift, 53% said they kept a picture of their car, 27% said they loved their cars more than their in-laws, and 45% said their car is more important than their spouse or children. *Id.* See also Melanie Baker Daly, *America—On The Road to Mass Transit*, 19 *TRANSP. L.J.* 357 (1991) (saying that the car is a symbol of American individualism); Carol Sanger, *Girls And The Getaway: Cars, Culture and the Predicament of Gendered Space*, 144 *U. PA. L. REV.* 705 (1995) (saying that cars have transformed our ideas about courtship, sex and sexuality); Dwight L. Greene, *Naughty By Nurture: Black Male Joyriding—Is Everything Going To Be Alright*, 4 *COLUM. J. GENDER & L.* 73, 90 (1994) (saying that cars are a primary symbol of manhood and a central expression of materialism).

2. Complaints about auto sales are reported by consumer agencies to be the top problem area for consumers. National Association of Consumer Agency Administrators, *Eighth Annual NACAA/CFA Consumer Complaint Survey Report*, available at <http://www.nacaanet.org/survey99.htm> (Nov. 23, 1999). Abusive car sales practices generate more complaints than auto repair and home improvement abuses. *Id.*

3. Darren K. Carlson, *Nurses Remain at Top of Honesty and Ethics Poll*,

preparation, is never really ready to deal with car dealers. Although the commercial sophistication of the parties may vary dramatically, with the balance in favor of the buyer, it would not be safe to predict a well-bargained result for the buyer.<sup>4</sup> For the uninformed and unprepared buyer, the trip will likely produce a “sucker sale.”<sup>5</sup> And if the unsophisticated buyer also has poor credit, discounting<sup>6</sup> and other financial practices<sup>7</sup> will probably make the deal decidedly profitable for the seller.

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[www.gallup.com/poll/releases/pr001127.asp](http://www.gallup.com/poll/releases/pr001127.asp) (Nov. 27, 2000) (consumers view car salesmen as the least ethical businesspersons).

4. See *Ex Parte Ford Motor Credit Co.*, 717 So.2d 781 (Ala. 1997). This case offers a glimpse at several variables that could weaken an informed buyer's bargaining effectiveness. Here, the buyer had one year of university education, had worked for an auto dealership, had bought, repaired and sold about 200 vehicles, and had financed about twenty of those vehicles. *Id.* at 783. However, a personal bankruptcy apparently made the buyer very insecure and may have caused him to not shop around for financing. *Id.* at 784. As a result, the buyer accepted the salesperson's representations that his interest rate was high because buyer had poor credit. *Id.* The buyer later discovered that the dealer, through an agreement with the finance company, was paid a commission of 3% on the loan. *Id.* The buyer then sued, contending that had he known about the 3% arrangement, he would have shopped around and gotten an interest rate 3% lower. *Id.* at 785.

Salespersons at car dealerships usually are not professional employees. To borrow definitional elements from the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1994), car sellers generally do not possess advanced knowledge that is typically acquired through lengthy academic training in an institution of higher learning. And they do not perform varied intellectual tasks that involve making discretionary judgments. *Id.* § 2(12). Rather, they are trained to follow a routine procedure, and have little independence with respect to what they may give at the bargaining table. Nonetheless, my personal experience and anecdotal information confirm that professionals like lawyers, doctors, and architects still do poorly when bargaining with car sellers.

5. The uneducated buyer will often end up paying sticker price for the vehicle although virtually all consumer guides advise against it. Uninformed buyers are regarded as suckers and such purchases account for a significant portion of dealer profit. See Ian Ayres & F. Clayton Miller, “*I’ll Sell It To You At Cost*”: *Legal Methods To Promote Retail Markup Disclosure*, 84 NW. U. L. REV. 1047, 1069 (1990).

6. Finance companies that buy the purchasers' contracts from dealers often pay less than the face value of such contracts if the purchaser represents a greater than usual financial risk because of poor credit. The process of paying the seller a price less than the amount financed in the contract is called discounting. See *Sampler v. City Chevrolet Buick Geo, Inc.*, 10 F. Supp. 2d 934 (N.D. Ill. 1998). The discounted amount serves as insurance for the finance company in the event of default. The dealer may get back some of the discounted sums which may be kept in a reserve and reimbursed to the dealer if default rates remain below certain levels. Nonetheless, sellers try to recoup the discounted sum up front by increasing the selling price of the vehicle by an amount approximating the discount. See *Sampler*, 10 F. Supp. 2d at 939 (seller tells buyer he must pay an additional charge because of discount). *Id.*

7. Customers with poor credit are usually assigned very high interest rates, in part because of their weak bargaining position. See Kenneth Reich, *An Equal Chance: When Buying A Car, The Buyer Must Be Aware*, L.A. TIMES, Aug. 19, 1999 at 35 (“a poor credit rating . . . puts a customer in a weak position, foreclosing options enjoyed by

This reality is alarming, particularly because there are so many devices intended to educate and protect buyers in car sales transactions. Car buyers can use a variety of published car buyer's guides<sup>8</sup> or the Internet<sup>9</sup> to research and gather valuable information in preparation for the deal. Buyers also are protected by consumer laws, which prohibit misrepresentation,<sup>10</sup> and common law rules governing fraud<sup>11</sup> and unconscionability.<sup>12</sup> Additional protections for buyers exist in the form of fi-

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people with good credit histories.”). Dealers say they have to charge high interest rates to protect against high default rates, and so in some cases buyers will pay rates as high as twenty nine percent. *See* Jane Seccombe, *Dealership's Clientele Are Those With Poor Credit Or No Credit*, THE HERALD-SUN (Durham, N.C.) Nov. 12, 2000 at B10. A poor credit rating may also allow the dealer to misrepresent that the lender requires credit life insurance or extended warranties as a condition of the loan. Acceptance of such programs results in substantial profits for sellers.

8. A trip to any major bookstore will reveal a great deal of consumer-oriented information on virtually any type of vehicle being sold. Books and magazines range from the simple to the comprehensive. With respect to new vehicles, the write-ups become repetitive, as does the price, cost and technical information. *See, e.g.*, CONSUMER GUIDE, CAR & TRUCK TEST: BUYING GUIDE PRICES (2000); EDMUNDS 2001 BUYER'S GUIDE, Vol. N 3501 (2001); AAA YEAR 2001 MODEL REVIEWS: NEW CAR & TRUCK BUYING GUIDE (2000); JACK GILLIS & AILIS AARON, THE ULTIMATE CAR BOOK 2001 (21<sup>st</sup> ed. 2000); PIERRE BOURQUE & RICHARD MANSFIELD, CAR BUYING ONLINE FOR DUMMIES (2000); W. JAMES BRAGG, CAR BUYER'S AND LEASER'S NEGOTIATING BIBLE (2d ed. 1999); JACK R. NERAD, THE COMPLETE IDIOT'S GUIDE TO BUYING OR LEASING A CAR (1996).

Sometimes the information may vary with price information or overall ratings being higher or lower in some magazines. Buyers should be aware that not all magazines are independent publications. Some may be dealer or manufacturer sponsored or supported, and therefore less consumer oriented. In any event, by perusing a number of available publications, buyers quickly get a sense of what information is reliable, if only because it is repeated in most publications.

9. *See, e.g.*, *Yahoo Auto Buyer's Guide*, at <http://autos.yahoo.com/auto/buy.html>; *Edmunds*, at <http://www.edmunds.com> (Dec. 9, 2001); *How To Buy A New Car*, at <http://www.autoadvice.com> (Dec. 9, 2001); *Car Prices*, at <http://www.carreview.com>; *CarFax*, available at <http://www.carfax.com> (Dec. 9, 2001).

10. The Federal Trade Commission Guidelines Against Deceptive Pricing give buyers some protection against sellers' misrepresentations. *See* 11 C.F.R. § 233 (1989). States have also enacted consumer legislation that covers some misrepresentational conduct by sellers. *See, e.g.*, FLA. STAT. § 320.27 (9)(f)(2000) (“Misrepresentation of false, deceptive, or misleading statements with regard to the sale or financing of motor vehicles which any motor vehicle dealer has, causes to have, advertised, printed, displayed, published, distributed, broadcast, televised, or made in any manner with regard to the sale or financing of motor vehicles [may be punished as a statutory violation].”).

11. *See, e.g.*, *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 591 (1996). To prevail on a fraud claim, a buyer must prove a false material statement, made with knowledge of its falsity, with an intent to induce the buyer to act, the buyer's reliance on the statement, and injury flowing from the reliance.

12. For a discussion of the application of the doctrine of unconscionability to car sale bargains, *see* *La Vere v. R.M. Burritt Motors Inc.*, 112 Misc.2d 225 (1982); *Bramlett v. Adamson Ford, Inc.*, 717 So.2d 781 (1997); *Beckman v. Vassall-Dillworth Lin-*

nancial disclosure<sup>13</sup> and warranty laws,<sup>14</sup> which obligate car sellers to provide valuable information about the transaction.<sup>15</sup> Consumer laws and consumer guides inform buyers that they must bargain, and help educate buyers about whether to pay cash, buy on credit, shop around, or accept a particular seller's offer, among other things.<sup>16</sup>

All of this information and regulation have done little to protect car buyers during the "critical period," that is, the time during which they contract for and finance a vehicle. The common law, in conjunction with growing state and federal regulations, provides some assistance and protection for car buyers.<sup>17</sup> But existing rules are complex, and do little to educate or protect a car buyer from bargaining abuse during the course of what will probably be their second biggest lifetime deal.<sup>18</sup> Available legal prescriptions providing for disclosure of information

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coln-Mercury, Inc., 468 A.2d 784 (1983).

13. See Truth-in-Lending Act, 15 U.S.C. § 1601-1667 (f)(1997). See also Automobile Information Disclosure Act, 15 U.S.C.A. § 1231 *et. seq.* This statute imposes disclosure obligations on the manufacturer that can greatly assist the buyer in pricing a vehicle. For example, the manufacturer is required to display on each vehicle a label showing the suggested retail price, the retail price of each option or accessory not included in the overall price and destination or transportation costs charged to the dealer. *Id.* § 1332(f)(1)-(3). By making it illegal for the dealer to remove this "window sticker," buyers get to see the suggested retail price of the vehicle and can form a bargaining strategy on price, even if this is the only information they have.

14. See The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C.A. § 2301 *et. seq.* (1998); Uniform Commercial Code, Article 2, §§ 2-313 to 2-317. Representations about a vehicle's condition can create express warranties. See *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 511 N.E.2d 1330 (Ill. App. 1987). And disclaimers of express warranties must be specific. See *Blankenship v. Northtown Ford, Inc.*, 420 N.E.2d 167 (Ill. App. 1981). For a discussion of the interface between the Magnuson Moss Act and state law warranties, see *Cosman v. Ford Motor Co.*, 674 N.E.2d 61 (Ill. App. 1996).

15. Disclosure and warranty laws allow car buyers to see the breadth of their transaction, ideally before the deal is finalized. Buyers get to see individual and cumulative charges for their purchases, the interest rate charged, finance charges, and other crucial information that make up their contracts. See 15 U.S.C. §§ 1632(a), 1638(b). And such disclosures must be clear and conspicuous. *Id.* § 1638(a)(9).

16. See *supra* notes 8-9.

17. For a survey of common law and legislative prescriptions that regulate car sales, see generally, Ian Ayres & F. Clayton Miller, "I'll Sell It To You At Cost": *Legal Methods To Promote Retail Markup Disclosure*, 84 NW. U. L. REV. 1047 (1990).

18. Car buyers spend billions of dollars on their vehicles every year. Next to their home, consumers' second largest lifetime purchase is often their car. See Fredrick L. Miller, *Introduction—Consumer Law*, 78 MI. BAR JNL 270 (1999). In the used car market alone car buyers spend eighty billion dollars annually. See Mary Flowers Boyce, *The Best Of The Worst; Used Car Dealership Finding Lucrative Opportunities In Sales To Customers With Poor Credit Records*, Vol. 27, NO. 1 DEALER BUSINESS, Sept. 1992 at 54.

have not been effective at controlling deceptive seller conduct.<sup>19</sup> Nor has the doctrine of unconscionability been a source of redress for buyers.<sup>20</sup> And lemon laws<sup>21</sup> or breach of warranty claims<sup>22</sup> only get activated after the contract has been made. Overall, existing rules, which emphasize disclosure by the seller, do little to help buyers make good deals. Principles of good faith<sup>23</sup> and the honesty associated with it<sup>24</sup> respond more to the “performance” and “enforcement” aspects of the deal and offer little help with “formation misconduct.”<sup>25</sup> As a result, car sellers negotiating a sale can evade these principles with impunity. Because of this, the law has failed car buyers. This failure can in large measure be traced to the law’s unresponsiveness to the bargaining environment in which car deals

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19. For example, the court noted in *Gibson v. Bob Watson Chevrolet Geo, Inc.*, 112 F.3d 283, 287 (7th Cir. 1997), that while the Truth-in-Lending Act may help consumers with issues of credit cost, it does not generally prohibit fraud.

20. The dearth of reported cases resolving car purchase disputes on unconscionability grounds attest to the impotency of the doctrine to police these transactions. Ironically, unconscionability seems particularly well-suited to police this area. The doctrine polices both the manner in which the bargain was made and the substantive results of the bargain. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS*, 365-369 (4th ed. 1998). The doctrine seeks to prohibit contracting through oppressive sale practices while also protecting against oppressive contract terms. *Id.* But the doctrine does not attempt to equalize the parties’ bargaining power or reallocate contract terms because one party is a stronger bargainer. *Id.* at 366.

21. Most states have passed lemon laws, but such laws do not address the bargaining aspects of a car sale transaction. Rather, lemon laws deal with defects or conditions of the purchased vehicle that may significantly impair its use, value or safety. See for example, FLA. STAT. § 681.102 (16)(2000). For a discussion of the various lemon laws around the country, see Duane A. Daiker, *Florida’s Motor Vehicle Warranty Enforcement Act: Lemon-Aid For The Consumer*, 45 FLA. L. REV. 253 (1993); Julian B. Bell III, *Ohio’s Lemon Law: Ohio Joins The Rest Of The Nation In Waging War Against The Automobile Limited Warranty*, 57 U. CIN. L. REV. 1015 (1989); Heather Newton, *When Life Gives You Lemons, Make A Lemon Law: North Carolina Adopts Automobile Warranty Legislation*, 66 N.C.L. REV. 1080 (1988). For a comparative analysis of American and Canadian lemon laws, see James A. Lack, *U.S. Lemon Laws vs. The Canadian Motor Vehicle Arbitration Plan: Two Approaches To Resolving New Car Defect Issues*, 19 SUFFOLK TRANSNAT’L L. REV. 315 (1995). And to deal with the inadequacies of used car remedies, New York enacted a used car lemon law, see Martha M. Post, *New York’s Used Car Lemon Law: An Evaluation*, 35 BUFF. L. REV. 971 (1986).

22. Warranty claims also address the quality of the vehicle itself or its defects as opposed to the bargaining behavior and bargaining results. The impetus for lemon laws came from the failure of available warranty laws to adequately protect car buyers. See Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 592.

23. See U.C.C. § 1-203. “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” *Id.*

24. See U.C.C. § 2-103 (b). “Good faith” in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

25. See *id.* note 24.

are made.<sup>26</sup> This failure by the law raises important questions such as whether more regulation can better position the buyer to bargain.

Although disclosure obligations imposed on sellers are intended to make buyers more informed and independent,<sup>27</sup> car buyers generally depend on sellers for crucial information. Available information and regulation do not respond to this dependence, nor do they prepare buyers for what will be, in many respects, the most complex deal they will ever make.<sup>28</sup> Car sellers therefore use buyer dependence and buyers' inability to fully understand the transaction to their advantage. The sellers' sophistication also allows them to avoid buyer-oriented regulation,<sup>29</sup> and distort consumer information that may assist buyers.<sup>30</sup>

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26. Common law and statutory good faith rules are linked to the post-negotiations conduct of the parties. In the commercial arena, good faith and its related requirement of honesty run to performance and enforcement obligations under contracts already made. See CALAMARI & PERILLO, *supra* note 20, at 457-461. As a result, bargaining abuse by a car seller is left to be policed by other contract doctrines that are not necessarily confined to requirements of honesty. *Id.* at 460.

27. See *Gibson*, 112 F.3d at 283. In this case the court highlighted how buyers may benefit from accurate disclosure of warranty charges the buyer must pay but which the seller shares with a third party. It found that: "The consumer would have a great incentive to shop around for an extended warranty, rather than take the one offered by the dealer if he realized that the dealer was charging . . . a 'commission,' and apparently a very sizeable one, for its efforts in procuring the warranty from a third party. Or the consumer might be more prone to haggle than if he thought that the entire fee had been levied by a third party and so was outside the dealer's direct control. Or he might go to another dealer in search of lower mark-ups on third-party charges." *Id.* at 286.

28. To the extent that a buyer underestimates the complexity of a car purchase transaction, he can be seriously abused by the seller. To be prepared, a car buyer needs cost and price information, credit, loan and financing data, an understanding of the seller's relationship with insurance companies, lenders, and others that may participate in the final deal, not to mention researching the vehicle itself, among other things. In many respects, buying a home is easier.

29. For example, the Truth-in-Lending Act requires that dealers itemize the amount financed and each amount to be paid to third parties on the buyer's behalf. See 15 U.S.C. § 1638 (a)(2)(B)(iii). In order to mislead buyers about the cost of additional service or products, dealers will incorrectly state the amount paid to others for services such as those covered by an extended warranty. See *Gibson*, 112 F.3d at 284 (dealer recorded in the contract that \$800 was paid to a third party for an extended warranty when in fact a substantial portion of the \$800 was retained by the dealer). *Id.* In *Cemil v. Viking Dodge, Inc.*, 982 F. Supp. 1296 (N.D. Ill. 1997), the dealer used a more nuanced technique to avoid disclosing that it retained a portion of the extended warranty price. Instead of using a heading which stated: "Amounts Paid to Others on Your Behalf," this dealer's heading stated: "Other Charges Including Amounts Paid to Others on Your Behalf." *Id.* at 1301. The seller argued that this heading satisfied TILA disclosure requirements because it notified buyers that the dealer may keep some or all of the warranty charges. *Id.*

30. For example, disclosure regulations cannot help buyers when sellers tell them that the pricing information in consumer guides is wrong, thereby undermining a key

The fact is that more than fourteen percent of car buyers do not even know that they are operating in a bargain market.<sup>31</sup> The lack of such fundamental knowledge greatly undermines a buyer's power to negotiate a fair deal. If knowledge translates into bargaining power,<sup>32</sup> then buyers can only benefit from knowing that they are equal participants in developing the deal. And while plenty of buyer-oriented information and regulations are available, many seller-controlled factors affect their accessibility and reliability.<sup>33</sup>

Forcing sellers to disclose helpful information raises thorny questions about what sellers' responsibilities are in this bargain market. From a seller's viewpoint, buyers are naive to think that the seller represents a buyer's interests or that the seller is responsible for shepherding a buyer through the transaction. Sellers contend that they provide valuable services to car buyers for which they should be compensated.<sup>34</sup> Sellers

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bargaining tool available to buyers. Recognizing this dealer distortion strategy, Consumer Guide notes: "If a dealer claims our prices are incorrect, or the information in this book doesn't match what you see in showrooms, contact us and we'll do our best to help." See CONSUMER GUIDE, *supra* note 8, at 3.

31. See Kenneth Reich, *An Equal Chance: When Buying A Car, The Buyer Must Be Aware*, L.A. TIMES, Aug. 19, 1999, at B5 ("Research shows that one in seven people who plan to buy a new car in the next year is unaware the price is negotiable."). See also, Ayres & Miller, *supra* note 5, at 1069 (sucker sales may be a product of consumers not knowing they can bargain); Lary Lawrence, *Toward A More Efficient And Just Economy: An Argument For Limited Enforcement Of Consumer Promises*, 48 OHIO ST. L. J. 815, 826 (1987) (often consumers do not bargain because they are unaware that bargaining is allowed).

32. One study showed that buyers who know a sellers' cost made a better deal than those who didn't. See Ayres and Miller, *supra* note 5, at 1063. The emphasis on seller disclosure and the flood of consumer-oriented information to help car buyers are all grounded in the belief that more information to the buyer will translate into a fairer overall deals. See Fredrick L. Miller, *supra* note 18, at 271. Consumer Guide notes that "[i]nformed shoppers have an edge when negotiating price. See CONSUMER GUIDE, *supra* note 8, at 4.

33. Cost information found in consumer guides is not guaranteed to be accurate. See EDMUNDS 2000 BUYER'S GUIDE: NEW CAR PRICES & REVIEWS, Vol. N3304 (2000) ("All information and prices published herein are gathered from sources which, in the editor's opinion, are considered reliable, but under no circumstances is the reader to assume that this information is official or final.") *Id.* at 12. And sellers are not going to provide documents that show their actual cost. Sales managers often are willing to show an invoice on a computer screen that in all likelihood is more unreliable than information obtained from a bookstore. Dealer cost is also affected by holdbacks which sellers will never tell buyers about. Buyers also need to know about rebates and the cost of options in order to calculate seller's final cost. Recognizing that complete and accurate information is unavailable to the buyer, salespersons can easily misrepresent dealer cost in order to justify a high selling price.

34. See Diana B. Henriques, *Hidden Charges: A Special Report; Extra Costs on Car Loans Draw Lawsuits*, N.Y. TIMES, Oct. 27, 2000 at A1 (sellers say they work hard for



say that they facilitate the acquisition of transportation, and also provide financial services and products that benefit buyers.<sup>35</sup> And to the extent that sellers profit at every step of the deal, those profits are justified as part of the bargain. But the complex structures used to deliver these services mislead buyers and deprive them of the ability to bargain.<sup>36</sup>

The typical response to seller control and abuse in this bargain market has been to propose more regulated disclosure.<sup>37</sup> But more disclosure runs the risk of information-overload.<sup>38</sup> Even existing and proposed disclosure rules are not meaningful unless they give buyers the core knowledge they need to succeed in the car sales bargaining culture.<sup>39</sup> Critical buyer-oriented information is available, but most car buyers do not access and utilize available protective devices. And it remains speculative whether additional disclosure rules will significantly rework the market, making it more efficient and equitable.<sup>40</sup> As a result, other

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buyers by not only selling them cars but by offering financial services and products in a convenient one stop shopping environment).

35. Used car sellers especially use the transportation argument, in selling to customers with poor credit ratings. See Bradford Wernle, *Subprime Rules Cause Tax Trouble*, AUTOMOTIVE NEWS, Apr. 20, 1998, at 22.

36. See, e.g., *Cirone-Shadow v. Union Nissan of Waukegan*, 955 F. Supp. 938 (N.D. Ill. 1997) (seller contended that the Truth-in-Lending Act only applied to "material" disclosures, and did not require the dealer to tell the buyer that the dealer got a cut of the extended warranty charge it assessed the buyer). *Id.* at 941.

37. See Ayres & Miller, *supra* note 5, at 1071-73; Lawrence, *supra* note 31, at 843-845; Miller, *supra* note 5, at 270-271.

38. See *Millhollin v. Ford Motor Credit Co.*, 531 F. Supp. 379 (1981) (meaningful disclosure does not automatically translate into more disclosure, and the goal of aiding consumers should not lose sight of the potential for information overload). *Id.* at 384. See also Maryann Keller, *A Responsible Role For Automaker Websites; The Problems With Automobile Advertising*, 180 AUTOMOTIVE INDUSTRIES 18 (2000) ("Now the Internet is adding another layer of confusion. With just a few clicks of the mouse, customers can find MSRP and invoice prices. These are usually the same, no matter which website they visit and are generally understood by consumers. But now they can also find hold-back and incentive data that is less than accurate and often misunderstood. While all of this is supposed to make them better bargainers and bring transparency to the purchase process it has, in fact, added more confusion for some shoppers.").

39. See *infra* notes 139-153 and accompanying text.

40. Concededly, mandatory disclosure rules will not eliminate the inequities of these bargains, and it is speculative how much impact they will have on negotiation practices, or how many buyers they will help. See Ayres & Miller, *supra* note 5, at 1650-70 (noting some disincentives to disclosure). See also Lawrence, *supra* note 31, at 843-45 (noting some of the high costs of disclosure). Although these writers conclude that greater disclosure would do more good than harm, they overlook important considerations that could make more information meaningless. For example, buyers cannot begin to use additional data unless they first understand that the transaction is bargained. Further, buyers' sophistication, credit history or personality may impede their ability to use the information. And providing more information does not coerce a change in seller prac-

approaches that may limit seller abuse and increase buyer bargaining strength are worth exploring.

This article evaluates the critical period during a car sale transaction.<sup>41</sup> It highlights the deceptive structure of car selling and financing, and seller domination of that structure. This article argues that seller abuse goes unchecked mainly because available disclosure rules are not responsive to the complex bargaining environment in which car deals are made. Regulations also do not give buyers the crucial information they need to operate well in this market. Current consumer regulations in this area are also a weak match for deft seller practices that escape policing.

This article highlights the complex nature of car sale transactions, and how seller conduct robs buyers of bargaining opportunity. It also discusses a variety of factors, such as poor credit, lack of information, and poor evaluative skills, which impair a buyer's ability to make a fair deal. The article shows how buyers' disabilities translate into buyer dependence on sellers, and how sellers cultivate and take advantage of that dependence *without* violating the law.

This article documents many of the seller abuses that occur during this critical period, and shows how good-faith principles are impotent in policing this area of contracting. To respond to the bargaining control that sellers exert, this article rejects additional disclosure laws as the antidote for seller abuse. By evaluating existing and proposed disclosure rules, this article shows instead that more information will not markedly change the environment, practices, or results of car bargains. Rather, this article proposes greater reliance on consumer education as the primary vehicle for combating seller abuse.

#### I. BE AWARE THAT THE DEAL IS COMPLEX

The paucity of cases in which buyers challenge the formation aspects of car sale transactions attests to the finality with which these deals are made. Yet for many buyers, very little bargaining takes place for this archetypal bargained transaction. The euphoria of owning a vehicle, new or used, is only one of the factors that impede rational decisionmaking by car buyers.

One recent case I reviewed typifies the bargaining environment

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tices that make that information meaningless.

41. The article does not address leases which often involve complex calculations that few buyers understand.

of a car sale.<sup>42</sup> The buyer, a young woman, needed transportation for her work commute. She was using public transportation, which took two hours each way for what was a ten minute drive. On her lunch break, she walked to a car dealer across the street from her job. Once she identified her car of choice the salesman told her she needed to hurry up and purchase the vehicle because it was “hot,” “would sell quickly,” and “he could not hold it for her.” He offered her \$4,400 for her trade-in vehicle, which she felt was worth very little, so she thought he was nice and had offered her a great deal.

With absolutely no discussion, he subsequently presented her with a typed contract that included the list price of the purchased car and the trade-in allowance of \$4,400. But the contract contained many other provisions that were never mentioned or discussed. It included dealer-installed car-theft equipment for \$399, dealer preparation charges of \$485, and a service contract at \$1,675. She was not given an opportunity to review the contract. The salesman simply indicated where she should sign and quickly escorted her to the finance office.

At the finance office, all the documents were ready and waiting for her. There was absolutely no discussion. She was shown where to sign and was rushed through the documents. When she got home she discovered that the documents she signed with the finance officer included many options she did not want. Specifically, she was assigned an interest rate of 17.45% although she has good credit. She was sold Credit Life Insurance for \$715.68, Credit Disability Insurance for \$1,067.02, GAP Insurance for \$429, and the Service Contract for \$1,675. What started out as an attempt to purchase a year-old Honda Civic for about \$17,600 turned out to be a \$32,425 transaction with financing charges of \$8,782.94.<sup>43</sup> With a trade-in credit of \$4,400, a deposit of \$2,000 and payment over five years, this visit to the dealer will cost her over \$32,425 for a used Honda Civic.

When I asked the buyer why she did not read the documents she was signing, she gave me a variety of reasons. She said she trusted the salesman and was happy to get the car. She felt that what she was signing reflected what the salesman told her because he was so nice and gave her so much money for her worthless car. Because she felt the salesman

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42. All contract documents for this case are on file with the author.

43. According to the National Automobile Dealers Association retail pricing guide, a 2000 Honda Civic Si with 11,687 miles is valued at about \$15,000. CONSUMER GUIDE 2001 Edition USED CAR & TRUCK BOOK 130 (2000). This pricing guide listed a price range of \$15,000-\$16,500 if the vehicle is in good condition, and a price range of \$13,800-\$15,000 if the vehicle is in average condition. *Id.*

was looking out for her, she trusted him and believed the documents presented to her reflected the numbers the salesman spoke to her about. She also noted that the deal was done so hurriedly that she was not allowed to read the documents.

In this transaction, no bargaining took place at any level on any issue. And if the seller denies the buyer's version of events leading to contract formation and insists on the contract terms, a buyer would have to be very strong and determined indeed to retain a lawyer and seek rescission of the deal. But a strong and determined person would probably not make such a deal in the first place. Undoubtedly, many buyers faced with this scenario will treat this as a bad experience and pay the bills or face repossession of the vehicle.

This type of bargaining abuse and many variations of it are commonplace. But most of these cases do not end up in court. Buyers are left with horrible experiences and high bills they can hardly afford. The car sales cases that are litigated deal primarily with financial disclosure laws which are complex and offer little protection against such bargaining abuse. For example, in *Perino v. Mercury Fin. Co. of Ill.*, the buyer alleged that the finance company paid the dealer "secret kick-backs" on finance charges in violation of racketeer and mail fraud laws.<sup>44</sup> And it was not until every aspect of a car deal nightmare had come true did this buyer get to the courts.

In 1993, Joseph Perino bought a used Chevrolet from Mancari's Chrysler Plymouth dealership.<sup>45</sup> The dealership arranged financing for Perino with MFC Illinois.<sup>46</sup> The financing arrangement included an interest rate of 41.04%, and sold Perino credit life and disability insurance.<sup>47</sup> MFC Illinois purchased Perino's contract from the dealership for a rate lower than 41.04%, and split the difference between what it paid and what Perino's contract provided with the dealer.<sup>48</sup>

Despite his purchase of disability insurance, Perino's car was repossessed when he became disabled, because he defaulted on his car payments and his disability claim was not processed quickly enough.<sup>49</sup> When MFC Illinois refused to return the car after Perino informed them

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44. 912 F. Supp. 313, 315 (N. D. Ill. 1995).

45. *Id.* at 314.

46. *Id.*

47. *Id.* at 314-15.

48. *Id.* at 315.

49. *Id.* at 315. Perino's disability insurance carrier eventually processed and paid his claim but this did not occur until after he had defaulted. *Id.*

of his disability and disability coverage, he sued, alleging, among other things, that the shared portion of the interest rate constituted an illegal kickback scheme.<sup>50</sup> The court ruled that the finance company's arrangement with the dealer was neither fraudulent nor an illegal kickback.<sup>51</sup> The court found that the Truth-in-Lending Act (TILA) only required the dealer to disclose to Perino the name of the creditor, the financed amount and the annual percentage rate.<sup>52</sup> Since Perino was given this information, no law was broken.

The case of *Cirone-Shadow v. Union Nissan of Waukegan*<sup>53</sup> offers another glimpse at the sources and complexity of car sale claims. In this case Mary Cirone-Shadow bought a used car from Union Nissan.<sup>54</sup> She also bought an extended warranty for which she was charged \$800.<sup>55</sup> The sales contract showed the \$800 going to Autoright, the extended warranty administrator, and this sum appears in a section of the contract captioned "Amounts Paid to Others for You."<sup>56</sup> However, Union Nissan did not pay Autoright \$800. Autoright was paid \$385 and Union Nissan kept \$415.<sup>57</sup> Mary Cirone-Shadow contended that the dealer violated TILA and the Illinois Consumer Fraud Act by documenting the \$800 in an inaccurate and deceptive way.<sup>58</sup> She contended that the dealer listed the \$800 among non-negotiable sums such as fees and taxes, thereby giving her the impression that the extended warranty was a non-negotiable item.<sup>59</sup> Union Nissan argued that TILA only applies to material disclosures affecting the cost of credit, and that the warranty charge was not material.<sup>60</sup> Further, Union Nissan argued that the buyer suffered no actual damages because of the dealer's actions, that the dealer's contract followed the same format as the statutory model form, and that the dealer's misrepresentation was not the legal cause of Ms. Cirone-

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50. *Id.*

51. *Id.* at 316.

52. *Id.*

53. 955 F. Supp. 938 (N.D. Ill. 1997).

54. *Id.* at 940.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 940.

59. *Id.* This claim by the buyer is very perceptive. Dealers easily make extra profit on each transaction by presenting the buyer with pre-printed fees for "dealer services." For example, in *Motzer Jeep Eagle, Inc. v. Ohio Att. Gen.*, 642 N.E.2d 20 (Ohio Ct. App. 1994), the dealer routinely charged buyers \$95 for "delivery and handling." In the course of litigation, all buyers testified that because the fee was preprinted they felt it was non-negotiable. *Id.* at 25. Placing a fee alongside non-negotiable items suggests to the buyer that this too is a non-negotiable item. This is true irrespective of a seller's intent.

60. See *Cirone-Shadow*, 955 F. Supp. at 941-42.

Shadow's harm.<sup>61</sup>

Although the representation that \$800 was going to Autoright was clearly misleading, the court could not simply conclude that the dealer's contentions were frivolous. Implementing regulations for TILA provides that the dealer may disclose that it kept part of an amount designated as "paid to others."<sup>62</sup> Courts disagree as to whether the dealer must disclose that a portion of such amount is retained or, in its discretion, can choose not to disclose it kept a portion of such charges.<sup>63</sup> And although this court held that the dealer must indicate that it retained a portion of such charges, the buyer still faced causation and injury challenges in order to establish liability in this lawsuit.<sup>64</sup> In any event, it is a rare buyer who brings a claim because a seller failed to disclose it kept a portion of a charge for a product or service.

One more example of how involved car sales litigation is can be gleaned from *Balderos v. City Chevrolet, Buick and Geo*.<sup>65</sup> *Balderos*-type cases address buyers' concerns that they pay hidden finance charges when sellers raise the selling price of vehicles to cover the discounted amount that finance companies take when they buy such contracts from the dealer.<sup>66</sup> In *Balderos*, the buyer complained that the selling price of the used car he purchased was increased to cover an approximately 10% discount Mercury Finance Company (MFC) took when it bought his contract from City Chevrolet.<sup>67</sup> *Balderos* contended that the elevated price to cover the discount was a hidden finance charge for which TILA requires disclosure.<sup>68</sup>

*Balderos* also argued that more financing charges were hidden as "increased risk charges" that MFC imposed on the dealer when the financed amount exceeded 120% of the retail value of the vehicle.<sup>69</sup> He argued that the dealer passed this charge on to the buyer by increasing the price of the car accordingly.<sup>70</sup> Further, *Balderos* contended that a \$50 application fee which MFC charged the dealer for every contract it buys

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61. *Id.* at 943-45.

62. *Id.* at 942.

63. *Id.* The court cited a number of car cases coming out on both sides of the issue.

64. *See id.* at 943-45 (discussing causation and damage requirements).

65. 1998 WL 155912 (N.D. Ill. March 31, 1998).

66. *See, e.g.,* *Sampler v. City Chevrolet Buick, Geo, Inc.*, 10 F. Supp. 2d (N.D. Ill. 1998).

67. *See Balderos*, 1998 WL 155912 at \*1.

68. *Id.*

69. *See id.* The retail value was determined by the National Automobile Dealers Association retail pricing guide (Blue Book). *Id.*

70. *Id.*

also constituted a hidden finance charge because MFC waived that fee for credit customers who buy the “Continental Car Club Membership” which MFC issues.<sup>71</sup>

The court ruled that the TILA requires clear and accurate disclosure of finance charges, except “charges absorbed by the creditor as a cost of doing business . . . even though the creditor may take such cost into consideration in determining the interest rate to be charged or the cash price of the property or service sold.”<sup>72</sup> Only if the dealer “separately imposes a charge on the consumer to cover certain costs”<sup>73</sup> might the charge qualify as a finance charge.

Because *Balderos* neither showed that the dealer separately added the discount to the selling price, nor showed that the dealer was charging cash buyers less than it was charging credit customers for the same vehicles, the court held he failed to prove a TILA violation.<sup>74</sup> The court also found that City Chevrolet’s actions were protected by the “cost of doing business exception,” so any increase in the selling price was not a finance charge governed by the statute.<sup>75</sup> With respect to the Continental Car Club Membership issue, the court ruled that *Balderos* had failed to state a claim upon which relief could be granted.<sup>76</sup>

These cases illustrate how dealers can finesse the deal to reduce buyers’ bargaining knowledge and opportunity. Most buyers likely are unaware that dealers are structurally positioned to profit not only from the sale of the vehicle itself but from every product or service offered. And despite disclosure requirements, sellers still present negotiable terms as non-negotiable items which buyers are probably too intimidated to question.

Courts are insensitive to the intimidating and seller-controlled

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71. See *id.* at 2. The district court’s opinion does not explain what the Continental Car Club membership is or what it is worth. However, the court of appeals decision does. See *Balderos v. City Chevrolet*, 214 F.3d 849 (7th Cir. 2000). “Membership [which] . . . entitles the member to a bond card so that he doesn’t have to surrender his driver’s license should he be ticketed for a traffic offense, is sold only to credit customers of the dealer. The plaintiff was charged \$60 for membership [and] . . . is prepared to prove that the value of the bond card is considerably less than \$60, and indeed is probably little more than \$10, in which event the membership fee is rather transparently in lieu of a \$50 finance charge.” *Id.* at 852.

72. 1998 WL 155912 at \*3.

73. *Id.*

74. *Id.* at 4.

75. See *id.*

76. *Id.* at 5-6.

environment in which car deals occur. As a result, car buyers' claims are evaluated as if the parties are reasonably at arms-length in their bargaining. Even attempts at liberal construction<sup>77</sup> of buyer-protective laws have not produced judicial outcomes capable of reworking this environment. For example, in *Balderos*, the court noted the importance of financial disclosure laws that help inform buyers whether they should pay cash, buy on credit, or shop around.<sup>78</sup> But more prominent in the court's decision is the emphasis that car bargains are arms-length transactions. The *Balderos* court found that

[a] dealer is not its customers' agent, obviously not in selling cars but only a little less obviously in arranging financing. If the buyer pays cash and arranges his own financing, the dealer is not in the picture at all. If the buyer wants to buy on credit, he recognizes that his decision does not change the arms-length nature of his relation to the dealer. He knows, or at least has no reason to doubt that the dealer seeks a profit on the financing as well as the underlying sale.<sup>79</sup>

Because the law and judges will not save buyers from oppressive sales practices, buyers must enter the dealership with the information or knowledge they need to make a good deal. Buyers also need bargaining skills that help them deploy their knowledge in a way that produces favorable contracts.

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77. See *Leathers v. Peoria Toyota-Volvo*, 824 F. Supp. 155, 157 (C.D. Ill. 1993) ("TILA requirements are enforced by imposing a sort of strict liability in favor of consumers who have secured financing through transactions not in compliance with the terms of the Act. It is strict liability in the sense that absolute compliance is required and even technical violations will form the basis for liability."). See also *Mars v. Spartanburg Chrysler, Plymouth, Inc.*, 713 F.2d. 65 (4th Cir. 1983) ("To insure that the consumer is protected, as Congress envisioned, requires that the provisions of the Act and the regulations implementing it be absolutely complied with and strictly enforced.") *Id.* at 67; *Hickman v. Cliff Peck Chevrolet, Inc.*, 566 F.2d 4 (8th Cir. 1977) ("The Truth-in-Lending Act was enacted by Congress in order to promote full disclosure of the cost of consumer credit so that buyers could make informed choices in their credit transactions. . . . The act is remedial in nature, and the substance rather than the form of credit transactions should be examined in cases arising under it.").

78. See *Balderos*, 214 F.2d at 851-52.

79. *Id.* at 853. See also *Lindholt v. Walser Ford*, 1998 U.S. Dist. LEXIS 22765 (Sept. 25, 1998) ("In the context of the sale of an insurance policy, would a reasonable consumer have known that the agent (in this case, Walser Ford) would be receiving a commission on the sale? The answer is clearly 'yes.' Plaintiff could not reasonably have believed that Defendant was selling Plaintiff the insurance policy gratis. Seldom, if ever, could any but the most naive consumer expect to purchase any insurance policy on a vehicle which would not include some sort of commission for the agent."). *Id.* at \*11.



## II. BARGAINING FOR THE VEHICLE

There is an abundance of information in libraries, bookstores, and on the Internet that can help car buyers prepare for the deal.<sup>80</sup> For a few dollars and a little time, buyers can acquire virtually all of the vital information they need about the vehicle they wish to purchase. Buyers can get safety, warranty, price, cost, reliability, and performance data, among other things.<sup>81</sup> From these same sources, buyers can obtain bargaining and financing tips, learn about rebates, holdbacks, and other schemes that may affect the price they should pay for their vehicle of choice. But these factors are only a fraction of what buyers need to know to be effective bargainers.<sup>82</sup>

Not every car buyer does his homework. And of those who consult a buyer's guide, only a fraction of them will study and understand the numerous variables that go into deciding on a price. Even fewer will be able to deploy the bargaining strategies outlined in the guide or get the price suggested by the guide. The buyer's credit history, evaluative skills, bargaining confidence and skill, and many other variables will influence the overall result.

### *Sizing Up The Buyer*

Experienced car buyers know the routine. However, they are still likely to feel unsettled and vulnerable when they enter a car dealership. At many dealerships it is common, particularly when business is slow, to see groups of salespersons gathered at the front entrance waiting for customers to arrive. Normally, there is no shortage of attention when a buyer arrives.<sup>83</sup> Sometimes one gets the sense of being pounced or preyed upon.<sup>84</sup> From the time the salesperson begins to speak, the bargaining or "show" has begun.

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80. See *supra* notes 8-9.

81. See *supra* notes 8-9.

82. See *supra* notes 144-157 and accompanying text.

83. In the exceptional case one may not get any attention. A friend once described an incident where he drove into the lot of a luxury car dealer and got no response from a group of salesmen standing on a terrace looking at him. He had arrived in his work truck wearing construction clothing. He parked, walked the lot, looked at the cars, and to his surprise none of the salesmen approached or spoke to him. He left without making any contact with them. He opined that the salesmen felt, based on his appearance, that he could not afford those cars and spending time with him would potentially result in a lost opportunity, with a yet-to-arrive qualified buyer.

84. In the Miami area, even car dealers try to capitalize on this phenomenon. I often hear radio advertisements by dealers who describe the competition as sharks in their attempt to entice buyers to choose their dealership.

What the salesperson says and how he says it is critical. One of the most troubling aspects of seller behavior is the practice of indirectly suggesting that the salesperson is an agent, fiduciary or representative of the buyer.<sup>85</sup> Sellers give buyers the impression that a big show is on, that buyers hold the key to whether the performance will go well, and that sellers will assist buyers in rendering a good performance. Of course, if the show does not go well, buyers are made to feel terrible, because, as the main performers, it is their fault if the show flops.

A seller's bargaining strategy starts immediately upon a buyer's arrival. A buyer's physical characteristics play an important role in the negotiations process and have significant financial ramifications for the final deal that will be struck.<sup>86</sup> Once verbal contact is made, a seller's planning is in full swing. What appears to be friendly conversation often is a critical evaluation. For example, seemingly neutral questions about where you live, where you work, what you drive, and what type of work you do, all typically probe a seller's interest in your credit worthiness, commercial sophistication, and vulnerability in negotiating a complex deal. Curiously, salespersons often do not alter an oppressive bargaining strategy or behavior upon learning that the buyer is an informed consumer.<sup>87</sup>

A buyer's responses to these apparently innocuous inquiries significantly affect what happens next. Often buyers are casually asked if their credit is good and whether a credit check may be done. If a buyer agrees to a credit check, a seller obtains a host of information that can

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85. *But see Balderos*, 214 F.3d at 853 ("an automobile dealer is not its customers' agent . . .").

86. Race and gender have been shown to greatly impact the outcome of the negotiations process. *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). A study of Chicago-area car sellers showed that black customers paid the highest premiums for their cars, with black women being charged the highest prices, and black men the second highest. *Id.* at 819. White men got the best prices and white women the next best price. *Id.* But discrimination in car sales is intriguing because it does not follow predictable patterns. For example, black salespersons gave black customers the worst deals and subjected blacks to the worst treatment. *Id.* at 847. Racial discrimination does not terminate with the salesperson. It continues with the financing officer. Studies have shown that mark-up on interest rates are typically greater for black buyers than for white customers. *See* Diana B. Henriques, *supra* note 34; *20/20*, (ABC television broadcast, Oct. 27, 2000).

87. I am always surprised when even after learning that I am an attorney and that I may know more about the vehicle and dealer cost than they do, salespersons start the negotiations by asking me what monthly payment I would like to make. This unwavering adherence to a strict bargaining routine tells me both about its effectiveness and the mechanical way in which it is deployed.

control the substantive outcome of the transaction.<sup>88</sup> A good credit report lets a seller know he is not wasting time, among other things.<sup>89</sup> A bad report may cause a seller to adjust his pricing structure. Because dealers usually sell risky buyers' promissory notes to third party lenders at a discount,<sup>90</sup> a salesperson is likely to raise the price of a car or pad the selling price in some other way to offset the discount.<sup>91</sup> As a result, the offering price to a buyer who is a bad credit risk will likely be greater than the price offered to a buyer with a good credit rating.<sup>92</sup> In some cases a salesperson may move from establishing credit status and go straight to price proposals. And, if allowed, salespersons will forego offering a test drive or any other time-consuming event that keeps the salesperson from another potential deal.

Generally, sellers behave as if they are looking out for a buyer's best interests. The portrait of agency is very misleading. Sellers gain an unfair advantage when buyers believe that the salesperson is there to help them get past the "unreasonable sales manager" and, for some buyers, their poor credit history. None of a seller's representatives functions as a buyer's agent, and agency principles offer little protection to buyers in car sales transactions.<sup>93</sup> So when a salesperson promises to get someone the best deal from his boss, expectations that the salesperson will behave like an agent are unfounded.<sup>94</sup>

Promises by a financing officer to get the buyer the best interest rates available are also designed to mislead a buyer about the capacity in which a seller is acting.<sup>95</sup> While the best available financing promised

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88. Poor credit puts the buyer in the weak bargainer category. *See Reich, supra* note 7.

89. Good credit may also trigger a selling decision to entice the buyer with a more expensive car or expensive options.

90. For a discussion of the practice of discounting, *see supra* note 6.

91. *See supra* note 6.

92. In addition to marking up the selling price, dealers also try to offset default risks by charging higher interest rates to buyers with poor credit. *See Seccombe, supra* note 7. In a Miami, Florida lawsuit, low-income buyers with poor credit charged that the seller priced cars at two to four times their retail value and then financed the transactions with exorbitant interest rates. *See Jim Oliphant, Buy here . . . pay here . . . get taken here? Car dealer accused of victimizing poor*, BROWARD DAILY BUSINESS REVIEW, April 13, 1998 at B1.

93. *See Balderos v. City Chevrolet, et. al.*, 214 F.3d 849 (7th Cir. 2000).

94. It would be extraordinary to find a case where the court concluded that the salesperson's representations created an agency obligation to advocate on buyer's behalf. From a seller's vantage point, only a naive buyer could think that the salesperson represents the buyer when he says he will try to get something from his manager for the buyer.

95. In rare situations, representations by the financing officer can create fiduciary

may trigger some disclosure obligations,<sup>96</sup> the best deal promise does not create special responsibilities for a seller.<sup>97</sup> Yet buyers are made to feel that they and the salesperson are aligned against the sales manager, and later, that they are teaming up with the finance officer to take on lenders and other service providers. Judges seem unaware that in the car sales context, dealers suggest that they shop for the best financing available, and that providing this service justifies the interest rate mark-up.<sup>98</sup>

Contract law and regulatory prescriptions afford little protection against what sellers say. Sellers routinely misrepresent pricing structures tied to dealer cost.<sup>99</sup> Representations that the selling price is at or below invoice are misleading yet often do not qualify as fraudulent.<sup>100</sup> Sophisti-

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obligations. See *Fairman v. Schaumburg Toyota Inc.*, 1996 W.L. 392224 (N.D. Ill. July 10, 1996). In *Fairman*, the seller's representative promised the buyer that he would find the best available financing. Although a lender agreed to extend credit to the buyer at a rate of nineteen percent, the seller marked up that rate by five points without telling the buyer that seller had an agreement with the lender that permitted this. Buyer contended that the "best financing" promise created an agency relationship and a fiduciary duty on seller to disclose the deal seller had with the lender. The court ruled based on these allegations that the buyer had properly pled agency. *Id.* at \*4-5.

96. *Id.* at \*4-5.

97. See *Balderos v. City Chevrolet*, 214 F.3d 849 (7th Cir. 2000). In this case the court noted that unless the dealer expressly declares that he is functioning as the buyer's agent, no fiduciary obligation is created. *Id.* at 854. The court added: "If there were such a relationship it would mean that the buyer could tell the dealer to shop the retail sales contract among finance companies and to disclose the various offers the dealer obtained for him, and no one dealing with an automobile dealer expects that kind of service." *Id.*

98. *Id.* Judge Posner's suggestion in *Balderos* that the seller cannot be expected to shop and disclose financing options is therefore misplaced.

99. It is not uncommon to see pricing structures tied to cost. Sellers often represent that vehicles will be sold at "factory" prices, "at or below invoice," or "one dollar above invoice," among other things. But buyers do not have access to the many variables that combine to constitute sellers' real cost. What the seller paid the manufacturer for the vehicle, the cost of each option, the value of holdback and rebate arrangements are only some of the many cost factors that buyers may not be aware of or are unable to access. See CONSUMER GUIDE, *supra* note 8, at 4. See Ayres & Miller, *supra* note 5, at 1066 (car sellers routinely misrepresent their cost).

100. Although cost information is a material element of the transaction, false statements about seller's cost have not produced a flood of fraud lawsuits against sellers. The vehicle cost is subject to many variables such as manufacturer incentives, rebates, discounts or other allowances. But it is sellers' responsibility to know their cost. And sellers do not routinely disclose these variables when they make representations about cost. Uninformed buyers are likely to rely on sellers' cost representations in assessing whether they are being offered a good deal. In a bargaining environment it is questionable whether buyers should be stuck when they rely on such representations. From a practical standpoint, buyers must first know that they were lied to before initiating a fraud claim. And it is because buyers do not know or cannot really determine seller's cost that seller gets away with this representation in the first place. If buyer knows the statement to be false he would not rely on it. And if buyer does not know the statement

cated buyers who have some ideas about the variables that make up dealer cost have been told that their sources of information are unreliable.<sup>101</sup> Offers to purchase at a few hundred dollars over invoice have been countered with statements such as, "If you can get it at that price, I'll buy it from you;" or, "At that price we'll lose money on the deal." Although usually false, such statements are not prohibited by the existing regulatory structure for car sales.

For the uninformed buyer, the contracting process can be downright predatory. In some cases, buyers may be unaware that purchasing a car is a bargaining transaction that affords them significant contracting freedoms. When a salesperson senses this lack of knowledge, the deal is effectuated on a different level. In such cases, the transaction may consist of the salesperson asking the buyer what monthly payments he would like to make, and offering to "back him up" into such payments. This type of payment packaging<sup>102</sup> can be very attractive to buyers who focus on their short-term obligations rather than their total liability for the deal. This contracting format is also attractive to buyers who do not

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is false he cannot bring a claim grounded in it.

101. While negotiating the purchase of several cars I used the dealer cost information provided by *Consumer Reports*. The seller told me that *Consumer Reports* is wrong and pointedly asked how *Consumer Reports* could know what the dealer paid for the vehicle. Of course he is right. *Consumer Reports* cannot account for dealer cost to the penny. This type of retort requires that buyers have a great deal of bargaining confidence and commitment to the independent cost information they acquired. Ironically, sellers are willing to concede the accuracy of *Consumer Reports* if it says, for example that the subject vehicle is a "best buy."

102. Buyers are advised to "run" if the seller attempts to negotiate based on the monthly payments buyers can afford. See *Noughty, Noughty*, THE SUN, Oct. 3, 2000, at <http://www.lexis.com/research/retrieve?> (Dec. 18, 2001). Loan packing is the process by which the seller gets the buyer to commit to a monthly payment in excess of the sum needed to pay off the loan. With a credit check showing what the buyer qualifies for, seller can compute a monthly payment plan that is higher than necessary so as to accommodate the inclusion of unnecessary add-ons. In really abusive circumstances, the seller may not discuss interest rates, the term of the loan or financing arrangements. The salesperson may simply say, for example, "If I can get you into the car for two hundred and fifty dollars a month, do we have a deal?" If the buyer says yes, then the details are added by the seller. In such situations, the monthly payment seller settles on will yield total payments in excess of the vehicle's cost and the cost to borrow money. For example, if the real cost of the vehicle plus the cost of borrowed money would be two hundred and thirty dollars a month, the extra twenty dollars a month is additional profit for the seller which seller absorbs through add-ons like an interest rate hike, credit insurance, an extended warranty and a service contract. When the deal is over, the buyer may or may not realize he has purchased additional things for which he will be paying during the next six years. In some cases, buyers get a bit more information. For example, a buyer may be told that the monthly payment is for six years at a particular interest rate. Even if this information is provided, a seller is still going to settle on a monthly plan that can accommodate profitable add-ons.

like to bargain, do not know how to bargain, or who are unable to comprehend the deal in any other way.<sup>103</sup>

Although salespersons pitch payment-packing as a way to accommodate a buyer's monthly financial limitations, it really operates as a scheme to deprive buyers of bargaining independence.<sup>104</sup> A buyer's commitment to a monthly payment plan as the sole basis for deciding the purchase price typically results in a lopsided transaction favoring the seller. Whatever monthly payment a seller proposes usually includes higher interest rates and more options than a buyer wants.<sup>105</sup> Even after luring a buyer into such a one-sided deal, a salesperson may tell the buyer that he has to go and convince his manager to give the buyer that payment plan.

Available regulations offer no protection to buyers faced with this selling strategy. If a salesperson does not tell a buyer the term of payments or interest rate, a buyer has no basis for computing the seller's offering price, and therefore does not know whether the price is below, equal to, or greater than the sticker price. A buyer may not even know what the sticker price is if a salesperson does not show him the actual vehicle that will be delivered. Yet, a buyer is made to believe that a salesperson will "help" him get both the vehicle and payment plan of his choice.

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103. Unfortunately, not all buyers are informed and can make rational financial decisions. The importance of starting with the total overall price is a financial practice that many buyers do not grasp for any number of reasons. Starting and ending the negotiations with monthly payments simplifies life for buyers who may not understand the role interest rates play. And some buyers may be unable to do the math in order to translate the monthly payments into a total purchase price.

104. Cajoling a buyer into a monthly payment bargaining routine takes advantage of the buyer's weaknesses in an unsavory way. It permits non-disclosure of crucial information that a buyer needs, under the guise of accommodating a buyer's financial limitations. *See, e.g., Ciampi v. Ogden Chrysler Plymouth, Inc.*, 634 N.E.2d 448 (Ill. App. 2 Dist. 1996). In this case the seller asked the buyer what monthly payment she can afford and she answered \$200. *Id.* at 452. The seller counter offered \$280 or \$289 and the buyer responded that she did not like doing the deal this way because she had no idea what the selling price was. *Id.* The seller told her she had to make another offer and she said \$210. *Id.* After going back and forth like this several times they settled on \$225. *Id.* Buyer claimed that at all times seller refused to tell her the price of the car and she was not allowed to see the window sticker. When the contract was drawn up her monthly payments totaled \$229 and when she complained the finance manager allegedly said, "What's four bucks?" *Id.* The buyer ended up with a five-year contract, a 12% interest rate, and a promise of a one-year, new-car warranty that contradicted the written documents and the mileage on the vehicle. *Id.* at 452-53. After getting home, buyer did the math and discovered that her total payments amounted to \$15,397.66 for a vehicle that should have retailed for less than \$12,000. *Id.* at 453-54.

105. *See supra* note 102 discussing the payment packing strategy dealers use.

The appearance of agency is further advanced when a trade-in is involved. In addition to making the bargain more difficult for a buyer,<sup>106</sup> the variable of a trade-in allows a seller to further advance the impression of agency. Salespersons often talk about trying to get a buyer as much money as possible for the trade. Buyers are also made to feel represented because of sellers' statements that the traded-in vehicle is a burden, which a seller will have to get rid of "for the buyer." And if a buyer has negative equity in the vehicle being traded, sellers talk about paying off the buyer's loan for them. Even though a seller is not doing the buyer any favors, and these representations are misleading, a buyer is not protected from them. The fact is that a seller will not accept the trade-in if the deal is not profitable. If there is negative equity, the seller will add this sum to the buyer's costs, and may also raise the selling price of the vehicle to make an additional profit. A seller then sells the traded-in vehicle at a profit. In fact, in some instances, a seller may make a larger profit on the trade-in than on the vehicle sold in the primary transaction.<sup>107</sup> And a buyer has to pay off any negative equity in the traded vehicle as part of the new financing agreement.<sup>108</sup>

Further seller misconduct occurs in the pricing strategy typically employed. Sellers usually withhold important profit information as negotiations take place about the final selling price. Price negotiations tend to be verbal or may include proposals on notepaper. Once a price is settled and a verbal contract is formed, the dealer then reveals its preprinted form contract that "memorializes" the deal. This preprinted document invariably contains at least one charge that can range from three to six hundred dollars of additional dealer profit. By preprinting charges, the dealer renders these items seemingly non-negotiable.<sup>109</sup>

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106. If a buyer is trading in a vehicle, he is now doing two transactions. Ideally, a buyer has to be vigilant to get the best price for the trade since he is the seller of the traded vehicle. If the traded vehicle is not paid off, a buyer is particularly susceptible to a seller's suggestions that the seller is unloading the vehicle for the buyer. And a buyer has to watch the selling price of the new vehicle to see if it is unusually high, which would suggest that the seller is offsetting the price he is willing to pay for the trade.

107. One can expect to lose an additional three to five thousand dollars if a car is traded in the transaction, at <http://www.edmunds.com/advice/buying/articles/43091-page006.html> (last updated Nov. 9, 2001).

108. Sellers can confuse buyers who have negative equity. What buyers are really getting for traded vehicles can be a mystery because sellers sometimes inflate trade-in values. On paper, a seller can eliminate negative equity by raising the trade-in allowance to equal or exceed the loan balance. If a buyer focuses only on the trade transaction, he may not notice a corresponding increase in the selling price of the new vehicle. Obviously, a seller is not going to pick up the cost of paying off a buyer's loan. But in trade-in situations, seller has greater opportunities to deflate and inflate prices to accommodate profit desires.

109. See *Motzer Jeep Eagle, Inc. v. Ohio Atty. Gen.*, 642 N.E. 2d 20, 25 (Ohio Ct.

A preprinted fee or profit is also projected as a charge that benefits the buyer. Specifically, the charge often shows up in the column: "customer services"<sup>110</sup> or "dealer services."<sup>111</sup> If a buyer questions this charge, it may result in the seller rescinding the verbal contract and walking away from the deal. A buyer has little or no protection when such "baiting and switching" occurs. After being stretched out for many hours trying to get to an acceptable price, a buyer may feel compelled to stay and finish the deal.<sup>112</sup> Any concessions on the dealer fee translate into additional profit for a seller and no recourse for an unhappy buyer.

So, in the course of consummating a contract for sale, a seller freely manipulates the buyer and has little or no accountability. There are few if any rules that coerce seller honesty, and virtually no rules to constrain the deceptive seller conduct that misleads the buyer about whose interests the seller represents. Uninformed buyers are particularly susceptible to pricing abuse, stemming from their reliance upon sellers' representations, which often are false. Yet existing regulations offer little or no recourse for buyers subjected to such practices.

### III. FINANCING THE DEAL

Commercial consumer guides and governmental agencies provide buyers with valuable information about financing the purchase of a car.<sup>113</sup> Buyers are advised to shop early and broadly for financing.<sup>114</sup> In-

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App. 1994) (customers construed preprinted charges as mandatory and non-negotiable).

110. Dealer prep charges can scam the buyer twice. First, by charging hundreds of dollars for a few hours of non-technical labor of cleaning and readying the vehicle. Second, if the manufacturer paid the dealer for these preparation services, the dealer profits twice when buyer pays again. See Jeff Ostroff, *Top 10 Car Dealer Scams for 2000*, available at <http://www.carbuyingtips.com/scams.htm> (last visited Feb. 6, 2001).

111. *Id.*

112. One of the most effective bargaining strategies sellers employ is to keep buyers at the dealership for as long as possible. Disappearing salespersons and finance managers is a technique that forces a buyer to invest a great deal of time in the transaction. This wearing down of buyers operates to a seller's benefit, because it is unpleasant and a buyer would prefer to not repeat this experience at another dealership. As a result, a buyer is unlikely to persevere, and may also agree to terms he otherwise would not have. See, e.g., *Ciampi v. Ogden Chrysler Plymouth, Inc.*, 634 N.E.2d 448, 452 (Ill. Ct. App. 1994) (buyer testified that after haggling with the dealer over a four-hour period, she felt it would be easier to contract at a price higher than the one agreed upon rather than continue negotiating).

113. See, e.g., EDMUNDS, *supra* note 33, at 14. See also CONSUMER ACTION HANDBOOK 2001 EDITION, U.S. GEN. SERV. ADMIN. FED. CONSUMER INFO. CTR. (2001).

114. *Id.* EDMUNDS advises: "Contact several financial institutions to obtain loan rate information. Later on, you can compare their arrangement with the dealer's financing plan." *Id.*



stead of depending on sellers, buyers are advised to check with local banks or credit unions, compare the terms of the various institutions, be leery of advertisements, and evaluate carefully loan terms, taking as much time as needed to fully understand them.<sup>115</sup> Despite the availability of this advice, most buyers routinely rely on the seller both to educate them and to negotiate financing for them. This dependence is often taken advantage of, resulting in additional costs to buyers.

Having concluded the contract for sale, a buyer must still remain diligent, because bargaining abuse is likely to continue in the finance manager's office. For many buyers, this aspect of the deal is even more complicated and makes them even more susceptible to abuse. While getting to a fair price may be a buyer's primary and sole goal with the salesperson, many other variables must be addressed with the finance representative. Even sophisticated buyers can run into problems here. And if a buyer is not diligent, or, worse, uncomfortable with numbers, any gains made with the salesperson could be recaptured for the seller through the finance officer.

At the outset, many buyers may not be aware that even after the sales contract is made they are free to walk out of the showroom and seek out independent sources of financing.<sup>116</sup> Ideally, a buyer should shop financing and go to the dealer prepared, but dealers have cornered and control the financing market.<sup>117</sup> As an initial matter, salespersons never mention to buyers that buyers have contractual freedoms and discretion with respect to financing.

More commonly, once a sales contract is signed, a salesperson simply escorts the buyer to the finance officer's office. To the extent that a salesperson makes any representations about financing, those statements continue in the vein of agency. Buyers are routinely told that the financing officer will help the buyer in dealing with any credit-related

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115. *Id.* Comparison shopping is critical and effective but it must be done before going to the dealership. Buyers cannot rely on seller representations about what the market offers or what individual buyers qualify for. The rushed environment that sellers create when presenting loan terms make it difficult to evaluate and digest what sellers are offering, even for a savvy buyer.

116. This is indirectly confirmed by sellers' large market share of finance contracts. See Diana B. Henriques, *supra* note 34 (dealers arrange credit for 77% of buyers). And most buyers finance. See R. Carter Pate, Michael C. Buenzow, Rishi Sadarangani, *Subprime Auto Finance: The Year Of The Bankruptcies*, AM. BANKS. INST. J., May 1998, at 30 ("The average American consumer cannot pay cash for a new or a used vehicle. Therefore, the purchase of an automobile is usually financed.").

117. *Id.*

issues that affect financing.<sup>118</sup> If this representation is not volunteered it is the likely response if a buyer inquires. If a credit check was done before a contract of sale was made, a financing officer is already aware of the buyer's creditworthiness and can begin strategizing long before a buyer is introduced.<sup>119</sup>

### *The Appearance of Agency*

Existing rules do not regulate sellers' conduct that creates misperceptions about whom the financing officer represents. This is particularly troubling for buyers with poor credit who may feel joy and relief to discover they could buy a car and obtain financing through the seller. Finance representatives are usually professionally trained, very savvy at their job, and well paid.<sup>120</sup> Many buyers may not appreciate the fact that a financing officer's job is to secure the greatest possible profit for a dealer. And the financing representative will not do anything to convey this impression. In fact, the opposite impression is conveyed through express statements.

A financing representative does his own show. Again, a buyer is made to feel he is the main performer, upon whose cooperation the success of the venture depends. A financing officer is not required to tell a buyer that he is free to go elsewhere. Disclosure of that freedom may never occur, unless a buyer is sophisticated and recognizes that the offered financing arrangement is not competitive.<sup>121</sup> More frequently, the show starts with a financing officer assigning an interest rate to a buyer without consulting the buyer. The financing officer's show continues with price-expanding proposals of extra services or products. Because every option is pitched as a necessary benefit to the buyer, a financing officer may grow increasingly agitated when products are declined. A buyer usually is not notified of the relationship between the seller and

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118. The exact opposite is more likely to be true. Buyers' credit problems create more profit opportunities for sellers. Sellers capitalize on this buyer weakness through higher interest rates and the inclusion of unnecessary programs and services sanctions pitched as loan conditions.

119. See *Flowers v. Ford Motor Credit Co.*, 959 F. Supp. 1467, 1469 (M.D. Al. 1997) (before buyer had decided on a car she was told the contract and financing paperwork were completed and waiting with the finance officer).

120. See *Diana B. Henriques*, *supra* note 34, at A1 ("The finance and insurance manager is usually one of the car dealership's highest paid employees, earning commission based incomes of \$100,000 or more a year."). *Id.*

121. Typically, the dealer will "find" lower interest rates for an alert buyer. But the negotiations tend to deteriorate rapidly when buyers start questioning the finance officer. And things can get downright tense if the offered terms are not accepted and a buyer decides to find his own lender.

the lender, or the seller and any other organization offering additional services.<sup>122</sup>

If a buyer inquires about the interest rate being offered, a financing officer can shift to an agency mode by representing that he shopped around "for the buyer," and got him the best possible rate given that buyer's credit situation. If a buyer balks at the proposed rate, a financing officer may offer to do some more shopping for the buyer while lamenting that it is unlikely that a lower rate can be found. Financing officers may boast about the large number of financial institutions with which they are associated, and may represent that a thorough search was conducted on the buyer's behalf. None of this may be true. And a buyer is not protected against such representations.

After putting up some resistance, a financing officer may offer a slightly lower rate to a buyer, but may now add a fee for the loan application, contending it is a lender requirement.<sup>123</sup> This fee, the absence of which might have been a selling point for the initial higher rate, now becomes a prerequisite for the lower rate, thereby adding to a buyer's cost. More often, irrespective of the sophistication of a buyer, no mention is made of the interest rate until the promissory note is printed and key provisions are highlighted.<sup>124</sup>

Dealers have extensive arrangements with lenders that include some financing discretion. Some lenders allow financing officers to in-

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122. As a practical matter, buyers do not need to know about such relationships and the laws that govern them in order to make a good deal. Buyers' fundamental understanding that the dealer sells everything for a profit and that everything is negotiable can sufficiently prepare them for the deal. Knowing that the dealer sells the finance contract to a lender for a profit can be helpful but not nearly as beneficial as shopping interest rates prior to going to the dealer.

123. One of the selling points of seller-arranged financing is the absence of an application fee. But buyers can be sure sellers will profit at some point in the financing process. In one deal I did, I told the finance officer there was no point in arranging financing if he could not beat my bank's rate. He played around on the computer, then proceeded to print out a contract with a rate .25% higher than what I told him. When I saw the higher rate I told him it was unacceptable, he became very upset, complained about having to retype the contract, and argued that the rate only changed my payment by pennies. I then told him that the pennies add up over the life of the loan. His final position was that the only way he could get me my quoted rate is if I paid a \$125 application fee.

124. I did an informal unscientific survey on my job and with friends. In every case where interest rates bargaining was not initiated by the buyer, the finance officer simply typed up the contract, printed it and then pointed out the rate and cost of the loan. In many cases, the buyer was not directed to this information. Instead, the buyer was simply directed to sign and initial the pertinent areas on the contract.

crease interest rates several points above the rate approved for a buyer, and allow a seller to keep the profit represented by the difference between the approved rate and the contracted rate.<sup>125</sup> Sellers also make kickback arrangements with third-party service providers that cause buyers' costs to go up.<sup>126</sup> Independent providers of maintenance or warranty protection also allow sellers to mark up their products and pocket the profit.<sup>127</sup>

Buyers are usually not informed of the variety of arrangements sellers have with third parties that adversely affect them. Such "up-charges" are legal, and subject only to limited disclosure rules.<sup>128</sup> So although buyers may be given the impression that they are being assisted with financing and other services, profit motive and available lender incentives motivate the finance officer to act contrary to a buyer's interests. Even if a buyer knows he has rights with respect to these charges, he is not fully protected from seller misconduct in this arena.

The image of a finance officer as a buyer's loyal servant permeates the transaction. Finance officers typically tell buyers that they are obliged to inform them of several programs that are offered for the buyer's benefit. Although a particular program may not benefit the buyer, a seller is not required to point this out.<sup>129</sup> For example, buyers are routinely offered extended warranties that sometimes are very expensive. A financing officer may represent that the warranty offer is only available at the time of sale, or that offered prices can only be locked in at the time of sale.<sup>130</sup> Such representations force buyers to quickly make

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125. See *Sampler v. City Chevrolet Buick Geo, Inc.*, 10 F. Supp. 2d 934, 936 (N.D. Ill. 1998) (dealer can raise the interest rate up to five points above what the lender approves, and lender and dealer splits the increase).

126. See *Perino v. Mercury Finance Co. of Illinois*, 912 F. Supp. 313, 315 (N.D. Ill. 1995) (the buyer was sold credit life and credit disability insurance).

127. See *Roche v. Fireside Chrysler-Plymouth*, 600 N.E.2d 1218, 1222 (Ill. App. Ct. 1992). In this case, the seller made a very profitable arrangement by selling buyer an extended warranty that duplicated the new car warranty. See also *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283, 284 (7th Cir. 1997) (seller admitted keeping a substantial portion of a \$800 extended warranty fee).

128. See *Sampler v. City Chevrolet Buick Geo, Inc.*, 10 F. Supp. 2d 934 (N.D. Ill. 1998) (discussing statutory hurdles buyer must clear in order to prevail in the various statutory claims brought by the buyer).

129. For example, CONSUMER GUIDE notes: "Popular moneymakers [for the dealer] include rust proofing, 'protection packages,' burglar alarms, powerful audio systems, and extended service contracts. Dealers pay little for these and mark them up sharply. You can usually buy them elsewhere for less money - and you might not need them at all." See CONSUMER GUIDE, *supra* note 8, at 4.

130. I have been told on several occasions that the longer I wait the more expensive the extended warranty becomes.

a decision, and deprive buyers of an opportunity to make a reasoned judgment.

Buyers may also be told that the manufacturer's warranty is limited, and the extended warranty gives a buyer complementary protection against out-of-pocket repair costs. The need for an expensive extended warranty may come as a surprise to a buyer, who was previously told by a salesperson that the subject vehicle is reliable. But because the finance officer conveys the impression that he, more than the salesperson, is looking out for the buyer's investment, a buyer may feel inclined to rely on his representations.

Buyers can also expect to be offered a variety of insurance programs, including life, disability, and guaranteed auto protection ("GAP") insurance. In addition to sometimes being unnecessary, such insurances may not insulate a buyer from repayment or repossession headaches.<sup>131</sup> A financing officer does not offer a buyer a balanced evaluation of his insurance options, nor are they required to do this. A buyer may already have life and disability insurance that provide adequate financial protection for unfortunate contingencies. Or a buyer may not care what happens to his car debt if he loses his life.

GAP insurance is usually a hard sell. Financing officers, when all else fails, will work hard to convince buyers that GAP protection should not be declined. A financing officer may even go so far as to tell a buyer that his precious new car is not a good investment because it depreciates rapidly, thereby necessitating extra (GAP) insurance coverage in the event the value of the vehicle is less than the covered loss.<sup>132</sup> With respect to GAP insurance, a financing officer may suggest that his advice goes beyond agency to friendship.<sup>133</sup> The reality, however, is that

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131. For example, see *Perino v. Mercury Finance Company of Illinois*, 912 F. Supp. 313 (N.D. Ill. 1995). In this case, the buyer purchased credit life and disability insurance along with the vehicle. *Id.* at 314-15. He subsequently became disabled and filed a claim under his disability policy. *Id.* at 315. However, benefits were not paid for several months during which time buyer defaulted and his car was repossessed. *Id.*

132. GAP insurance can be very lucrative for the seller. See *Fairman v. Schaumburg Toyota Inc.*, 1996 WL 392224, \*1-2 (N.D. Ill. 1996). In this case, the dealer sold the buyer 'Guaranteed Auto Protection Loan Agreement Addendum' ('GAP') for \$585, forwarded \$185 to the GAP administrator and kept \$400. GAP insurance may be good for many buyers because the financed amount will likely be greater than the insured value of the vehicle.

133. In my last car purchase transaction, the finance manager told me after I had declined all products and services offered that he wanted me to think carefully about GAP protection before he printed the contract. He stated that he has GAP protection on his vehicle and that he knows of many situations where buyers had to make deficiency

acceptance of any of these offers means an additional cost to a buyer, and more profit for a seller. Existing rules do little to prepare a buyer for such misleading seller conduct.

Other suggestions of agency by financing officers come in the form of articulated concerns about a buyer's safety, vehicle safety, and vehicle maintenance. Financing officers use theft and carjacking information to scare buyers into buying security systems such as Lo Jack<sup>134</sup> or Tele Aid,<sup>135</sup> even if the vehicle already has a security device installed by the manufacturer.

Service contracts are a source of additional profit for sellers and increased buyer cost. Here, again, finance officers convey the impression that they are representing the buyer. By emphasizing the high cost of repairs, and highlighting the high cost of replacement parts, a financing officer suggests that he is looking out for the buyer's financial interest. In reality, he is not. And he is not required to tell a buyer that. Service contracts are another profit-maker for the seller, but more importantly, a financing officer cannot be expected to disclose the conflicts of interest created by such contracts, or the disincentives to repair caused by the seller's financial interest in such contracts.<sup>136</sup> To cap it off, a financing officer makes his disclosure obligations meaningless to the buyer by not discussing them, preprinting all of the information, highlighting or circling it, then rushing the buyer to sign in the appropriate boxes with little opportunity to read them.<sup>137</sup> As a result, sellers are able to entice buyers to rely on representations that are only appear to be in a buyer's best

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payments because they did not buy GAP coverage. He cited a recent flood which destroyed many cars as an example when many buyers will suffer out-of-pocket losses because they did not get GAP insurance.

134. Lo Jack is a tracking device that is hidden on the vehicle and allows the police to track and recover the vehicle if it is stolen.

135. Tele Aid is a vehicle locator device installed in the vehicle that permits the car operator to get emergency help when danger is encountered by simply pressing a bottom.

136. See Daniel G. Deneen, *Automobile Finance, Warranty, And Insurance Extras: What The Consumer Should Know And How An Attorney Can Attack The Deceptive Practices*, 6. LOY. CONSUMER L. REP. 5 (1993) (discussing arrangements where the dealer is also the service provider or the dealer gets kickbacks based on the amount of repairs charged to its account). *Id.* at 6.

137. Many buyers never get to learn the valuable information the Truth-in-Lending Act makes available. See 15 U.S.C.A. §§ 1638(a)(1)-(B)(14)(2001). Advance knowledge and discussion of the interest rate, the finance charge, the total payments required, the total price to be paid, amounts to be paid those other than the dealer, and the amounts the dealer will retain from charges designated for others would shock a buyer, even a euphoric one, into questioning whether proper bargaining was done or whether the terms are acceptable.

interest.

*The Inadequacy of Agency Rules*

Because sellers implicitly represent that they are acting on buyers' behalf, rules of agency would seem relevant and controlling. Educating buyers about their basic bargaining freedoms is not sufficient to stem harmful selling practices. Even when buyers are armed with the knowledge that sellers pursue their own self-interest that will not eliminate their reliance on seller representations. Many buyers are intimidated by the bargaining process, some are uninformed and unsophisticated, many have poor credit, and others lack vital information that could increase their bargaining strength. Sometimes these factors combine to make the buyer very weak and dependent on the seller. Sellers should not be allowed to prey on these weaknesses through suggestions of friendship or agency.

When salespersons start to tell buyers that they are going to try to achieve a specific result for buyers, they should be saddled with fiduciary responsibilities, and buyers should have the power to avoid any resultant deal that is harmful. But activation of agency principles in this area is limited by the same problems of proof that come with other common law theories like misrepresentation and fraud. Most of the formation aspects of the purchase and financing arrangements are face-to-face and verbal. Resultant writings usually reflect the final deal, not the bargaining representations. Therefore, proving that the dealer assumed the responsibilities of an agent becomes a major hurdle. While there should be zero tolerance for such representations and buyers should have a power of avoidance should salespersons suggest that they are serving as buyer's advocate, a buyer would have a difficult time proving such a case. If buyers could prove agency and have the power of avoidance, this could help reduce the gamesmanship sellers use whereby the salesperson pretextually aligns himself with the buyer to take on the unreasonable sales manager. This good-cop bad-cop routine could be limited and buyers would delegate fewer bargaining responsibilities to the seller.

But for the limitations of proof, agency rules could have played a greater role in this area. Finance officers like to tell buyers that they are doing the best they can for buyers. Their show is run on "I'm looking out for you" fuel. They often convey the impression that they know and will do what is in a buyer's best interest. Finance officers routinely represent that they have shopped interest rates for buyers, and that the offered rate is the best rate buyers qualify for, given their credit status. Representations of this sort should saddle the financing officer with the duties and

responsibilities of an agent. In this regard, the financing officer's obligations will include a duty of honesty and diligence. If a buyer believes such representations when they happen to be false, the buyer is effectively deprived of his bargaining freedom because he fails to shop for lower interest rates. Failure by a finance officer to diligently search for the best rate should give a buyer a relief option that includes the best rate for which he is qualified. But as the *Balderos* court pointed out, the dealer is not the buyer's agent, and buyers have actual or constructive knowledge of this.<sup>138</sup>

If the law imposed on sellers the responsibility to stay at arms-length, buyers would have a better chance of staying focused on the respective roles of the parties at the bargaining table. The agency approach could help reduce buyers' dependence on financial disclosure regulations which do not alert buyers to sellers' real arrangements in structuring financing. If sellers cannot convey the impression that they are the best arrangers of financing, buyers are less likely to delegate that responsibility to them.

Financing officers sometimes behave as if they are buyers' financial planners when they try to sell products and services to buyers. Financing officers often counsel buyers on how best to protect their investment in the vehicle. Buyers may be told that an extended warranty is necessary, or that credit life or GAP insurance is a must. A buyer may later determine that he was sold something he did not need because he relied on the financing officer's representations and expertise. But how a seller provides that information in the give and take of negotiations is a difficult thing to police. The fluidity of the transaction, the nature of the exchanges, and the degree of reliance by the buyer are only a few factors that stymie a case grounded in agency.

So, despite the prevalence of seller conduct which suggests the seller is acting in a representative capacity, agency rules, like other common law rules, appear ill-suited for this area. If agency principles cannot be deployed to coerce sellers into making more balanced or neutral representations, then alternative methods for limiting bargaining abuse should be considered. Public education may be a way to make sellers more responsible in their exercise of bargaining freedoms. Public education can also reduce the need for more regulatory disclosures and make available disclosure laws more meaningful to buyers.

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138. See *Balderos*, 214 F.3d at 853.



#### IV. MOVING BEYOND REGULATORY DISCLOSURES

Car buyers can consult a variety of guidelines and rules intended to assist and protect them during the critical period. However, these rules and guidelines have been particularly ineffective in policing this type of transaction. Consumer regulations that prohibit misrepresentation help to make consumers better informed through seller disclosures. For example, consumers are entitled to see the manufacturer's suggested retail price or sticker price because that information must be posted on the vehicle.<sup>139</sup> This information can help take buyers out of the dark about what to offer for a particular vehicle.<sup>140</sup> Current regulations also require disclosure to buyers that a seller has some financial interest in the financing agreement being arranged with a lender.<sup>141</sup> But available rules are complex and under-enforced, leaving many buyers to exploitative selling practices and contracts.

Disclosure proposals are premised on the idea that buyers are intelligent and capable bargainers. But this is not necessarily true. Information can be useful if buyers understand and are able to use it. But many factors stand in the way of this.<sup>142</sup> Even if a seller is forced to provide more information to buyers, there is no guarantee that the information will be effectively used. And even if it were, there is nothing to stop the seller from adjusting other aspects of the deal, for example, increasing the selling price, in order to maintain current profit levels. Further, even if more disclosure worked in practice as in theory, buyers may find themselves more confused because of information overload.

##### *The Benefits of Disclosure*

The more a buyer knows, the greater his chances of making a fair or reasonable deal.<sup>143</sup> Disclosure of dealer cost may help buyers figure out mark-up and may assist in making the critical period more competitive and efficient.<sup>144</sup> Cost disclosure may also produce more equitable

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139. See Automobile Information Disclosure Act, 15 U.S.C.S. § 1231 *et. seq.* (2001).

140. To the extent buyers know that car buying is a tough bargained transaction, the sticker price can serve as a ceiling for price discussions. The seller would have greater opportunities at price abuse if the buyer had no idea what the suggested retail price is.

141. The Truth-in-Lending Act requires that sellers indicate that they will retain a portion of the price of a product or service sold to the buyer but is being provided by a third party. See 15 U.S.C.A. § 1638(a)(2)(B)(iii) (2001).

142. See *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 227 (N.D. Ill. 1969) (age, weakness of mind, sickness, incapacity, pecuniary necessities and ignorance affect bargaining power in contracts).

143. See Ian Ayres & F. Clayton Miller, *supra* note 5, at 1063.

144. *Id.* at 1064 (cost disclosure likely will produce smaller price dispersion).

results for buyers.<sup>145</sup> But cost disclosure only addresses one important part of the bargaining dilemma that vehicle buyers face. Suggestions of agency that promote buyer dependence and other mark-up elements of the transaction during the critical period affect what buyers pay in the end. And some of the things buyers need to know should not necessarily be placed on sellers' shoulders in the form of disclosure responsibility.

### *Consumer Education - Alternative*

Many consumers do not know that purchasing a car is a bargaining transaction.<sup>146</sup> Although most buyers probably understand as an intuitive matter that everyone does not pay the same price for a similar vehicle, many buyers are not aware of their contractual freedoms in this area. Car buying is a distinctly different endeavor from supermarket or department store shopping.<sup>147</sup> Consumers might benefit if "how-to-buy-a-car" was part of our public educational program. Drivers' education classes provide a great opportunity to expose teenagers to the intricacies of buying and financing a car.<sup>148</sup> Car sellers facilitate the appearance, at least to some customers, that the transaction is subject to little or no bargaining. While this may be true in the exceptional case, the norm is for sellers and buyers to bargain about every aspect of the deal.<sup>149</sup> Buyers need to know that they are free to bargain when purchasing a vehicle, but it is doubtful that the common law or regulatory prescription are the proper educational tools to do this. Public education and public service programs are probably more suitable for this.<sup>150</sup>

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145. *Id.*

146. See Kenneth Reich, *supra* note 7, at 35.

147. Most car buyers know that the displayed price is not a mandatory price and therefore try to get a reduction. When there is a "special" or "sale" at a supermarket or a department store, consumers can be sure that prices are reduced. This is not true in the car sales market. "Tent sales" and "blowout sales" at car dealerships operate in my experience as hype to get customers in without any real reduction in price.

148. Some of the fundamentals of car buying are already incorporated in high school curricula, see Elizabeth C. Yen, *Current Truth In Lending Issues*, 52 CONSUMER FIN. L. Q. REP. 25, 27 (1998).

149. Saturn and Mercedes Benz have moved to a no-haggle one-price policy which requires all buyers to pay the same price for the same or similar products. But this manufacturer and dealer pricing policy only affects one aspect of a buyer's cost. Buyer's total cost will also be affected by what happens in the finance officer's office. The interest rate assigned and the price paid for additional products and services can produce great price disparities between buyers. In addition, when bargaining is eliminated from the transaction, the informed buyer ends up paying more than he might have if bargaining were allowed. In the case of luxury cars like Mercedes Benz, the no-haggle policy guarantees hefty profits through high dealer mark-ups on dealer cost.

150. There is recognition on a national level that public education can be fortified by funding programs that advance consumer education. See 20 U.S.C.A. §8001(1)(H) (2001). States have also prioritized consumer education in order to achieve the objective

Once the deal is done, a buyer may sue on the theory of unconscionability, in part because the buyer was unaware he could bargain and therefore did not bargain.<sup>151</sup> But typically, consumers are expected to be aware of the type of market (bargain or non-bargain) in which they are operating. And that awareness is generally gained through independent knowledge and research. To the extent there is societal interest in protecting buyers who do not know they can bargain, consumer education programs in schools and public service announcements may be better suited to the task.<sup>152</sup>

Buyers' awareness that they are operating in a bargain market is equally necessary as they move from the salesperson to the financing officer. A financing officer is not required to tell a buyer that he is free to reject the seller's financial services. Available rules also do not prohibit a seller from behaving as if the buyer has no choice in the matter. Buyers need to know that they are not required to finance the deal with a seller. This basic piece of consumer information is critical to the transaction, sometimes more critical than knowing the seller's cost.

No one has proposed requiring dealers to disclose this fact, and it is a responsibility that sellers probably should not have to shoulder. Education about financing freedom can be had from other sources, and these sources should be fortified or made more accessible. Again, public education and public service programs could serve as more effective mechanisms to inform buyers that they can and must bargain about financing. Reliance on sellers to tell buyers they may shop around would be mis-

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of preparing students for "a satisfactory personal life." See Norman B. Smith, *Constitutional Rights Of Students, Their Families, and Teachers In The Public Schools*, 10 CAMPBELL L. REV. 353, 355 (1988).

151. An uninformed or unsophisticated customer who ended up with an oppressive contract because of a seller's cunning conduct may activate the doctrine to avoid the contract. See CALAMARI & PERILLO, *supra* note 20, at 372-76.

152. See Gene A. Marsh, *A Practitioner's Guide to the New Alabama Mini Code*, 48 ALA. L. REV. 957, 966 (1997) ("The most basic and effective consumer protection tool [is] effective public education . . ."). *Id.* Governmental agencies provide consumer education through brochures, pamphlets, videos, and bill inserts, see Patrick E. Michela, "You May Have Already Won . . .": *Telemarketing Fraud And The Need For A Federal Legislative Solution*, 21 PEPP. L. REV. 553, 608 (1994). Exposure to the dangers of car shopping can also be achieved in this way. Standardizing consumer education in public schools can be such a great benefit, and the State of Wisconsin is considering mandatory money management education. See Paul Gores, *Wisconsin Educators May Be Required to Show Children How To Manage Money*, MILWAUKEE JOURNAL SENTINEL, Oct. 10, 2000. And private initiatives such as the banking and economics class Union National Bank conducted at high schools should be promoted. See *ABA Education Foundation Recognizes Barbourville Bank For Community Service*, KENTUCKY BANKER ASSOCIATION, Feb. 1, 2000.

placed, because there would be no controls over how sellers do this or what else they may say.

Before a buyer decides to use a seller's financial services, a buyer needs to understand that everything a seller does is for a profit. A buyer needs to know that a seller will try to profit from arranging financing, insurance, warranties, and other services and products. Every service a seller offers, whether a buyer needs it or not, is done for profit. If buyers understand this fundamental fact, they will be better equipped to ask the right questions, through which they might make more intelligent decisions. More disclosure regulations would not necessarily give buyers such a clear picture.

If a buyer knows that everything offered by a seller has a price tag, a buyer can probe a financing officer's assertion that he thoroughly shopped interest rates for the buyer.<sup>153</sup> And although a buyer has no way of checking whether a financing officer simply assigned him the highest rate he thinks buyer will accept, his inquiries could trigger other seller obligations to disclose. Knowing that a dealer profits from the assigned interest rate, a buyer might ask questions that inform him about whether to proceed with the transaction or do independent shopping.

If a buyer learns that the rate offered includes a discretionary mark-up permitted by a lender, a buyer can further inquire about the lowest rate he was approved for, and how much of the mark-up the seller gets. This would give a buyer a better sense of his credit-worthiness, and help in his decision as to what to accept. Of course, if a buyer shops interest rates prior to visiting the dealership, a buyer will have a good idea of what the mark-up is.

The knowledge that sellers get a cut of everything would better prepare a buyer than existing disclosure rules, which permit a seller to hide behind complex relationships and laws. The existing disclosure regime allows a financing officer to completely avoid discussions about interest rates. More routinely, financing officers simply assign buyers a rate that buyers see for the first time when the promissory note is printed. A seller is not required to disclose his share of profits or kick-backs stemming from an interest rate hike.

Sellers have a variety of financial relationships with providers of products and services that they sell to buyers. These relationships are

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153. See Gene A. Marsh, *supra* note 152, at 966 ("The most basic and effective consumer protection tool [is] effective public education . . .").

structured to increase a buyer's cost, and increase a seller's profit. Invariably, sellers never tell buyers anything about the relationship it has with lenders, insurance companies, warranty providers, and others. Current disclosure laws require that a seller inform a buyer that a seller retains a portion of the price charged for options or services. But the timing of this disclosure does little for a buyer's bargaining ability.

Because disclosure often occurs after contract documents are printed, the information is provided to a buyer as a *fait accompli*. A buyer's opportunity and ability to evaluate complex and lengthy documents will also affect whether a buyer can use this information at all. However, knowing at the outset that every product or service comes with a price prepares a buyer for what will show up later in writing, and allows a buyer to bargain about these matters before documents are typed and printed. And for those buyers who are unsure about their bargaining skills, a broker may be the best alternative.<sup>154</sup> Car manufacturers are also experimenting with direct sales to buyers over the Internet as a cheaper alternative to traditional dealer sales.<sup>155</sup>

The big question is what is the best way to prepare buyers for this transaction. Proving misconduct by a seller is very difficult. Problems of proof have contributed to the failure of existing laws and data to change the transaction environment. As a result, public education seems attractive. A drivers' education class that includes a classroom component on this subject would be a great starting point to change the way these contracts are formed, and improve the net product of such negotiations. A classroom environment provides the structure for teaching young buyers the many variables that go into car-buying contract formation. An academic environment permits the time needed to educate consumers about the many issues that affect the buyer. Student buyers get to obtain this information in a non-threatening way and under conditions that allow them to digest and reflect on the information. Schools can include a practicum element to the course, so students can role-play and obtain exposure to the documents and behavior that typify the transac-

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154. Nationwide Auto Brokers advertise that they can get buyers prices \$50-\$125 over dealer invoice on most vehicles. See CONSUMER GUIDE, *supra* note 8.

155. See *GM's Opel to Sell Cars at Discount on Web*, USA TODAY, March 8, 2001 at B1. This General Motors program will offer vehicles at prices up to 11% less than dealers. See *Opel to Offer Cars on Net at Discount to Boost Sales*, DETROIT NEWS, March 8, 2001 at B3. A pilot program in Brazil in which Ford, General Motors and Fiat participate have produced sales at about 6% less than what dealers charge. See *Belo Horizonte, On-line vehicle sales seen rising in 2001 in Brazil*, GAZETA MERCANTIL ONLINE, March 8, 2001. General Motors is also planning to do more sales nationally via the Internet by partnering with Autobytel, an online car sales service provider. See *Autobytel Will Test GM'S Web Shopping System*, L.A. TIMES, Feb. 22, 2001 at C3.

tion.

Although this approach would benefit a narrow group of buyers at first, it could spread as students use this knowledge and training to assist family members and friends buying vehicles. Public education makes the information and preparatory tools much more accessible and usable than public laws or consumer publications. Laws, disclosure-premised or otherwise, are virtually inaccessible to the average consumer. Consumer information is accessible to a narrow "informed" group. Further, that information is most often consulted when a buyer wants to do the deal, and is thus unwilling or unable to do thorough research. Consulting consumer publications just prior to a transaction also limits a buyer's ability to digest the data and deploy it at the bargaining table. These reasons, among others, militate in favor of a public education approach.

## V. CONCLUSION

Buying and financing a car is often a tough and complex bargained transaction. For buyers who know it is a bargain market, the negotiations process is tough enough. For buyers who do not know they can bargain, the process often yields truly harsh results. The plethora of consumer information and regulation has failed to broadly educate or prepare buyers, nor have they changed the selling practices that harm buyers. And it is doubtful that more regulation will yield better results. Available regulatory prescriptions are generally inaccessible to buyers, and more regulatory information may prove to be of little use.

What buyers need to know, regulations do not seem capable of providing. Regulations also do not get the information to buyers when they need it, that is, before the transaction occurs. Buyers need to know they can bargain about the selling price. Buyers need to know that they can bargain about the interest rate, and any other product or service the seller offers. Buyers also need to know that sellers do not represent them, and that everything a seller offers, he offers for profit. And buyers need to know this information well before the transaction begins. Disclosures in writing, after documents are written or typed, do little to protect buyers from sellers' bargaining abuses.

Buyers also need protection from sellers who behave as if they are buyers' agents, or make representations that imply an agency relationship. A buyer should be aware that a seller can cause buyer dependence by projecting a representative image, of this. Agency rules can be flexibly applied to prohibit seller conduct that misleads and deprives the

buyer of his bargaining freedoms, but only if buyer can prove seller acted improperly.

Because common law and consumer regulations have not greatly impacted oppressive seller practices in car sales, buyers need other helpful mechanisms that limit bargaining abuse. Buyers need to know that they can bargain and question every aspect of the deal, but sellers should not necessarily be responsible for telling them that. If inequitable results are products of harsh selling practices, buyers should be given consumer education to combat this. Adding burdensome and complex disclosure laws would be an overbroad answer to the problem. Additional regulations also avoid the reality that buyers may not know they exist, may not understand them even if they were aware of their existence, and may not be able to deploy them to their advantage. Regulatory proposals should focus not only on the potential market benefits of greater disclosure, but also on buyer disabilities and the accessibility of such information to buyers.

But knowing cost alone does not help much. Buyers also need to know how small a profit the market will tolerate for the transaction. Buyers need to know that sellers have hidden profit strategies in sellers' preprinted form contracts, and in arrangements with lenders and other third party service and product providers. Cost disclosure does not inform buyers about these contracting practices that siphon more money from the buyers' pockets.

Dealer cost information is available from secondary sources, but services like *Consumer Reports* do not adequately protect buyers from false cost representations. In the first place, *Consumer Reports* or similar guides cannot guarantee that their cost information is completely accurate. And dealers know this. As a result, the salesperson may not hesitate to say that *Consumer Reports* is wrong, in order to justify an inflated price. While disparaging the available guides to dealer cost, the salesperson or dealer can also withhold information about manufacturer rebates and "holdback" programs that ultimately reduce dealer cost and increase seller profit. And although consumer guides may alert the buyer to such programs, they cannot assist with the task of forcing dealers to be honest about their actual cost. A program of mandatory disclosure of dealer cost, included in the manufacturer's sticker price, would help respond to one area of dealer misrepresentations, but leave many other problems unaddressed. Because buyers must be knowledgeable about all of these variables, an educational program seems better suited to prepare buyers for car sale transactions.