



National Association of
Consumer Advocates

A close-up photograph of several cars parked in a row, showing the hoods and front fenders in various colors including blue, red, and white. The focus is sharp on the car in the foreground, with others blurred in the background.

ONLINE SURVEY:
CONSUMER HARMS IN AUTO
TRANSACTIONS TODAY

JANUARY 2021

ACKNOWLEDGMENTS

This report was written by Christine Hines, legislative director at the National Association of Consumer Advocates (NACA). Thank you to Ira Rheingold and Sophia Huang of NACA for editorial and layout assistance. Special thanks to consumer attorneys Sophia Romero, Bernard Brown, Christina Gill Roseman, Dan Blinn, Young Walgenkim, David Addleton, Ron Burdge, Paul Bland, and Jane Santoni for their valuable insight and assistance with the preparation of the survey and/or this report. Thank you also to John Van Alst at National Consumer Law Center for his review and comments. Finally, many, many thanks to the consumer attorneys/advocates who completed the survey and shared their perspectives.

About National Association of Consumer Advocates

The National Association of Consumer Advocates (NACA) is a national nonprofit organization of more than 1,500 private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus is the protection and representation of consumers. We are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information-sharing among consumer advocates across the country, and by serving as a voice for consumers in the movement to curb unfair or abusive business practices.

Table of Contents

Table of Contents 3

I. EXECUTIVE SUMMARY 4

II. ABOUT THE SURVEY RESPONDENTS 8

III. HARMS RELATED TO VEHICLE DEFECTS ARE THE MOST PREVALENT AND THE MOST SYSTEMIC 11

IV. HARMS RELATED TO DEALER CONDUCT WITH CREDIT APPLICATIONS, FINANCING, AND SALES CONTRACTS 14

A. Deceptions and fraud in financing applications, loan costs, generally 14

B. Spot delivery/yo-yo financing schemes 16

C. Dealer markups on loans 17

D. Subprime auto lending and high-interest auto loans 18

E. Misconduct with car advertising, pricing, and warranty coverage..... 19

F. Misrepresentations with add-on products 22

G. E-Contract abuse 23

V. HARMS RELATED TO ABUSIVE DEBT COLLECTION AND UNLAWFUL REPOSSESSION 25

A. Unlawful repossessions 25

B. Abusive debt collection 27

VI. HARMS RELATED TO OTHER MISREPRESENTATIONS, FRAUD, AND ABUSES IN AUTO TRANSACTIONS 27

A. Title, failure to deliver and/or misrepresentations..... 27

B. Odometer tampering, fraud and/or misrepresentations. 28

VII. ACCOUNTABILITY IN AUTO SALES 29

A. Forced arbitration 29

B. State of boilerplate auto sale contracts 31

C. Consumer laws and remedies for auto related harms. 32

VIII. CONCLUSION AND RECOMMENDATIONS 37

IX. APPENDIX 40

I. EXECUTIVE SUMMARY

Consumer attorneys report receiving calls and emails daily, and often multiple times per day, from people seeking help following miserable experiences related to vehicle purchases. In this year marked by the COVID-19 pandemic that has led to financial shock for millions of households, this survey sheds light on consumer advocates' experiences assisting individuals and families in addressing harms connected to vehicle purchases, the second highest national consumer expense after housing.¹

The survey of 115 advocates from 33 states who work for private law firms, legal services, and nonprofit organizations, provides a broad overview of their work defending consumers hurt in the course of negotiating, buying, and financing motor vehicles, as well as consumer harms related to auto debt collection and the repossession process. Collectively, their responses to the survey questions offer insight into the existence and prevalence of certain auto industry practices and identify areas that require better protections for automobile buyers.

This survey sought to gather numeric data through multiple-choice questions, and also advocates' comments on both consumers' auto sales experiences as well as their efforts to seek redress for harm consumers suffered during the vehicle buying process.

Most sections of this report contain subsections called "*Advocates' Outlook*," which summarize respondents' reactions based on their and their clients' experiences with vehicle dealers, financing companies, and auto manufacturers. Generally, in these narrative responses, survey participants identified practices that deserve more scrutiny and they proposed protections to improve the automobile sales marketplace.

This survey follows the July 2020 release of two Federal Trade Commission (FTC or Commission) staff reports containing findings and analyses of interviews with dozens of consumers who had recently purchased and financed a vehicle through an automobile dealer.² This survey focuses on consumer advocates' perspectives on consumer harms in the auto market, while the FTC reports offer consumer reactions to inquiries about experiences with the auto buying process.

¹ U.S. Bureau of Labor Statistics, *CONSUMER EXPENDITURES—2019*, Sept. 9, 2020, <https://www.bls.gov/news.release/cesan.nr0.htm>.

² Carole L. Reynolds and Stephanie E. Cox, *Buckle Up: Navigating Auto Sales and Financing Staff Report of the Bureau of Consumer Protection*, Federal Trade Commission, July 2020, https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf and Mary W. Sullivan et al, *The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research*, Joint Staff Report of the Bureau of Economics and Bureau of Consumer Protection, Federal Trade Commission, July 2020, <https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf>

Survey's General Findings

The survey showed that consumers are vulnerable in all stages of motor vehicle transactions. Advocates' responses to the survey indicate that consumers run the risk of being defrauded and exploited from initial communications and negotiations to repossessions of vehicles when buyers fall behind on their payments. The survey also shows that consumers' troubles continue as a result of the barriers to justice they face as they seek relief when they are harmed.

Most Common Claims - A majority or more of survey participants said that in the past four years they have represented consumers with claims related to: vehicle defects/failure to disclose true car condition (84% of participants); misrepresentations or fraud re: car advertising, pricing, or warranty coverage (78% of participants); deception and/or fraud in financing applications, loan costs (76% of participants); failure to deliver title and/or misrepresentations related to title (67% of participants); spot delivery/yo-yo financing schemes (63% of participants); false promises and/or deceptions related to add-on products (56% of participants).

Similarly, 71% of survey participants reported vehicle defects/failure to disclose true car condition as one of three most prevalent auto-related issues in their practice; followed by misrepresentations or fraud regarding car advertising, pricing, or warranty coverage (46% of participants); and deception and/or fraud in financing applications and loan costs (41% of participants).

Most Systemic Harm in the Auto Market - Overall, survey participants identified 1) vehicle defects and failure to disclose true car condition (61% of participants); 2) deception and fraud in financing applications and loan costs (44% of participants); and 3) misrepresentations and/or fraud in advertising, pricing or warranties (37% of participants), as the top three auto issues that cause the most systemic harm to consumers in the auto sales market.

Survey respondents also expressed deep concerns about consumer harms related to spot delivery/yo-yo financing schemes; subprime auto lending debt traps; add-on products; failure to deliver and/or misrepresentations related to title; unlawful repossessions and vehicle tracking, starter interruption, and shut-off devices; abusive debt collection on auto loans; dealer markups on loans; odometer tampering, fraud and/or misrepresentations; unrepaired safety recalls; and e-contract abuse. They called for added consumer protections or outright bans of systemic practices in these areas.

WHAT ARE THE TOP THREE SYSTEMIC
HARMS IN THE AUTO INDUSTRY
ACCORDING TO CONSUMER ADVOCATES?



Deserves More Scrutiny – In their comments, advocates identified numerous auto industry practices that deserved closer scrutiny and investigation. For example, they suggested that the practice among some used car dealers of covering up defects in cars and selling them “as is” deserve more scrutiny. A number of survey respondents called for closer scrutiny of “fraud in financing applications,” including “forgery of customers’ signatures” and “falsification of customers’ income.” Others called for investigations of price gouging and unfounded charges in car sales contracts for unnecessary and “forced” add-on products. Many advocates recommended closer scrutiny of e-contracts in auto sales as well as illegal conduct during the repossession process.

Access to Justice – Survey respondents identified a number of impediments that interfere with consumers’ ability to seek remedies when they are harmed in vehicle transactions. For example, while the survey did not directly inquire about advocates’ views on arbitration for claims to be heard, overwhelmingly, the narrative responses condemned the auto industry’s use of forced arbitration clauses and class action bans in sales contracts with customers.

Survey participants were also concerned over terms in dealer contracts that waive or remove regulations and other statutory consumer rights, limiting consumers’ ability to enforce legal protections. They also criticized a shortage of public or government enforcement for outright fraud and criminal conduct, and grave related offenses, such as financial exploitation of the elderly in auto transactions.

Top Recommendations

Survey participants offered numerous suggestions to improve the auto buying market for consumers. The top recommendations for possible exploration as solutions based on their comments include:

Vehicle Defects and True Condition

- Create a clear duty to inspect, in states where no such duty already exists, for all car dealers on any car they sell, and require they provide consumers with a detailed report of that inspection including all defects detected.
- Require disclosure of all repairs made in preparation for sale.
- Adopt consumer protective minimal requirements for inspection, safety, and warranty coverage for any vehicle sold as “certified” or by any similar description.
- Provide a universal 3 day cooling off period for car sales.
- Prohibit dealers from waiving a universally mandated “implied warranty of merchantability.” including the use of any “As Is” disclosures.
- Require disclosure that use of “CarFax” report does not include complete vehicle history.
- Prohibit sales of vehicles with unrepaired safety recalls.

Auto Financing

- Prohibit dealer kickbacks from creditors, or require disclosure of the interest rate consumer qualifies for, the identity of all potential assignees that received the buyer’s credit application, and the range of available credit options.
- End yo-yo sales. Prohibit the practice of permitting consumers from leaving the dealership with the car until the financing terms are properly finalized and assigned.
- Permit consumers to cancel any add-on products within a reasonable period for a full refund.
- Mandate strict dealer recordkeeping of all consumer financing activities.
- Create auto finance servicing requirements that would include written notices of default to consumers before repossession, a right to cure the default amount prior to repossession and post-repossession but prior to resale, and a defined list of allowable fees and costs that can be charged to the consumer to cure the default amount post repossession.
- Require mechanism that discloses all states where a car has been titled, such as required participation in a nationwide title database.

Accountability and Consumer Remedies

- Prohibit arbitration clauses and class action bans.
- Explicitly state that the FTC Holder Rule applies to all entities that have held or

currently hold the consumer's purchase contract.

- Subject all car dealer duties to private enforcement under state UDAP law.

II. ABOUT THE SURVEY RESPONDENTS

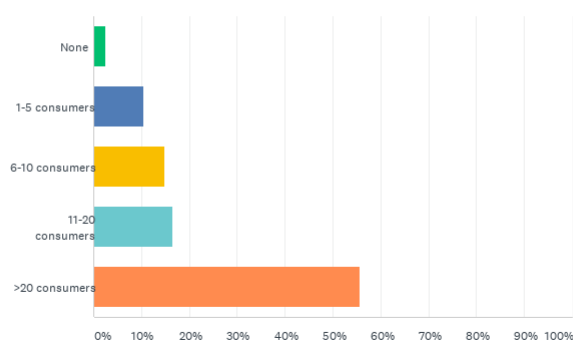
This report is based on the results of a 22-question online survey of consumer attorneys (representing consumers' interests) that was emailed to members of the National Association of Consumer Advocates (NACA). The survey registered 115 responses. The respondents are consumer attorneys/advocates from private law firms, legal services, and nonprofit organizations reporting from 33 states: AL, AR, AZ, CA, CO, CT, FL, GA, ID, IL, IN, KS, KY, MA, MI, MO, MT, NC, NJ, NM, NV, NY, OH, OK, OR, PA, SC, TN, TX, VA, WA, WI, WV.

Generally, the survey questions seek information about attorneys' work representing consumers over the past four years. Survey respondents varied on how much time they spent representing consumers with auto related issues.

» More than one-half of survey participants said they had represented over 20 harmed consumers with auto related issues in the past four years. About one-third of respondents said that they had represented between approximately 6 and 20 consumers in that time period. While 10% said they had represented between 1 and 5 harmed consumers with auto related issues.

» According to their own estimates, 36% of respondents spent more than one-half of their time representing consumers with auto related issues, and 45% said they spent between 11% and 50% of their time on this work. Meanwhile, 19% reported that less than 10% of their work was related to auto related matters.

Q4 In the past four years, approximately how many harmed consumers have you represented with auto related issues?

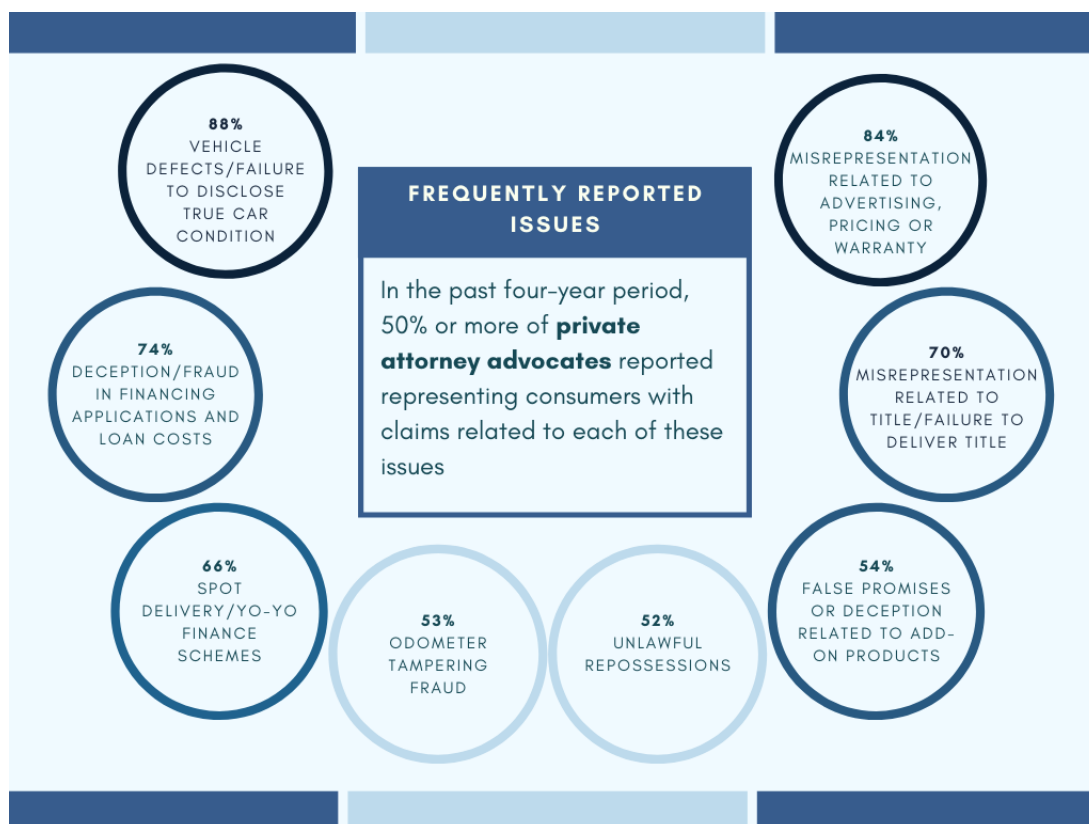


Private consumer attorneys make up the bulk of respondents to this survey.

» 64% of private attorney respondents said that they aided more than 20 consumers with legal issues related to auto transactions in the past four-year period, and 29% represented between 6 and 20 consumers during that time.

» One-half or more of the private attorney respondents reported that they helped consumers with claims related to each of the below categories (in order, beginning with the most mentioned):

- vehicle defects and/or failure to disclose car's true condition (88%);
- misrepresentations or fraud relating to car advertising, pricing, or warranty coverage (84%);
- deception and/or fraud in financing applications and loan costs (74%);
- failure to deliver title and/or misrepresentations related to title (70%);
- spot delivery/yo-yo financing schemes (66%);
- false promises and/or deceptions relating to add-on products (54%);
- odometer tampering, fraud, and misrepresentations (53%); and
- unlawful repossessions, including issues relating to vehicle tracking, starter interruption, and shut-off devices (52%).



» As a group, private attorney respondents named: (1) vehicle defects, failure to disclose true car condition; (2) misrepresentations or fraud related to car advertising, pricing, or warranty coverage, and (3) spot delivery/yo-yo financing schemes as the top three topics that cause the most systemic harm to consumers in the auto sales market.

» 36% of private attorney respondents said that ¼ or more of their auto-related cases over the past four years involved buy here-pay here dealers, where dealers originate and finance auto loans in-house, in lieu of banks or other financing companies. Buy here-pay here dealers typically target cash-strapped consumers and burden them with greater costs, such as higher interest rates and fees than traditional loans to buy poorer quality vehicles.³

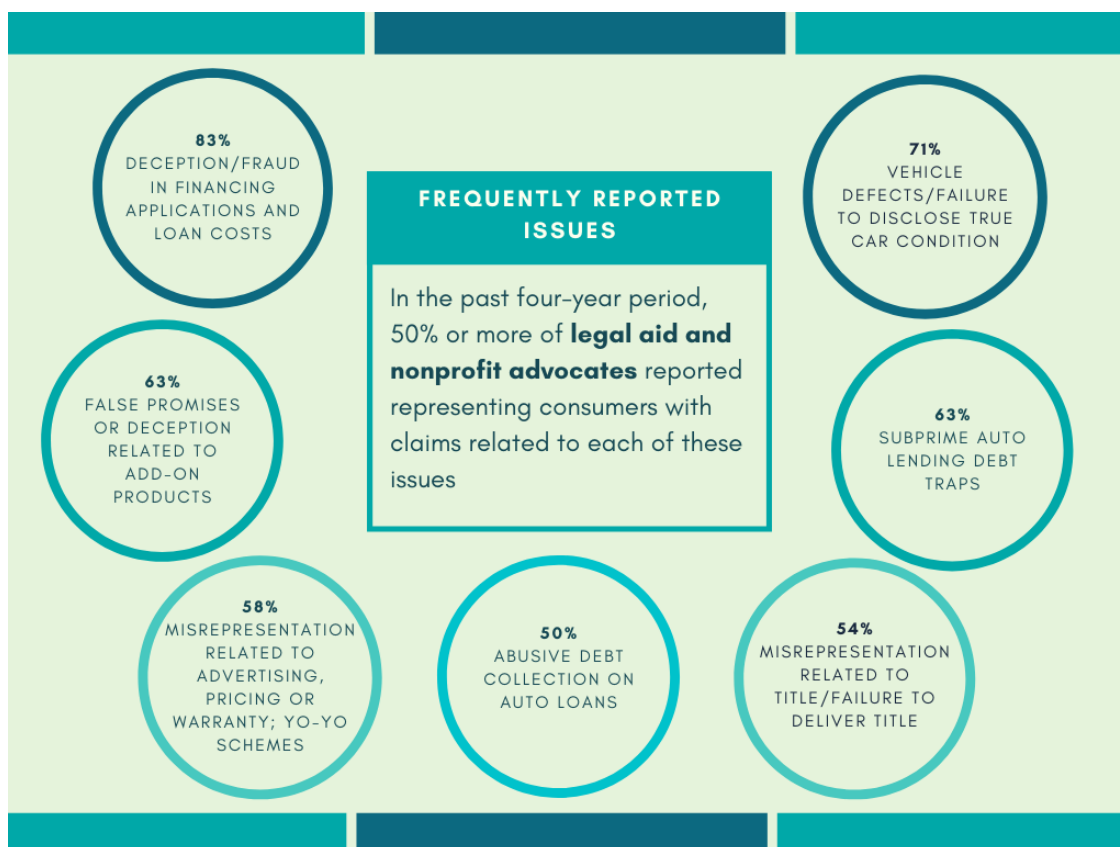
Legal aid or legal services attorneys provide low or no-cost assistance with civil legal problems to consumers who have annual incomes at or below established poverty levels. Legal services attorneys make up 21% of survey respondents.

» Of legal aid and nonprofit advocates who responded, more than one-third (33%) represented over 20 consumers with auto related issues over the past four years, while 42% represented between approximately 6 and 20 consumers in that time.

» As a group, legal aid and nonprofit advocate respondents named, starting with the most reported, (1) deception and/or fraud in financing applications, loan costs; (2) vehicle defects, failure to disclose true car condition; and (3) subprime auto lending debt traps, as the three top issues that cause the most systemic harm to consumers in the auto sales market.

» 54% of legal aid and nonprofit advocate respondents said that ¼ or more of their auto-related cases over the past four years involved buy here-pay here dealers.

³ See, e.g. The State of New Jersey Office of the Attorney General, *Division of Consumer Affairs Files Lawsuit Against Two South Jersey 'Buy Here-Pay Here' Auto Dealerships Alleging Fraud and Deception in Sales and In-House Financing Targeting Consumers with Poor Credit*, March 7, 2019, <https://www.nj.gov/oag/newsreleases19/pr20190307b.html>.



III. HARMS RELATED TO VEHICLE DEFECTS ARE THE MOST PREVALENT AND THE MOST SYSTEMIC

» *The Most Prevalent Problem Overall.* Approximately eight out of ten of all respondents reported that in the last four years they had represented consumers with claims related to vehicle defects or failure to disclose a car's true condition. These respondents include 88% of private attorneys and 71% of legal aid and nonprofit advocates.

» *Reported by Most as a Systemic Harm.* Six in ten of all survey respondents named vehicle defects or failure to disclose true car condition as an issue that causes the most systemic harm to consumers in the auto sales market.

» Seven out of ten of all respondents named vehicle defects as one of three auto-related problems that is most prevalent in their work.

» In addition, 9 out of every 10 respondents who reported that more than half of their (auto related) cases involved buy here-pay here dealers represented consumers with vehicle defect-related claims.

» In response to a related inquiry, 15% of survey advocates said that they had represented consumers with claims related to unrepaired safety recalls.

Advocates' Outlook – *Inspect and disclose.*

Consumer advocates were consistent in their suggestions on how to address vehicle defects in the auto market. Generally, they called for more investigations, inspections, and transparency requirements with detailed dealer disclosures.



Defects and Inspections

Survey participants recommended more scrutiny related to the safety of cars that have been in prior accidents and better disclosure of vehicle defects. They suggested that the practice among some used car dealers of covering up defects in cars and selling them “as is” deserve more scrutiny. They also called for more oversight of dealers’ “failure to perform actual pre-sale inspections.”

Survey respondents called for requirements for detailed inspections and disclosures of any defects and other inspection results. They emphasized that dealers should be required to inspect and then provide disclosures with evidence that confirms inspection of each car up for sale. Further, they asserted that any exemption for inspections for mileage reporting over certain number of miles should be eliminated. One participant suggested a requirement that dealers inspect vehicles sold with over 75,000 mileage.

Survey respondents also identified possibly overlooked areas where vehicle condition could be at issue. For example, advocates highlighted the role of online sellers of used cars, recommending further study of their practices. They also suggested investigations related to the resale of former rental cars.

At the same time, advocates have identified loopholes in their states include allowing dealers to obtain state-mandated inspections for used cars at inspection stations they have special arrangements with, and immunity for dealers licensed by a state regulator.

They also identified manufacturers' "certified" vehicle programs that declare vehicles as fit for sale although some are damaged, as a practice that deserves more scrutiny and regulation.⁴ They suggested a standard definition for a certified preowned vehicle and similar regulations to curb deceptions in certified programs.

Disclosures

In addition to inspections, advocates emphasized the need for more disclosures. The FTC has a used car rule, last amended in November 2016, which requires car dealers to display a window sticker, or "Buyers Guide," on used cars offered for sale.⁵ The "Buyer's Guide" provides consumers with information about a car's warranties and lists potential major defects that used cars can have. But responses indicate that the present state of the Buyer's Guide is insufficient to alert consumers. An advocate suggested that a more detailed "Buyer's Guide" should be required in all states to include full disclosures of car condition and detailed inspections.

To make disclosures more robust and effective, advocates insist on full transparency including dealer's pricing information; the amount a dealer paid for the car; any changes and repairs to the car, and repair costs that the dealer arranged before marketing the car.

A survey participant also recommended a more detailed requirement that any auto body damage or mechanical problems, involving repairs costing more than 3% (retail repair costs) of the vehicle's value must be disclosed in writing and signed by the consumer buying the vehicle. Another participant suggested clear disclosure of any issue with a vehicle, mechanical or physical, that costs more than \$500 to repair.

“DEALERS MUST STATE WITH PARTICULARITY EACH MAJOR DEFECT AND STATE THEY HAVE INSPECTED THE VEHICLE FOR PRIOR ACCIDENT DAMAGE REPAIRS”

Concerning Disclaimers

On the other hand, advocates also noted that dealers should not force buyers to sign documents with broad statements claiming that the car at issue could have been in an accident. Dealers have given car buyers documents with non-specific disclaimers and

⁴ Christopher Jensen, *Buyer Beware: 'Certified' Used Cars May Still Be Under Recall*, THE NEW YORK TIMES, Dec. 16, 2016, <https://www.nytimes.com/2016/12/16/business/buyer-beware-certified-used-cars-under-recall.html>.

⁵ Used Motor Vehicle Trade Regulation Rule, 81 Fed. Reg. 81664, Nov. 18, 2016.

disclosures attempting to shield themselves from responsibility. This practice deserves scrutiny, an advocate said.

Relatedly, participants also mentioned potentially wrongful uses of CarFax and other similar reporting tools on vehicle status and condition. They suggested more scrutiny of the “(f)raudulent uses of CarFax,” and recommended a requirement that would prohibit a dealer from using CarFax or similar reporting measure, rather than inspections and disclosures, as a means to reassure a car buyer that a vehicle does not have any issues.

Finally, survey participants recommended better accountability for dealers’ failures to inspect and properly disclose defects, including private remedies for consumers harmed by dealer actions, further discussed below.

IV. HARMS RELATED TO DEALER CONDUCT WITH CREDIT APPLICATIONS, FINANCING, AND SALES CONTRACTS

A. Deceptions and fraud in financing applications, loan costs, generally

Claims relating to financing and loan costs are another prevalent issue that consumers face in auto transactions. Three out of every four respondents reported that they represented consumers with claims related to deception and/or fraud in financing and loan costs in the past four years. Harms related to dealer conduct and misrepresentations with credit applications, sales contracts, and/or financing were the second most prevalent type of auto-related calls or inquiries received over the past four years, behind vehicle defects.

» 83% of legal aid and nonprofit respondents represented consumers with claims related to financing applications and loan costs – more than any other auto-related issue area – in the past four years. Meanwhile, 73% of private attorney respondents represented consumers with claims related to these issues.

» Overall, 41% of respondents named deception and/or fraud in financing applications, loan costs as one of the most prevalent auto-related issues in their practice.

» 43% of advocates who said more than one-half of their (auto related) cases involved buy here-pay here dealers named financing and loan costs as one of the most prevalent issues in their practice.

» 45% of all respondents named this issue as a top auto-related problem that causes the most systemic harm to consumers in the auto sales market.

Advocates' Outlook – Monitor fraud and deception in auto financing, generally

Advocates in their narrative comments strongly suggested that auto financing methods and costs should be monitored more closely and regulated.

What Auto Financing Practice Deserves More Scrutiny?

“

The lack of regulations to prevent dealers from abusive and misleading practices related to the financing of vehicle sales such as

- not disclosing kickbacks,
- misusing credit applications,
- falsifying credit applications information,
- not disclosing dealer's overpricing when lenders reject purchasing the finance contract,
- trapping buyers in a unilateral sales contract,
- not disclosing better financing options to buyer,
- misrepresenting documents to buyers prior to signing and/or not providing buyer an opportunity to read document prior to signing,
- forging buyers' signatures and/or misuse of e-signatures,
- misleading buyers about the finalization of contracts, and
- misrepresenting the purpose and/or true costs of fees and various itemized costs.

”



Participants declared dealer misrepresentations rampant in indirect auto lending, and bemoaned dealers who hide the true conditions of a sales contract to the buyer until it is signed. A number of survey respondents called for closer scrutiny of “fraud in financing applications,” including “forgery of customers’ signatures” and “falsification of customers’ income.” A survey participant mentioned that “credit card financing of motorcycles and automobiles” should be investigated, while another opined that impermissible pulls on consumers’ credit reports should be explored.

Advocates recommended more dealer disclosures to consumers about financing during a sale, including the identities of all potential lenders that received the buyer's credit application, as well as specifics on financing options and dealer kickbacks where the dealer receives an incentive for using a particular financing company, such as being granted the ability to markup the interest rates on the loans for extra profit. Advocates also recommended more stringent requirements on dealer recordkeeping of their financing activities.

B. Spot delivery/yo-yo financing schemes

Spot delivery and yo-yo financing have become a widely used industry tactic in car sales. In it, a dealer may allow a consumer to sign a contract and take a car home even though the dealership believes that the deal has not been finalized yet. Afterwards, the dealer may call them back to the dealership, claiming that problems arose that require changes to the financing terms or other contract conditions.⁶

In 2016, the FTC acted for the first time to enforce unfair and deceptive practices laws against a particularly widespread yo-yo financing scheme operated by a consortium of auto dealerships.⁷ Survey participants have extensive experience helping consumers recover from harms stemming from spot delivery and yo-yo financing tactics.

» In the past four years, 63% of all survey respondents have represented consumers with claims related to spot delivery/yo-yo financing schemes; 66% of private attorneys alone, and 54% of legal aid and nonprofit advocates.

» 1 of every 3 survey respondents cited spot delivery/yo-yo financing schemes as one of the most prevalent issues in their practice.

» Meanwhile, 34% of respondents identified spot delivery/yo-yo financing schemes as one of their three topics that causes the most systemic harm to consumers in the auto sales market.

Advocates' Outlook – Outlaw yo-yo deals.

In their narrative responses, survey respondents shared examples of unfair yo-yo schemes,

⁶ Philip Reed, *Don't Let a Car Dealer's 'Yo-Yo' Financing Scam Reel You In*, NERDWALLET, Feb. 19, 2019, <https://www.nerdwallet.com/article/loans/auto-loans/avoid-yo-yo-financing-spot-deliveries>.

⁷ Federal Trade Commission, *FTC Returns More Than \$3.5 Million to Consumers Subjected to Deceptive and Unfair Sales and Financing Tactics by Los Angeles-Area's Sage Auto Group*, Dec. 6, 2018, <https://www.ftc.gov/news-events/press-releases/2018/12/ftc-returns-more-35-million-consumers-subjected-deceptive-unfair>.

such as a consumer who was called back to the dealership to ‘correct’ warranty terms, and after re-signing documents, discovered that their financing was also re-applied, and consequently lengthened their financing term.

Overall, advocates made an emphatic call for an outright ban on yo-yo sales. Alternatively, they suggested better regulation and streamlining of the spot delivery process or requirements for proper written disclosures with explanations about the contracts used during such sales.

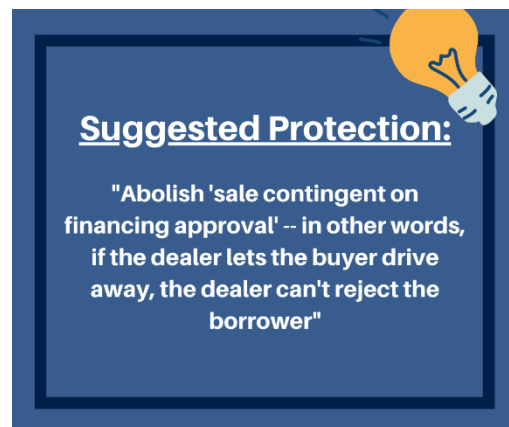
One survey respondent suggested barring “sale contingent on financing approval” contract language, to bar a dealer from allowing a buyer to drive the sold vehicle away without finalizing the sale.

Advocates also noted the role of trade-in vehicles in yo-yo transactions. In a typical yo-yo sale where a trade-in is involved, a dealer will market and sell a trade-in vehicle possibly before the dealer believes that financing is approved and finalized. If a dealer sells a trade-in vehicle regardless of whether the retail installment sales contract is sold to a financing company, it leaves the consumer vulnerable, particularly if the consumer still owes on the trade-in vehicle.

To address issues with trade-in vehicles, an advocate called for more requirements that a dealer pay off existing liens on a trade-in at the point of sale. Another respondent suggested a rule that would require a dealer to retain a buyer’s trade-in car until the sales contract is affirmatively assigned to a lender. That way, they said, if the dealer attempts a yo-yo scheme, “the consumer has the option to say, ‘no thanks, just give me my old car back.’”

C. Dealer markups on loans

Dealers’ discretionary interest rate markups on auto loans is a widely-criticized practice that costs consumers.⁸ Past research has shown that dealer interest rate markups lead to expensive loans and higher chances for default and repossession for subprime borrowers.⁹



⁸ Ian Ayres, *Guess how much cheaper your auto loan would be if dealers had to play fair*, THE WASHINGTON POST, June 26, 2019, <https://www.washingtonpost.com/opinions/2019/06/26/guess-how-much-cheaper-your-auto-loan-would-be-if-dealers-had-play-fair/>

⁹ Delvin Davis and Joshua M. Frank, *Under the Hood: Auto Loan Interest Rate Hikes Inflate Consumer Costs and Loan Losses*, April 19, 2011, <https://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/Under-the-Hood-Auto-Dealer-Rate-Markups.pdf>

In addition, the Consumer Financial Protection Bureau has settled enforcement actions against indirect auto financing companies for pricing policies that allowed dealers to make discriminatory discretionary markups to Black, Asian, and Latino consumers who were required to take on higher interest rates than white borrowers for their auto loans.¹⁰ In addition to targeting customers by race, discretionary markups are often accompanied by other unlawful deceptions, such as failing to honor advertised sale prices, changing prices without disclosing them to customers, and misrepresenting other fees in order to tack on additional costs.¹¹

» In the past four years, 34% of this survey's respondents have represented consumers with claims related to dealer markup on loans.

» For 7% of respondents, dealer markups on loans were one of three auto-related topics most prevalent in their work.

» 10% of respondents identified dealer markups on loans as one of the top three issues that causes the most systemic harm to consumers in the auto sales market.

Advocates' Outlook – Restrict markups and disclose true lender rates.

Survey respondents said that this issue deserves more scrutiny. They recommended that undisclosed dealer markups on interest rates be prohibited. One suggested a disclosure requirement to ensure that consumers are aware of the true interest rates at which they were approved by the lenders. And another advised that dealers should be prohibited outright from receiving kickbacks on loans, or that price markups should be capped at a certain rate.

D. Subprime auto lending and high-interest auto loans

Dealing with subprime auto lending is an additional burden for consumers with low credit scores or limited credit histories.¹² In the past four years, 30% of all survey respondents have represented consumers with claims related to subprime auto lending. Notably, most

¹⁰ See, e.g. Consumer Financial Protection Bureau, *CFPB and DOJ Order Ally to Pay \$80 Million to Consumers Harmed by Discriminatory Auto Loan Pricing*, Dec. 20, 2013, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-ally-to-pay-80-million-to-consumers-harmed-by-discriminatory-auto-loan-pricing/> and Consumer Financial Protection Bureau, *CFPB and DOJ Reach Resolution With Toyota Motor Credit To Address Loan Pricing Policies With Discriminatory Effects*, Feb. 2, 2016, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-toyota-motor-credit-to-address-loan-pricing-policies-with-discriminatory-effects/>

¹¹ See, e.g. Federal Trade Commission, *Auto Dealership Bronx Honda, General Manager to Pay \$1.5 Million to Settle FTC Charges They Discriminated Against African-American, Hispanic Car Buyers*, May 27, 2020, <https://www.ftc.gov/news-events/press-releases/2020/05/bronx-honda-to-pay-over-1-million-to-settle-charges>

¹² Gary Rivlin, *They Had Created This Remarkable System for Taking Every Last Dime From Their Customers*, MOTHER JONES, March/April 2016, <https://www.motherjones.com/politics/2016/04/car-subprime-bubble-auto-loans-credit-acceptance-don-foss/>.

legal aid and nonprofit respondents (62%) had represented consumers with subprime auto lending claims in that time period.

» As a group, 42% of legal aid and nonprofit respondents named subprime auto lending debt traps as one of the three most prevalent auto-related topics in their practice.

» In addition, 21% of all advocates who responded to the survey identified subprime auto lending as one of the three biggest causes of systemic harm in the auto market. That number jumped to 38% for legal aid and nonprofit survey participants.

Advocates' Outlook -- Put interest rate caps on auto loans.

Advocates have observed unregulated high-cost auto loans, some with interest rates as high as 30% APR. They strongly recommended interest rate limits on auto loans. One advocate recommended clearer disclosures of the implications of high-interest loans. For most respondents who commented on this issue, regulation of interest rates was the answer.



E. Misconduct with car advertising, pricing, and warranty coverage

» In this survey, 78% of respondents represented consumers for complaints related to misrepresentations or fraud regarding car advertising, pricing, or warranty coverage in the past four years.

» About 84% of private attorney advocates had represented consumers with related claims in the past four years, and 51% said that these issues were most prevalent in their work. Meanwhile, 58% of legal aid and nonprofit advocates said they had represented consumers with related claims in the past few years.

» Overall, 46% of all respondents said that misrepresentations or fraud related to car advertising, pricing, or warranty coverage was one of three auto-related topics that was most prevalent in their work.

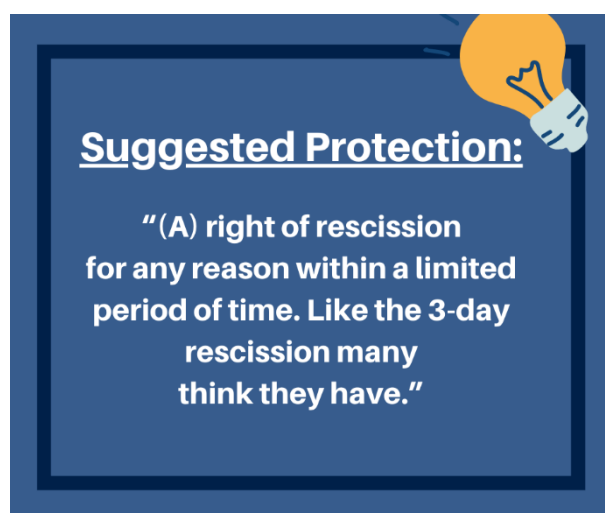
» 37% of respondents identified misrepresentations or fraud related to car advertising, pricing, or warranty coverage as one of their three top auto issues that causes the most systemic harm to consumers in the auto sales market.

» On a related note, 56% of advocates said that they represent consumers with auto related complaints for alleged violations of their respective state's lemon laws, which allow remedies for consumers who buy vehicles with serious defects or mechanical problems.

» Some advocates in their comments added lemon law as one of the three topics most prevalent in their auto-related practice.

» Also related, 62% of survey respondents said that they represent consumers with auto related complaints for alleged violations of the Magnuson Moss Warranty Act, a federal law that governs warranty on consumer products.

Advocates' Outlook - Allow a cooling-off period, mandate implied warranty, improve state lemon laws



Cooling-off periods

The FTC issued a regulation, last updated in 1995, that requires a 3-day cooling-off period to allow consumers to cancel a sale made at their homes, workplace or dormitory, or at a seller's temporary location, like a hotel or motel room, convention center, fairground or restaurant.¹³ The rule requires a disclosure from the seller to the buyer of their right to cancel the sales contract. The rule also declared that failure to disclose cancellation rights constituted an unfair and deceptive act

or practice.¹⁴ However, this regulation often does not apply to car sales which are frequently made at dealerships.

In its 2020 study, the FTC reported that consumers believe they have a right to cancel an auto transaction within 3 days. Based on its interviews, “(a)t least two consumers said that they believed they had a 3-day rescission window during which you could cancel or change your deal, but their paperwork contained no such protection.”¹⁵

The FTC cooling-off period rule is not generally available for car sales, but there was a consensus among this survey's respondents that car buyers need a similar right to cancel

¹³ Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR Part 429, Oct. 20, 1995.

¹⁴ See, Id. See, also, Federal Trade Commission, *Buyer's Remorse: When the FTC's Cooling-Off Rule May Help*, <https://www.consumer.ftc.gov/articles/0176-buyers-remorse-when-ftcs-cooling-rule-may-help>

¹⁵ FTC, at 12, https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf

these transactions. Several advocates called for a mandated, nationwide 3-day cooling-off period in every consumer auto sales contract.

Warranties

Implied warranties were also a commonly discussed topic in the narrative responses. Advocates agreed that implied warranties are an important benefit for car buyers. One noted that auto dealers are pressuring customers to sign documents that would waive the implied warranty of merchantability, without the customers knowing or understanding the repercussions of those documents. Another mentioned that they receive numerous inquiries from consumers who bought their vehicles “as-is,” which eliminates an implied warranty protection, and were unprotected when their cars died within days of purchase, suggesting that the dealers likely knew of the cars’ condition. Another mentioned that they are aware of dealers that have refused to honor implied warranty requirements under their state law.

Despite small differences based on their experiences in their states, advocates’ recommendations came back to one central point: ensure implied warranty of merchantability. Survey respondents said they would impose a mandatory implied warranty of merchantability that could not be waived. One respondent said that they would extend an existing state statutory warranty to the case of buy-here-pay-here purchases, and would require dealers to rescind transactions instead of offering to repair the vehicles.

“ I WOULD NOT ALLOW THE IMPLIED WARRANTY OF MERCHANTABILITY TO BE SIGNED AWAY AT ALL. NO WAIVERS FOR THIS WARRANTY. ”

Advocates offered further fixes to curb other misconduct with car advertising, pricing, and warranty coverage. In the case of predatory pricing, an advocate suggested restrictions on markups that go beyond the fair market value of a vehicle’s price, excluding special or classic cars. Another recommended a requirement for dealer recordkeeping on their advertisements after the sale of their cars. A survey participant also endorsed a national version of California’s “Car Buyer’s Bill of Rights,” that would list required disclosures in sales contracts on warranties, financing, add-on products, and the true costs of a car purchase.¹⁶

Leases

In their narrative responses, advocates also identified issues with motor vehicle leasing practices. For example, one advocate contended that “used car dealers will trick low-

¹⁶ See, e.g. California’s Car Buyer’s Bill of Rights, <https://www.dmv.ca.gov/portal/car-buyers-bill-of-rights-ffvr-35/>

income consumers into thinking they are buying vehicles when they are actually signing lease agreements with a very low residual value.” Several advocates suggested that they would add a consumer leasing act or expand certain auto sales protections to leased vehicles, such as similar grace periods for late payments before repossession. Another suggested a requirement that the “agreed upon value” of a vehicle on a lease would not be more than the cash sales price for the consumer.

Lemon Laws

State lemon laws play a major role in providing relief when consumers purchase defective vehicles. In response to a question that asked respondents to identify protections they would add in their states for consumers in auto sales transactions, several advocates asserted that they would add consumer protections related to their state lemon laws.

A couple of advocates mentioned that they would add a “used car lemon law,”; others would add lemon law protections for other vehicles, such as boats; others would amend the arbitration process for lemon law claims to include better remedies, costs, and fees. Another suggested added disclosures to a Buyer’s Guide to include safety recall information on vehicles subject to lemon laws due to defects, reacquired by their manufacturers, and then re-sold.



56% of respondents have represented consumers in cases involving violations of state lemon laws in the past four years

F. Misrepresentations with add-on products

The survey inquired about false promises and deceptions with add-on products that accompany car sales, such as Guaranteed Asset Protection (GAP) insurance and extended warranty coverage. Researchers have previously noted the associated costs and harms to car buyers resulting from the aggressive and deceptive sales of add-on products.¹⁷

The FTC Bureau of Consumer Protection’s staff report resulting from its study found that most of its 38 study participants’ contracts “included charges for add-ons.” FTC’s interviews with its participants “revealed consumers who were unaware which add-ons they had purchased, were unable to identify add-ons in the paperwork, were unclear what

¹⁷ John W. Van Alst, et al, *Auto Add-Ons Add Up How Dealer Discretion Drives Excessive, Arbitrary, And Discriminatory Pricing*, Oct. 2017, https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf.

those add-ons included, and sometimes did not realize they had purchased any add-ons at all. Indeed, add-ons were the single greatest area of confusion observed in the study.”¹⁸

» The instant survey reports that 56% of its respondents represented consumers with add-on product-related claims over the past four years.

» For 18% of respondents, false promises and/or deceptions relating to add-on products was one of three auto-related topics that was most prevalent in their work.

» Meanwhile, 18% of survey respondents identified false promises and/or deceptions relating to add-on products as one of their top three topics that causes the most systemic harm to consumers in the auto sales market.

Advocates' Outlook – Offer cancellation rights and dealer accountability for add-ons.

Survey respondents noted that use of add-on products in auto sales, including those labeled as a “mandatory” part of the purchase, such as surface protectant, window etching, and floor mats, deserved more scrutiny. They remarked upon the price gouging and unfounded charges in car sales contracts for these and other unnecessary add-ons. They also noted that forced add-on products and services would unduly hike the price of a car from the price advertised online.

To restore fairness, survey participants recommended policy changes such as granting consumers a broad right to cancel add-on purchases. A respondent suggested disclosures that accurately describe each service or product offered. Another survey participant suggested a cap on dealer profits gained from add-on products.

Survey participants also urged protections related to service contracts and warranty coverage that dealers offer in connection with their vehicle sales. In addition to disclosures about the cost of these add-on products and what they cover, advocates strongly suggested that dealers should be considered parties to third-party service contracts and warranties that they sell and be held legally accountable for their terms.

G. E-Contract abuse

While electronic transactions have long been commonplace in many other areas of consumer products and services, use of electronic contracts in auto sales and financing has

¹⁸ Carole L. Reynolds and Stephanie E. Cox, *Buckle Up: Navigating Auto Sales and Financing, Staff Report of the Bureau of Consumer Protection Federal Trade Commission*, at 9, July 2020, https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf

been on the rise in only the last several years.¹⁹ Dealers increasingly are adopting the practice of completing auto transactions with customers' electronic signatures on devices, in lieu of filling out paperwork.

But according to reports, e-contracting in auto sales is increasingly accompanied by fraud and abuse.²⁰ It is easier to forge customers' signatures and deceptively add unnecessary products or tack on unexpected fees and charges without a customer's knowledge on e-contracts than paper contracts.²¹

One commonly cited advantage to e-contracts is that they make the car-buying process faster.²² However, speed can be a disadvantage to consumers if they are unable to adequately review the terms they are agreeing to. As the FTC shared in its report, "Some consumers received information while at the dealership on an iPad or tablet, and some of these participants had trouble following along with the information."²³

» In the past four years, 32% of respondents have represented consumers with claims related to e-contract abuse.

» 3% of respondents name e-contract abuses as one of the three most prevalent auto-related topics in their practice.

» While e-contracting in dealerships and auto financing is growing, at this time, less than 4% of respondents consider e-contract abuses as a systemic harm in the auto market.

¹⁹ Hannah Lutz, *E-contracting grows, has hurdles to clear*, AUTOMOTIVE NEWS, March 13, 2017,

https://www.autonews.com/article/20170313/FINANCE_AND_INSURANCE/303139989/e-contracting-grows-has-hurdles-to-clear

²⁰ Diana Hembree, *E-Contract Abuse Alert: How Car Dealers Can Fake Your Auto Loan*, FORBES, April 15, 2017,

<https://www.forbes.com/sites/dianahembree/2017/04/15/e-contract-abuse-alert-how-car-dealers-can-fake-your-auto-loan/?sh=7a04d54d65c5>


²¹ Ryan Felton, *Car Dealers Are Using Electronic Loan Contracts To Scam Buyers Into Horrible Situations*, JALOPNIK, Dec. 15, 2017,

<https://jalopnik.com/car-dealers-are-using-electronic-loan-contracts-to-scam-1821021493>.

²² Hannah Lutz, *What's holding up e-contracting?*, AUTOMOTIVE NEWS, July 13, 2015,

https://www.autonews.com/article/20150713/FINANCE_AND_INSURANCE/307139935/what-s-holding-up-e-contracting.

²³ Carole L. Reynolds and Stephanie E. Cox, *Buckle Up: Navigating Auto Sales and Financing*, Staff Report of the Bureau of Consumer Protection Federal Trade Commission, at 11, July 2020, https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautofinancing_0.pdf.



32% of respondents have represented consumers in auto cases with e-contract claims in the past four years

Advocates' Outlook - "E-contract abuse is becoming the most rampant problem that I am seeing."

In this survey, many advocates recommended closer scrutiny of e-contracts in auto sales. A survey participant noted that they have observed many consumers who have been defrauded by auto dealers that use e-contracting. Others stated that dealers also delay delivery of the signed paperwork to their customers when using e-contracts.

Overall, respondents recommended added protections for e-signatures, including strengthening the federal E-SIGN Act and state e-contracting laws, and providing for a private right of action for violations of these laws. Another stated that paperwork should still remain a part of every auto transaction, and consumers must be provided with printed contracts with an inked signature at the time of the transaction.

To protect consumers in the course of litigation related to e-contract abuse, an advocate suggested a requirement for all electronic devices to record voices and metadata to show how long each page of each contract was displayed to the consumer so these devices could preserve necessary evidence.

V. HARMS RELATED TO ABUSIVE DEBT COLLECTION AND UNLAWFUL REPOSSESSION

A. Unlawful repossessions

In October 2020, the CFPB announced a consent order against an auto financing company for wrongful repossession of hundreds of consumers' vehicles. The company engaged in unfair and deceptive acts such as repossessing vehicles despite consumers having made payments or taken other actions to prevent repossession, retaining and charging fees for a

consumer's personal property left in a repossessed car, and depriving consumers of financing payment options to help prevent default and repossession.²⁴

In addition to these wrongful acts, a financing company or their repo agent may also engage in harmful conduct such as breaching of the peace with unlawful actions to take the car, including damaging the vehicle and other property during the repossession, repossessing the wrong vehicle, and failing to follow state rules for repossession. In addition, the CFPB in a 2019 report disclosed that it identified unfair acts or practices by auto financing companies for incorrectly calculating deficiency balances (that is, an unpaid balance after repossession and sale of a car) and for incorrect representations on deficiency balance notices.²⁵

» In the past four years, 48% of respondents represented consumers with claims related to unlawful repossessions, vehicle tracking, starter interruption, and shut-off devices.

» 14% of advocates reported that repossession is one of the most prevalent topics in their auto-related practice.

» Survey participants noted “violations of laws regarding post-repossession notices” and disputes related to post-repossession deficiency balance, as most common in their work.

» In the survey, 17% of respondents identified unlawful repossessions as one of their three issues that causes the most systemic harm to consumers in the auto sales market.

Advocates' Outlook – Unlawful repossessions and deficiency judgments need more attention, clear notices, and better consumer remedies.

Some advocates highlighted wrongful repossessions as an area that deserves more scrutiny. They also identified deficiency judgments, where collection can occur against a consumer years after the car was repossessed, as a significant issue. They contended that deficiencies are particularly harmful in cases where the purchase price was significantly higher than the fair market value of the vehicle leaving an excessive balance for the consumer to pay back.

Survey participants recommended better protections and remedies for victims of illegal repossessions and improper notices of intent to sell the vehicle. They suggested lenders be required to send written notices of default to consumers before lenders can proceed with

²⁴ CFPB, *Consumer Financial Protection Bureau Settles with Nissan Motor Acceptance Corporation for Illegal Collections and Repossession Practices*, Oct. 13, 2020, <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-settles-nissan-motor-acceptance-corporation-illegal-collections-and-repossession-practices/>.

²⁵ CFPB, *Supervisory Highlights*, Issue 18, Winter 2019, https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-18_032019.pdf

repossessions. They also suggested a defined list of allowable fees and costs that can be charged to the consumer to buy back (or redeem) the vehicle after a repossession.

In addition, a survey respondent suggested requiring a creditor to reinstate a loan after a repossession by permitting a car owner to pay the missed payments, instead of requiring payment of the entire balance. Another also suggested better requirements to monitor or record actions of repossession agents.

B. Abusive debt collection

Debt collection is a frequent consequence of aggressive auto sales and lending. Abusive debt collection on auto loans can take many forms, such as harassing phone calls, threats, and more.

» In the survey, 37% of respondents said they have represented consumers with claims related to abusive debt collection on auto loans in the past four years.

» 14% of advocate respondents identified abusive debt collection on auto loans as one of the most prevalent topics in their practice.

» In addition, 12% of respondents identified abusive debt collection on auto loans as one of their top three issues that cause the most systemic harm to consumers in the auto sales market.

VI. HARMS RELATED TO OTHER MISREPRESENTATIONS, FRAUD, AND ABUSES IN AUTO TRANSACTIONS

A. Title, failure to deliver and/or misrepresentations.

The transfer of a car title to a buyer or their lender is one of the most critical aspects of a sale. Buyers have faced problems with attaining proper delivery of title or accurate information related to the vehicle title. When a title is not delivered, other problems may exist that may prevent a buyer from obtaining insurance or selling the car in the future,

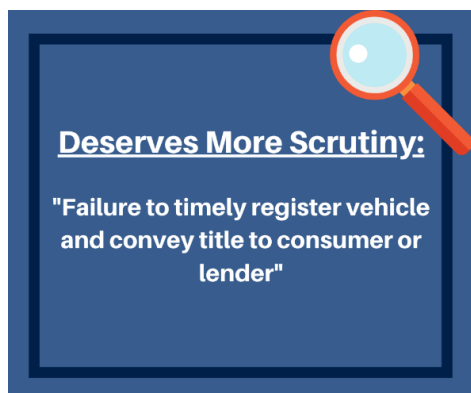
including an unpaid lien or state obligation owed by the previous owner. Failure to obtain title also puts the consumer at risk of arrest and fines for failing to have a vehicle properly registered.

» In the past four years, 67% of survey respondents have represented consumers with claims related to failure to deliver the car title and/or misrepresentations relating to the car title.

» For 23% of advocates, claims related to failure to deliver the car title and/or misrepresentations relating to the car title was one of three auto-related topics most prevalent in their work.

» Of all respondents, 17% identified failure to deliver the car title and/or misrepresentations related to the car title as one of their three topics that causes the most systemic harm to consumers in the auto sales market.

Advocates' Outlook – *The system needs more transparent records on car titles.*



An advocate said that failure to timely register vehicles or to convey title to the consumer or the lender should be more closely monitored. Another noted a lack of uniformity across states regarding designation of salvage titles for significantly damaged cars that are resold. Advocates' general call for transparency with all aspects of car sales includes a recommendation to disclose all states where a car has been titled. Survey respondents also recommended a requirement for a nationwide title database.

B. Odometer tampering, fraud and/or misrepresentations.

The National Highway Traffic Safety Administration estimates that about 450,000 vehicles a year are sold with false odometer mileage readings, costing car buyers about \$1 billion a year.²⁶ Typically, unscrupulous sellers will disconnect, alter, or reset a vehicle's odometer so that the vehicle's mileage appears lower than it is, allowing the seller to fraudulently sell the vehicle at a higher price.

²⁶ NHTSA, *Odometer Fraud*, <https://www.nhtsa.gov/equipment/odometer-fraud>.

- » In the past four years, 45% of respondents have represented consumers with claims related to odometer tampering, misrepresentations or fraud.
- » For 9% of respondents, odometer tampering was one of three of the most prevalent topics in their work.
- » In the survey, 8% of respondents identified odometer tampering as one of their three topics that causes the most systemic harm to consumers in the auto sales market.

VII. ACCOUNTABILITY IN AUTO SALES

A. Forced arbitration

Pre-dispute binding (or forced) arbitration is a longstanding barrier to justice for consumers harmed by unfair, deceptive, or fraudulent business practices. Forced arbitration clauses, ubiquitous in corporate contracts including auto sales contracts, bar harmed customers from taking their complaints to a public court. Instead these non-negotiable terms force consumers with complaints to go to private, closed-door arbitration proceedings to resolve them. Arbitration clauses often also bar consumers from banding together in class actions, one of the most efficient tools to stop systemic and widespread illegal behavior. Ultimately, forced arbitration blocks access to remedies for those harmed by misconduct.

Forced arbitration was once an obstacle for auto dealers in their dealings with car manufacturers. Manufacturers had added the provisions to their franchise contracts with auto dealers. In 2002, car dealers, frustrated by the imbalance of power in the manufacturer-dictated arbitration process,²⁷ successfully lobbied Congress to pass a bill to make the choice to arbitrate voluntary for dealers.²⁸ The law ensured that dealers can choose either court or arbitration after a dispute arises between them.

The 2002 law does not apply to transactions between dealers and their customers, meaning consumers remain vulnerable to dealers' forced arbitration provisions.²⁹

²⁷ Letter from National Automobile Dealers Association to Representative Nadler, July 12, 2000, https://carconsumers.org/pdf/arbitration_NADA_letter_to_Congress.pdf

²⁸ *Motor vehicle franchise contract dispute resolution process*, 15 U.S. Code § 1226 (2002).

²⁹ Jim Henry, *Arbitration issue cuts both way for NADA*, AUTOMOTIVE NEWS, Jan 22, 2017, <https://www.autonews.com/article/20170122/NADA100/301239993/arbitration-issue-cuts-both-ways-for-nada>

Consequently, because of arbitration clauses in many circumstances, consumers hurt by exploitative conduct in auto transactions have difficulty seeking remedies for their injuries and holding the responsible parties accountable.

» In the survey, 64% of respondents said they will represent a consumer where an arbitration clause is present in the related documents. Meanwhile 6% of survey participants said no, outright; they do not represent consumers where arbitration clauses are present. 30% listed “other” as their response, further discussed below.

» Meanwhile, two out of every 5 respondents said that in the past four years they represented more than half of their clients in their auto practice in cases involving arbitration clauses.

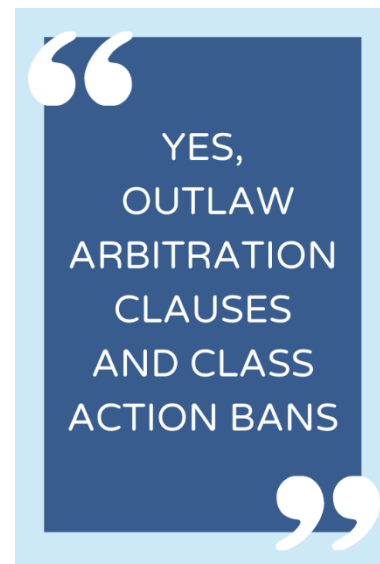
Advocates’ Outlook – *Make arbitration voluntary for consumers.*

In a question inquiring about systemic harm in the auto market, a number of respondents wrote in their comments that forced arbitration, which was not offered as a multiple-choice answer option, causes the most systemic harm to consumers in the auto sales market. Overwhelmingly, advocates urged action to prohibit the use of forced arbitration clauses and class action bans in auto sales.

At the same time, advocates’ approach to tackling forced arbitration’s continued presence while helping harmed consumers in auto transactions is mixed. For example, the majority of survey respondents said they are willing to help a consumer even where an arbitration clause is present, but advocates had varied explanations on whether, when, and how they are able to do so.

Forced arbitration is a significant factor for advocates evaluating consumer cases against dealers and auto lenders. First, some advocates simply “lean away” from these cases. They will refer potential cases involving arbitration to other advocates who are more likely to help in that forum. Second, others will attempt to help consumers to resolve their claims before an arbitration occurs. Still, other advocates who said they generally avoid cases involving arbitration, will agree to represent consumers in this forum under exceptional circumstances, such as where a case is particularly “outrageous.”

Even advocates who are generally willing to go to arbitration on behalf of their clients agree that it can change the outlook of these cases. For example, due to the costs, limited discovery, and general unpredictability in arbitration, some advocates said they help



consumers under different terms than those they can represent before a judge and jury. Others' decisions to represent a consumer in arbitration depend on other factors such as the arbitration rules themselves, availability of remedies, or the potential parties in a case.

Even with arbitration clauses in the contracts, cases can still land in court. Advocates mentioned that while sales contracts typically include forced arbitration provisions, the clause is not always enforced. Other advocates have noted that auto lenders file deficiency cases against consumers in court rather than in arbitration.

Finally, an advocate observed manufacturers, which are not parties to contracts between consumers and auto dealers, nonetheless seeking to invoke arbitration provisions in those contracts in an attempt to force consumers to bring their complaints against the manufacturers in arbitration forums, instead of court.

B. State of boilerplate auto sale contracts

The survey sought broad information on certain characteristics of auto sales contracts.

» 83% of respondents said that the dealerships in their states typically use an auto industry (not state mandated) standard-form contract for consumer-auto sales transactions.

» 22% of question respondents said that their states have a mandated uniform sales contract for consumer-auto dealer transactions.

» 18% of respondents stated that uniform sales contracts for consumer-auto dealer transactions have included arbitration clauses.

» Others noted in their comments that instead of a uniform sales contract, their states require specific provisions in retail installment sales contracts, such as financing requirements.

Respondents also reported experiencing situations where a dealer has altered a uniform sales contract to be less favorable to the buyer. One observed the "insertion of finance terms not disclosed to (the) buyer." Another advocate observed in at least one case that the grace period (15 days) before a late fee was imposed and the grace period (30 days) for repossession were both changed to one day in the contract. An advocate also noticed that dealers had been disregarding contractual caps on late fees.

Survey respondents added that uniform sales contracts had been altered with forced arbitration provisions. An advocate stated that auto sales contracts sometimes lack the statement of rights required under the FTC Holder Rule, discussed below.

Advocates' Outlook – Make it unlawful to “contract away” statutory rights.



Survey respondents said that provisions waiving statutory rights in the contract terms deserved more scrutiny. In their comments they suggested that contract terms that remove protections regulating vehicle dealers and other statutory rights should be made unconscionable.

The state of Retail Installment Sales Contracts (RISC) is an area of particular concern. Advocates in states that do not have laws governing RISCs believe that such laws are needed in their jurisdictions. However, existing RISC laws are also in need of improvement. For example, one respondent has called for closing a loophole in their state that exempts RISCs from usury laws.

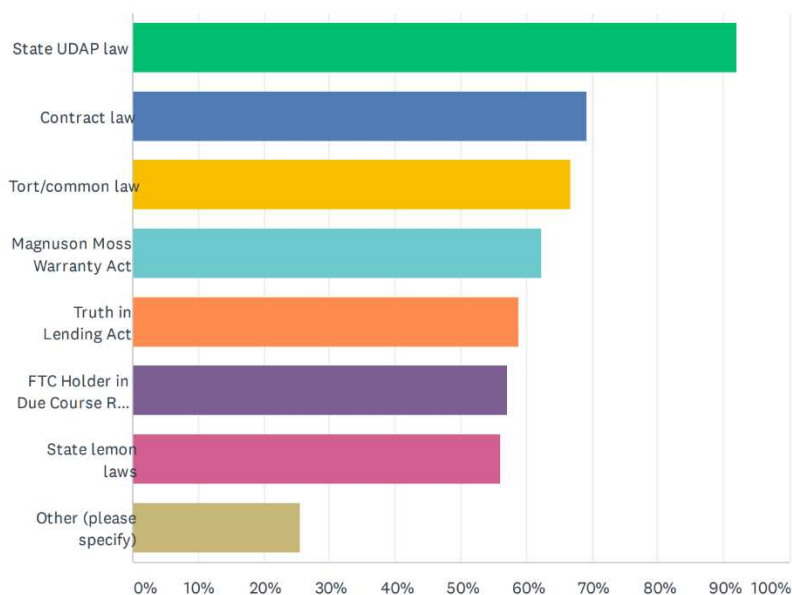
Advocates also criticized burdensome choice of law and forum selection provisions in contracts. An advocate named “forum shopping” by dealerships for jurisdictions with more favorable terms as a systemic harm for consumers with auto related claims.

C. Consumer laws and remedies for auto related harms.

The survey sought to identify existing state and federal consumer laws and protections available to protect consumers from harms and fraud in the auto marketplace.

» Participants reported that they represent consumers with auto related complaints for alleged violations of their state’s laws on unfair and deceptive acts and practices (UDAP) (92%), contract law (69%), tort and common law (67%), as well as the federal Magnuson Moss Warranty Act (62%), the Truth in Lending Act (59%), and the FTC Holder in Due Course Rule (57%). In addition, 56% of respondents said that they represent consumers with auto related complaints for alleged violations of state lemon laws.

Q18 Pick all that apply. You represent consumers with auto related complaints for alleged violations of:



» In addition to the above, advocates highlighted other legal protections they use to assist consumers with auto related claims, including the federal Fair Debt Collection Practices Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Military Lending Act, the Federal Odometer Act, Article 9 of the Uniform Commercial Code, and the bankruptcy code. Survey participants also cited to their respective state statutes that focus or include protections on repossession, motor vehicle sales and titles, vehicle financing, retail installment sales contracts, usury, identity theft, and financial exploitation against the elderly.

Advocates' Outlook – Enhance consumer remedies.

FTC Holder in Due Course Rule. The Federal Trade Commission's Holder Rule is a policy that protects consumers who enter into credit contracts with a seller of goods or services by preserving consumers' right to assert claims and defenses against any holder of the contract.³⁰ The Rule requires sellers that arrange for or offer credit to finance consumers' purchases to include language in their credit contracts to notify parties of the rule.

³⁰ 16 CFR Part 433.

“The Commission adopted the Rule to provide recourse to consumers who otherwise would be legally obligated to make full payment to a creditor despite breach of warranty, misrepresentation, or even fraud on the part of the seller.”³¹ It is an important consumer protection in auto sales and financing.

Several survey respondents recommended an FTC action declaring that consumers could recover their legal expenses for successful claims under the Holder Rule. Advocates also suggested clarification that the Holder Rule applies to any entity that has held or currently holds the consumer’s purchase contract.



UDAP and other state protections. Practitioners call for additional protections, improvements to existing state laws.

Every state has its own version of an Unfair and Deceptive Acts and Practices Law (UDAP) to protect consumers in transactions like auto sales, but the strength and scope of these laws vary greatly among states. Strong UDAP laws, like those modeled after the federal FTC Act, include broad prohibitions against unfair and deceptive conduct while the weakest laws only pertain to lists of specific practices.

Several consumer advocates have made general calls for expanding and improving UDAP statutes, while others have offered specific suggestions based on the protections provided in their states.

Five states’ UDAP laws currently do not broadly prohibit unfair or unconscionable practices.³² One survey respondent recommends that an “unfair practices provisions [be] added to our DAP Act.” Similarly, two states’ UDAP laws do not broadly prohibit deceptive practices, signaling a need for improvement there as well.³³

Respondents have also identified many other areas of state law in need of improvement to effectively protect consumers during auto transactions. Many of these recommendations

³¹ Letter from Federal Trade Commission to Jonathan Sheldon and Carolyn Carter, May 3, 2012, https://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf

³² National Consumer Law Center, *Consumer Protection in the States: a 50-State Evaluation of Unfair and Deceptive Practices Laws*, March 2018, <https://www.nclc.org/images/pdf/udap/udap-report.pdf>.

³³ Id at 14.

relate to increased oversight by state officials, greater accountability and transparency, closing loopholes, and protection of vulnerable consumers.

Advocates recommend empowering state officials, including those who are not typically involved in consumer protection, to be more proactive about enforcing state laws. For instance, state Departments of Motor Vehicles (DMV) are responsible for issuing dealer licenses. Respondents have suggested that revoking a dealer's license when they engage in harmful business practices as a punishment would be good incentive for dealers to treat consumers fairly.

Advocates' calls for greater transparency measures are intended to allow consumers to make more educated decisions and to combat potential fraud. Respondents favor instituting official dealership ratings and warnings against fraud to alert consumers.

Finally, advocates support increased state protections for vulnerable consumers. One respondent recommends establishing a consumer ombudsman office for auto sales that consumers can consult with in advance of purchase.

Advocates additionally identified elder abuse as a prevalent problem in auto sales and financing that deserves to be addressed independently. An advocate suggested an hours-long cooling-off period or more time for older car buyers to consider the car purchases. Financial exploitation of the elderly is not adequately pursued by law enforcement, the advocate said.

[Access to remedies and legal representation.](#) Individual consumer actions or class actions against auto dealers and lenders are an important avenue through which harmed consumers can receive compensation and bad actors can be held accountable. However, unnecessary obstacles exist that prevent consumers from moving forward with their claims in court.

Some state UDAP laws make it difficult or even impossible for consumers to take legal action on their own behalf. Five state UDAP laws do not allow consumers to bring claims to enforce prohibitions on unfair or unconscionable practices, instead limiting these actions to the state Attorney General. Similarly, three states do not allow consumers privately to enforce prohibitions on deceptive conduct.³⁴ Survey respondents believe consumers should always have a private right of action for general unconscionability and deception under all state UDAP laws and other consumer protection laws.

³⁴ Id. at 14-15.

Additionally, advocates recommend removing “public impact” requirements from UDAP laws. Seven states currently require the consumer bringing an action to show that the public at large is being harmed by a practice.³⁵ One respondent noted that even in cases where there are enough violations by a dealer to constitute a public impact, “the dealership is in charge of all the evidence necessary to prove the case so it is a big bar to taking on litigation for these prospective clients.”

Consumers may also be deterred from going to court to seek justice because of the financial burden. Advocates agree that all state UDAP and other relevant statutes should remove this barrier to make it easier for consumers to hold bad actors in the auto market accountable.

Survey respondents favor mandatory fee-shifting to make legal representation more affordable for consumers. This policy would require an auto dealer or lender who loses a case to pay for the winning consumer’s legal expenses. While most consumer protections already allow successful consumers to recover their legal expenses, there are five state UDAP laws that do not. Advocates believe that these laws and any others that still shut consumers out of the courts should be revised to provide better access to legal representation.³⁶

Some advocates have noted that currently, certain state consumer laws also require consumers to pay for an auto dealer or lender’s legal expenses if the consumer loses. This may deter consumer actions because individual consumers are much less able to bear the costs of legal action than businesses like auto dealers. The risk of having to pay for a business’s legal costs has deterred advocates from helping harmed consumers bring certain claims.

In addition to better access to justice, survey respondents have also identified a need for increased access to remedies presumably to deter misconduct. To that end, multiple respondents have proposed that dealers be required to carry higher surety bond amounts. These bonds, which dealers must purchase before being licensed, act as a guarantee that dealers will follow the law and treat consumers fairly. Consumers harmed by a dealer can file claims against the dealer’s bond for compensation.

Typically, a bond amount is an aggregate limit for claims meaning the bond will only pay out a certain amount no matter how many claims are made against it. Higher bond amounts, which advocates especially recommend for smaller “buy here, pay here” dealers, would ensure more consumers are adequately compensated for the harms they suffer.

³⁵ Id. at 39.

³⁶ Id. at 35.

Outside of dealer bonds, respondents also propose enacting statutory damages for violations of state consumer laws where they do not already exist. Statutory damages are relief that a consumer can receive for proving a violation of the law took place. Allowing for a small statutory damages award for each violation grants consumers greater access to remedies, and more incentive to pursue their claims and hold bad actors accountable.

State prosecution and criminal enforcement. Respondents called for more state criminal enforcement against harms in the auto market, particularly in cases of serious misconduct, such as fraud, forgery, and financial exploitation of the elderly. Advocates recommended that local district attorneys enforce criminal penalties against dealers. Several respondents also advocate for greater penalties for dealers who are caught violating the law, including treble damages.

VIII. CONCLUSION AND RECOMMENDATIONS

The FTC's 2020 study suggests that its recommendations could lead to "improving consumer understanding through consumer education and better disclosures, especially for contract add-ons."³⁷ The FTC Bureau of Consumer Protection report included suggestions on how dealers and financing companies should treat consumers in a fairer way for the benefit for consumers. It also concluded that the agency would continue monitoring deceptive or unfair tactics in the auto industry, enforcing laws and bringing cases against dealers, developing consumer education materials, and researching topical issues.

While the FTC's study is instructive, this advocate survey shows that certain auto industry practices are causing systemic harm to consumers in all stages of motor vehicle sales, requiring stronger government action than merely consumer education and sporadic enforcement.

The Dodd-Frank Wall Street Reform and Consumer Protection Act authorized the Federal Trade Commission to issue a rulemaking over motor vehicle dealers predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor

³⁷ Mary W. Sullivan, et al, *FTC Joint staff report The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research Joint Staff Report of the Bureau of Economics and Bureau of Consumer Protection, Federal Trade Commission, July 2020*, <https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf>.

vehicles, or both.³⁸ The Consumer Financial Protection Bureau maintains supervision, enforcement, and rulemaking authority with conditions over auto financing. The report and the survey participants' narrative responses cover multiple aspects of motor vehicle transactions whose industry practices would fall under the jurisdiction of both federal agencies, the U.S. Department of Justice, and state authorities.

To combat widespread misconduct in the auto market, the FTC and the CFPB can and should be more proactive in tackling predatory sales and lending tactics that hurt consumers, using all the tools at their disposal including rulemaking, research, supervision, and vigorous enforcement.

Based on the survey participant responses, the below potential solutions are worth exploration as they seem the most critical for tackling widespread misconduct and bringing about fairness for consumers in auto sales. Some states have already implemented some of these and other safeguards in their auto markets. Therefore, while federal protections are also recommended, they should be considered a floor, or minimum standard, to allow states the ability to provide greater protections for their residents.

Vehicle Defects and True Condition

- Create a clear duty to inspect, in states where no such statutory duty already exists, for all car dealers on any car they sell, and require they provide consumers with a detailed report of that inspection including all defects detected.
- Require disclosure of all repairs made in preparation for sale.
- Adopt consumer protective minimal requirements for inspection, safety, and warranty coverage for any vehicle sold as “certified” or by any similar description.
- Provide a universal 3 day cooling off period for car sales.
- Prohibit dealers from waiving a universally mandated “implied warranty of merchantability.” including the use of any “As Is” disclosures.
- Require disclosure that use of “CarFax” report does not include complete vehicle history.
- Prohibit sales of vehicles with unrepaired safety recalls.

Auto Financing

- Create a rate cap on all credit terms.
- Prohibit dealer kickbacks from creditors, or require disclosure of the interest rate consumer qualifies for, the identity of all potential assignees that received the buyer's credit application, and the range of available credit options.

³⁸ 12 U.S. Code § 5519 (d) (2010).

- End yo-yo sales. Prohibit the practice of permitting consumers from leaving the dealership with the car until the financing terms are properly finalized and assigned.
- Permit consumers to cancel any add-on products within a reasonable period for a full refund.
- Hold dealers legally accountable for terms of third-party service contracts and warranties that they sell.
- Mandate strict dealer recordkeeping of all consumer financing activities.
- Increase mandatory dealer surety bonds.
- Create auto finance servicing requirements that would include written notices of default to consumers before repossession, a right to cure the default amount prior to repossession and post-repossession but prior to resale, and a defined list of allowable fees and costs that can be charged to the consumer to cure the default amount post repossession.
- Require mechanism that discloses all states where a car has been titled, such as required participation in a nationwide title database.

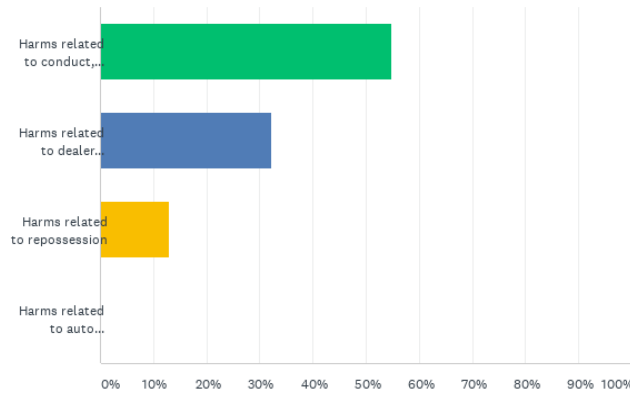
Accountability and Consumer Remedies

- Prohibit arbitration clauses and class action bans.
- Explicitly state that the FTC Holder Rule applies to all entities that have held or currently hold the consumer's purchase contract. Further provide that legal expenses are recoverable for winning claims brought under this rule.
- Subject all car dealer duties to private enforcement under state UDAP law.
- Provide for mandatory fee-shifting and recoverable legal expenses to make legal representation more affordable for consumers.

IX. APPENDIX

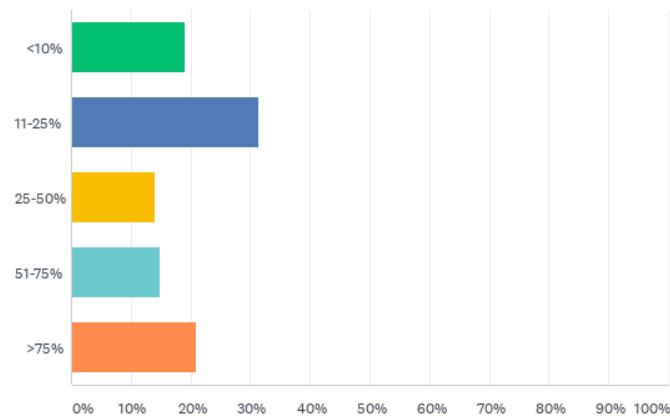
Selected graphs from the survey results:

Q2 Of the auto related calls or inquiries your office has received over the past four years, which issues have been the most prevalent?

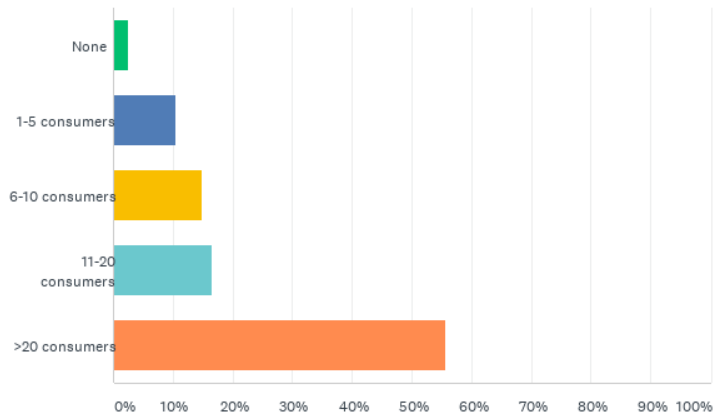


- Harms related to conduct, misrepresentations, and/or failures to disclose, with respect to vehicle defects
- Harms related to dealer conduct and misrepresentations with credit applications, sales contracts, and/or financing
- Harms related to repossession
- Harms related to auto advertising

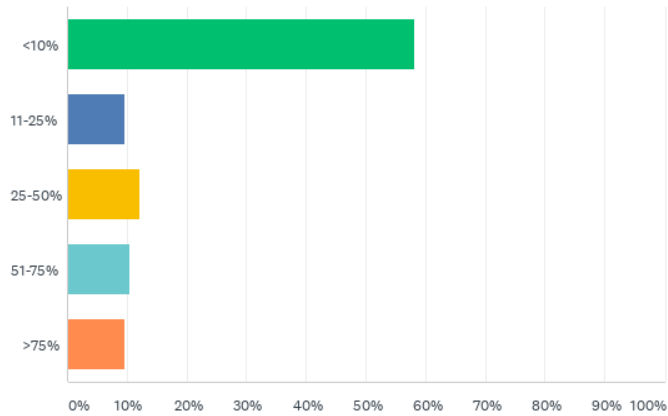
Q3 How much of your practice has involved representing consumers with auto related issues over the past four years?



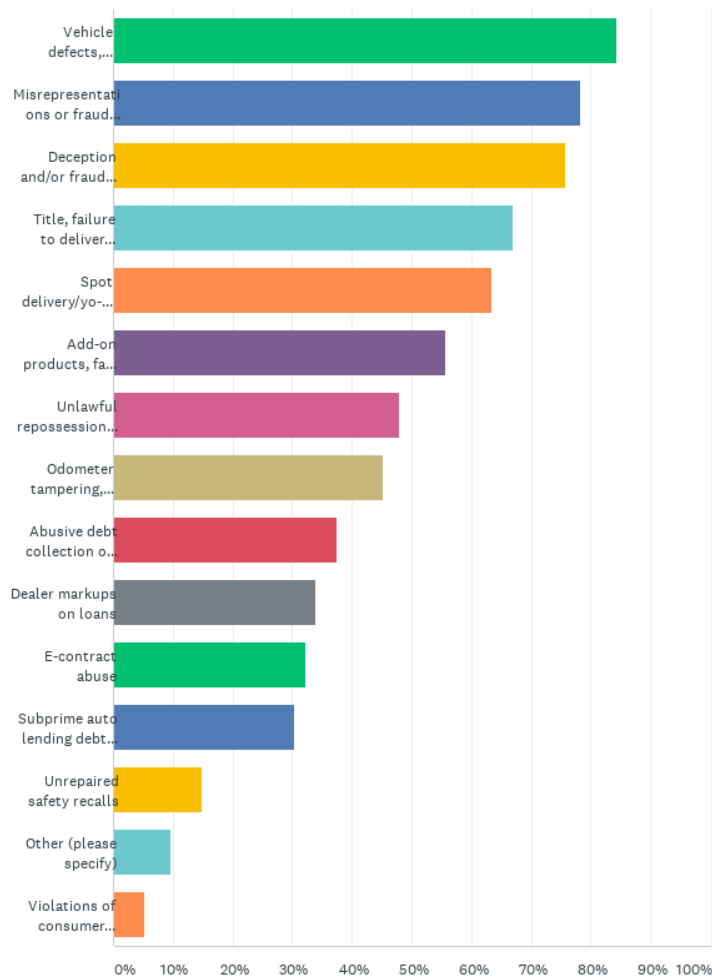
Q4 In the past four years, approximately how many harmed consumers have you represented with auto related issues?



Q5 In the past four years, approximately what percent of your cases representing consumers have involved buy here/pay here dealers?

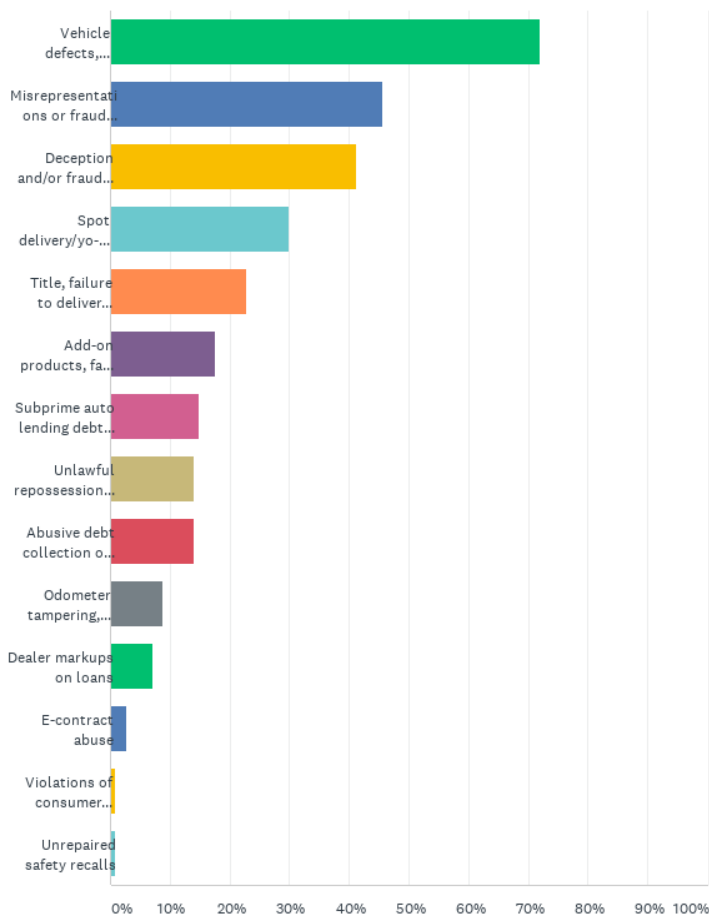


Q7 In the past four years, you have represented consumers with claims related to which of the following complaints? Click all options that apply.



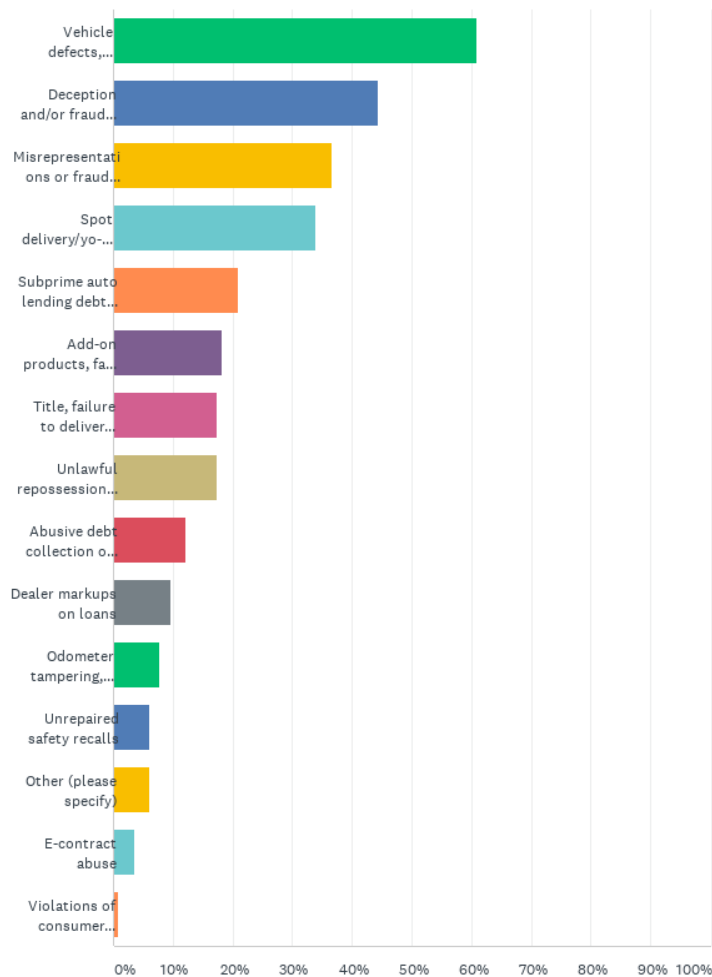
- Vehicle defects, failure to disclose true car condition
- Misrepresentations or fraud re: car advertising, pricing, or warranty coverage
- Deception and/or fraud in financing applications, loan costs
- Title, failure to deliver and/or misrepresentations
- Spot delivery/yo-yo financing schemes
- Add-on products, false promises and/or deceptions (e.g., GAP or extended warranty coverage)
- Unlawful reposessions; vehicle tracking, starter interruption and shut-off devices
- Odometer tampering, fraud and/or misrepresentations
- Abusive debt collection on auto loans
- Dealer markups on loans
- E-contract abuse
- Subprime auto lending debt traps
- Unrepaired safety recalls
- Other (please specify)
- Violations of consumer privacy and data security

Q8 Which three (3) of these topics are the most prevalent in your practice?



- Vehicle defects, failure to disclose true car condition
- Misrepresentations or fraud re: car advertising, pricing, or warranty coverage
- Deception and/or fraud in financing applications, loan costs
- Spot delivery/yo-yo financing schemes
- Title, failure to deliver and/or misrepresentations
- Add-on products, false promises and/or deceptions (e.g., GAP or extended warranty coverage)
- Subprime auto lending debt traps
- Unlawful repossessions; vehicle tracking, starter interruption and shut-off devices
- Abusive debt collection on auto loans
- Odometer tampering, fraud and/or misrepresentations
- Dealer markups on loans
- E-contract abuse
- Violations of consumer privacy and data security
- Unrepaired safety recalls

Q9 In your view, which three (3) of these topics cause the most systemic harm to consumers in the auto sales market?



- Vehicle defects, failure to disclose true car condition
- Deception and/or fraud in financing applications, loan costs
- Misrepresentations or fraud re: car advertising, pricing, or warranty coverage
- Spot delivery/yo-yo financing schemes
- Subprime auto lending debt traps
- Add-on products, false promises and/or deceptions (e.g., GAP or extended warranty coverage)
- Title, failure to deliver and/or misrepresentations
- Unlawful repossessions; vehicle tracking, starter interruption and shut-off devices
- Abusive debt collection on auto loans
- Dealer markups on loans
- Odometer tampering, fraud and/or misrepresentations
- Unrepaired safety recalls
- Other (please specify)
- E-contract abuse
- Violations of consumer privacy and data security

Q16 In the past 4 years, approximately what percentage of consumers have you represented in auto related cases where arbitration clauses were involved?

