

Frontline News

Negative Equity Case Yields Positive Result

California NACA member **Hal Rosner**, of Rosner, Law & Mansfield, recently obtained a remarkable and detailed California Court of Appeal decision holding that rolling in negative equity/over-allowances into the cash price charged for vehicles violates California's Automobile Sales Financing Act (ASFA), as well as the Truth In Lending Act (TILA), specifically Regulation Z.

In *Thompson v. 10,000 RV Sales*, 130 Cal.App.4th 950, 31 Cal.Rptr.3d 18 (2005), the Court rejected not only the claims raised by the appellant San Diego-based RV retailer, but also addressed and rejected various arguments raised by the *amicus curiae* California RV Dealer's Association and California Motor Car Dealer's Association.

Because California's ASFA incorporates Regulation Z, the court's analysis should be useful to all practitioners in states that have laws similar to ASFA, as well as any practitioners wishing to use the TILA or Reg. Z against a vehicle retailer or lender agent.

The trial court entered an injunction that prohibited the dealership from "rolling over-allowance on trade-in vehicles into the cash price of the [motor homes] it sells. . . ."

"Over-allowance" refers to the amount by which a dealership over-values the vehicle for the purpose of obtaining consumer financing. Here's how it works. Dealerships, all for accounting purposes, must assign vehicles a value that will be used when later reselling the vehicle. In the industry this is recognized as being the amount for which the vehicle could be liquidated. In this case, the dealership assigned an actual cash value to the vehicle trade-in of \$30,000.00.

Thompson owed \$46,000; therefore her negative equity was \$16,000. To create a phony trade-in value, the contract value of the trade-in was set at \$54,000, creating an "over-allowance" of \$24,000 above the \$30,000 actual case value.

The dealership increased the price of the vehicle sold to Thompson by that same \$24,000. This is particularly easy to do in cases of motor homes, where there is no sticker on the vehicle, but the practice also occurs often in other vehicle transactions.

When the dealer rolls this amount into the cash price of the vehicle, the consumer must pay sales tax and registration on a phony inflated amount, and must also pay sales tax and registration on the trade-in vehicle value. This makes all the financing disclosures inaccurate and violates a wide variety of provisions of the various

financing statutes at issue, as recognized by the Court of Appeal.

Thompson testified that she had no idea about how the numbers were being manipulated and did not know that she was actually being charged more because of the trade-in value that she received.

She recovered \$363,372.23 on a lemon law claim based on her service contract problems.

The Court then found that Thompson was also entitled to rescission under her ASFA cause of action. Significantly, the Court found that the ASFA violation also was a violation of California's Consumer Legal Remedies Act. The Court awarded rescission under this statute, added \$75,000.00 in punitive damages and a \$5,000.00 senior citizen penalty.

The Court ordered injunctions under the CLRA and under California's Business and Professions Code § 17200. The Court also awarded restitution to all those consumers whose files were produced by defendant in discovery who also had an over-allowance in a trade-in vehicle. These consumers were refunded the increased amount of sales tax and license fees that they were charged as a result of the over-allowances. These amounts were quite significant in that the over-allowances often involved tens of thousands of dollars on their motor home purchases.

One issue that has presented problems in other cases was how strictly the credit disclosure statutes should be construed. Relying on older case law from the 1940s and 1950s, defendants argue that close was good enough—that technical violations were not actionable.

Thompson provides an overview of TILA and Regulation Z. The Court of Appeal concluded that courts should strictly enforce TILA and Regulation Z requirements, and that these statutes were mandatory under California's own ASFA.

In the two *amicus* briefs, the dealer's associations contended that this injunction, if upheld, would significantly alter and change the way car dealers did business with the consuming public. One can only hope that their prediction comes true.

Arbitration Agreement Chucked Out

NACA member **Brian Ruschel** and his co-counsel Patrick Perotti of Dworken & Bernstein won a significant victory over an abusive arbitration clause in *Maestle v. Best Buy Co.*, where an Ohio court of appeals followed *Badie v. Bank of America*, 79 Cal. Rptr.2d 273 (1998) and rejected *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001) in finding that a credit card contract's