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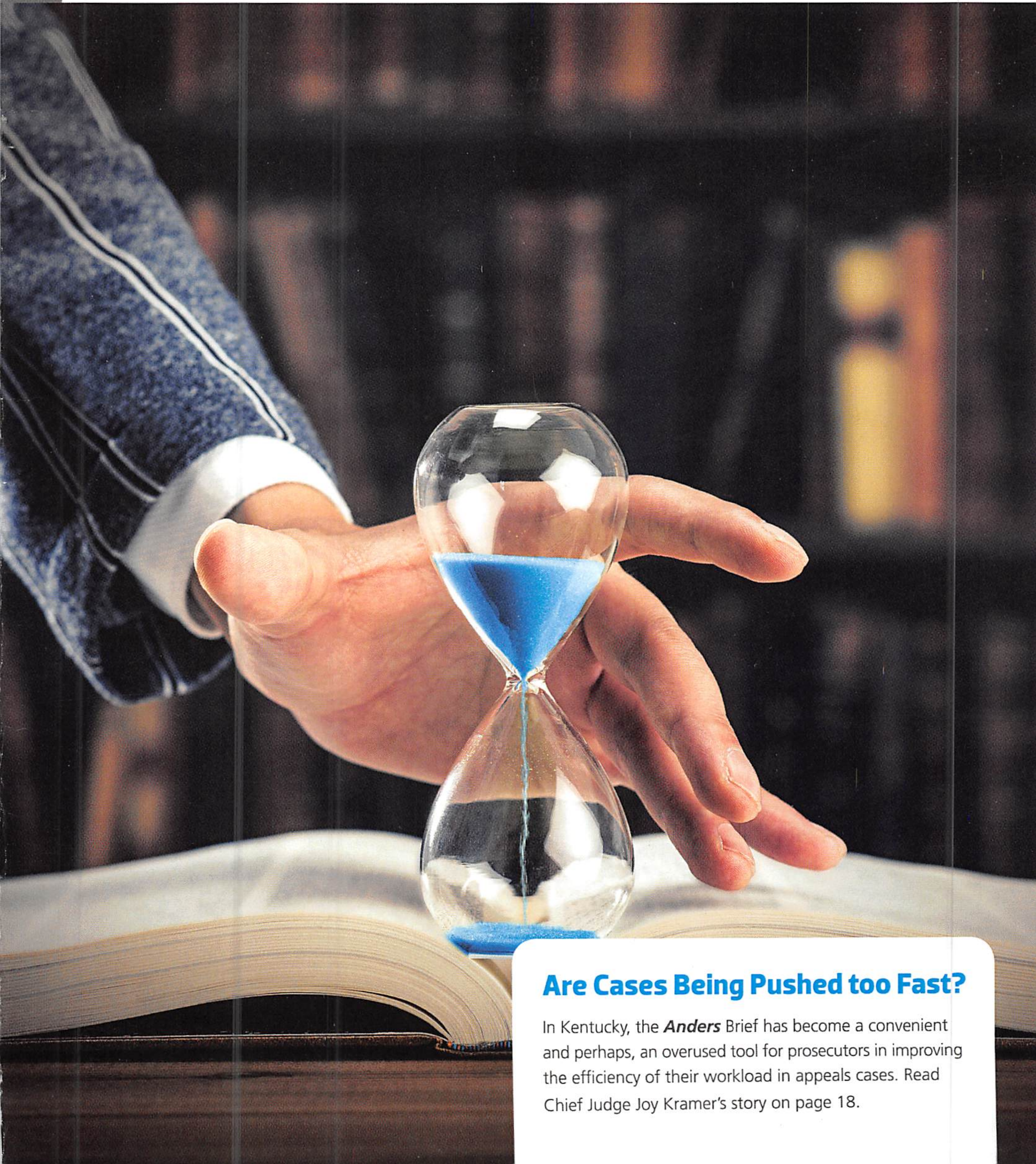

Are Cases Being Pushed too Fast?

In Kentucky, the ***Anders*** Brief has become a convenient and perhaps, an overused tool for prosecutors in improving the efficiency of their workload in appeals cases. Read Chief Judge Joy Kramer's story on page 18.

How to Advise the Auto Buyer Who is Trapped in the Auto Dealers' Web of Spot Delivery & Yo-Yo by Steven C. Shane

There are too many systematic and time-tested devices used by automobile dealers to deceive car-buying consumers to write about in one article. However, by far, the most common is what is known as "Spot Delivery." Spot Delivery occurs after all the paperwork has been completed and the salesman informs the buyer that the deal is done—only it isn't. This happens after the buyer, who typically has spent many hours at the dealership and is physically and mentally exhausted and anxious to leave, is allowed to drive-off with the vehicle. That is when the vehicle is said to have been "spotted." In this way, the dealer can be assured that the buyer will not visit any other dealerships and will not continue to shop while the dealer attempts to sell or assign a retail installment sales contract ("RISC") to a third-party financial entity commensurate with the buyer's creditworthiness. In most instances, the dealer will quickly get that approval, and the buyer will forever be unaware that the vehicle has been "spotted." The problem arises, however, when the dealer is unable to sell the deal due to, for example, the buyer's shaky credit history. At some point, the dealer will contact the surprised buyer and demand the return of the vehicle or that the buyer, in order to retain the vehicle, return to the dealership and enter into a new contract on different and less favorable terms. This is when you will typically receive a call from a sometimes frantic buyer who will ask for advice on whether to keep or return the vehicle.[i] Before advising the client, the very first thing the lawyer must do is demand to see ALL the deal documents (front and back); especially, the RISC.

According to the Ohio Attorney General, Spot Delivery is not unlawful. However, the dealership must provide the buyer with what is known as a "Spot Delivery Agreement" or must disclose a provision which informs the buyer that the dealer is allowing the vehicle to be taken from the lot conditioned on financing approval while outlining the rights and duties of the parties if financing approval cannot be obtained. Failure to make the necessary disclosures is considered a deceptive sales practice under Ohio law,[ii] although it is not in Kentucky. This office maintains that spot delivery is inherently unlawful because it plainly violates the federal Truth-in-Lending Act ("TILA"), among other statutes, each and every time it takes place.

When reviewing and evaluating these cases for the consumer, the lawyer must always look for the Spot Agreement. Sometimes it is a separate document, but just as often, it is a provision buried somewhere in one of the documents given to the buyer. It is called by a number of different names. Rarely is it referred to as the Spot Delivery Agreement, but we have occasionally seen it referred to as an "Affidavit of Spot Delivery." One major local dealer refers to it as the "Qualified Delivery Permit," which is hardly descriptive. Most frequently, we've seen it called the "Limited Right to Cancel."[iii]

What these all have in common is that they inform the buyer that financing continues to be conditional and that, if financing is not approved, the dealer may demand the return of the vehicle. Essentially, the opposite of what the buyer has been told when he or she originally signed all of the deal documents and driven off with the vehicle. Often, this document or provision is simply slid in front of the exhausted buyer, and he or she is asked to sign; rarely is this document or provision ever explained or even brought to the attention of the buyer. Most critical is the fact that these agreements or provisions make the financial terms or disclosures made to the buyer at the original signing essentially meaningless, because they may be changed or even ignored if the dealer is unable to sell the deal.

Such a transaction violates the very essence and spirit of TILA, which has as its Congressional purpose, a finding that:

> ***[E]conomic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.***[iv]

More specifically, it invokes that provision of the Act that deals with the timing of those material credit disclosures that must be made to the buyer prior to the time he or she becomes obligated.

> ***Except as otherwise provided in this part, the disclosures required... shall be made before the credit is extended[.]*** [v]

The position of this author is that a Spot Delivery Agreement, by its very nature, violates this provision of the Act because any disclosure that has been previously provided to the buyer has been made meaningless. The late Federal District Judge S. Arthur Spiegel understood this. In *Salvagne vs. Fairfield Ford*, Judge Spiegel held that the separate and contemporaneous execution of both a RISC and a Spot Agreement constituted a violation of TILA because the dealer failed to integrate the terms of the separate Spot Delivery Agreement into the RISC. [vi] The Spot Agreement quite literally contradicted the terms of the RISC. Since this decision, some dealers have integrated those spot terms. However, there remain a goodly number of dealers who, for some reason, continue to fail to properly integrate those terms. Obviously, being able to spot this becomes a critical factor in advising clients.

The "Yo-Yo"

When the dealer contacts the buyer and demands the return of the vehicle or tells the buyer that he or she must return to the dealership to enter into a new deal on less favorable terms, Spot Delivery has turned into what we refer to as a "yo-yo." In a yo-yo, the dealer, unable to get a third-party financer to purchase the RISC, demands the return of the vehicle. The dealer has already extended credit and become a creditor under the terms of a RISC, which was earlier executed between the parties. Therefore, the assertion by the dealer that it was unable to obtain financing for the buyer is untrue. In the RISC form used by dealers today, you don't have to look very hard to see language that will usually designate the dealer as the "seller-creditor," which also provides that the dealer is to assign or sell the obligation to a third-party. Federal District Judge Susan Dlott expressly ruled this to be the case where dealerships use the standard RISC form. [vii]

continued on next page

By holding itself out on the Installment Contract as the Creditor Seller to whom the Pattons as the Buyers were obligated to pay the Amount Financed and the Finance Charge, Wyler Eastgate is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness. [viii]

Recently, in *Tyson vs. Sterling Rental, Inc. dba Car Source*, a case involving the Equal Credit Opportunity Act rather than TILA, the Sixth Circuit found a dealer to be a creditor for the purpose of requiring it to provide notice of adverse action to the buyer.[ix]

The upshot of this is that, in demanding the return of the vehicle, the dealer is essentially wrongfully repossessing it. When we are asked, we usually advise the buyer never to voluntarily surrender the vehicle which might allow the dealer to claim that repossession did not occur.[x] We advise the buyer to allow the dealer to repossess. If the dealer is intent on repossessing a vehicle, it does little good to resist because the dealer rarely completes the paperwork necessary for the buyer to register the vehicle unless and until it is able to sell its deal. After the temporary tag that is issued at the time of sale expires, the buyer is, for practical purposes, unable to drive the vehicle. As soon as the dealer repossesses the vehicle, the cause of action for unlawful repossession accrues and that, coupled with the TILA violation, allows you to obtain federal jurisdiction.[xi] In many instances, the buyer may have given a vehicle in trade which has been sold by the time the dealer gets around to demanding the return of the vehicle. In some cases, the dealer even refuses to refund the buyer's cash down payment. Such conduct justifies a claim for conversion.[xii] Additionally, we will usually include a claim for deceptive or unfair sales practices under either the Ohio or Kentucky deceptive trade acts as well as a common law claim for breach of contract.

Steve Shane is in solo practice both in Cincinnati and Newport, Ky. He specializes in Consumer Rights Litigation which consists mostly of automobile fraud, debt collection abuse, and inaccurate credit reporting. He practices mainly in federal court. He is a charter member of the National Association of Consumer Advocates (NACA) and a long-time member of the Northern Kentucky Bar Association.

[i] The buyer may even inform you that the dealer has threatened to call the police or that the police are even on their way to arrest them because the dealer has informed them that the buyer has stolen the vehicle or committed some type of criminal fraud. [ii] OAC § 109: 4-3-16(B)(30). [iii] Many of these forms are provided to the dealer by the National Automobile Dealers Association (NADA) which is a professional trade organization representing franchised dealers from all over the nation. [iv] 15 U.S.C. § 1601. [v] 15 U.S.C. § 1638(b)(1). [vi] 794 F. Supp. 2d 826 (S.D. Ohio 2010). [vii] *Patton vs. Jeff Wyler Eastgate*, 608 F. Supp. 2d 907 (S.D. Ohio 2007). [viii] *Id.* at 912 (internal citations omitted). [ix] 836 F.3d 571 (6th Cir. 2016). [x] One could hardly argue that the buyer who receives a demand from the dealer to return the vehicle has not had his or her vehicle repossessed, even if that buyer voluntarily returns the vehicle to the dealership. [xi] If you prefer to be in state court, TILA provides for concurrent jurisdiction for any violation. *See* 15 U.S.C. § 1640(e). [xii] *Craig & Bishop, Inc. v. Piles*, 2005 WL 3078860 (Ky. App.) *aff'd in part & rev'd in part*, 247 S.W.3d 897 (Ky. 2008).