



# Vehicle Loans Notices of Intent & Post-Sale Notices

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## **About the Materials**

These program materials are intended to supplement discussion at the seminar. Although every effort has been made to ensure these materials are accurate, current, and reasonably thorough, they are not designed to be used independent of the seminar, to present an independent, thorough treatment of the subject, or to take the place of legal advice.

## **Not Legal Advice**

Great effort has been made to ensure that the information provided during this program is accurate, current, and reasonably thorough.

However, attorneys provide legal advice to clients based on a variety of factors, including, but not limited to, applicable law, the facts and circumstances of the case, the client's tolerance for risk and for legal expenses, and the attorney's opinions or beliefs concerning whether the court that would hear the particular case is likely to be easily convinced of the attorney's analysis of the law or is likely to be difficult to convince. All of these issues must be considered, and many may change periodically as courts interpret the applicable law. This program is intended to provide only a portion of that information.

As a result, participants should use this seminar as an opportunity to learn about applicable laws and possible strategies, but should always consult with an attorney who is familiar with the exact facts of the specific case taking a course of action. Participants should recognize that fact situations and examples discussed during this seminar are included for illustrative purposes, and are not intended to provide specific advice concerning how any particular credit union should act under any particular circumstances.



# Post-Repo Requirements in CA Rees-Levering Act Retail Installment Sales Contracts

- Rees-Levering Act (or Automobile Sales Finance Act – “ASFA”) requires that a Notice of Intent to sell vehicle be sent to any consumer/member that has a vehicle repossessed before vehicle is sold.
- Laws apply to all retail installment sales contracts (not direct loans made by credit union)
- Requirement applies to both involuntary and voluntary vehicle repossessions
- If the ASFA requirements are not followed, a creditor may not seek recovery of a deficiency judgment after vehicle sale



# ASFA Requirements

- ▶ At least 15 days' written notice of intent to dispose of a repossessed or surrendered motor vehicle shall be given to all persons liable on the contract.
- ▶ The notice shall be personally served or shall be sent by certified mail, return receipt requested, **or** first-class mail, postage prepaid, directed to the **last known address** of the persons liable on the contract.
- ▶ If those persons are married to each other, and, according to the most recent records of the seller or holder of the contract, reside at the same address, **one notice** addressed to both persons at that address is sufficient.
- ▶ Recipient(s) shall be liable for any deficiency after disposition of the repossessed or surrendered motor vehicle **only if** the notice prescribed by this section is given **within 60 days** of repossession or surrender.



# ASFA Exception to Notice

- ▶ Credit Union need **NOT** send NOI if the motor vehicle has been seized by a federal, state, or local public agency or authority pursuant to an illegal drug or illegal immigrant violation and the seizing authority, as a precondition to the return of the motor vehicle to the seller or holder, prohibits the return of the motor vehicle to the buyer or other person liable on the contract or any third person claiming the motor vehicle.
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# ASFA Notice Requirements

- ▶ Notice must state that debtor(s) shall have a right to redeem the motor vehicle by paying debt in full until the expiration of 15 days from the date of giving or mailing the notice and
  - ▶ Provides an itemization of the contract balance and of any delinquency, collection or repossession costs and fees and sets forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice.
  - ▶ FDCPA/Rosenthal warning – Notice must be accurate
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# ASFA Notice Requirements

- ▶ Notice must either state that there IS a conditional right to reinstate the contract until the expiration of 15 days from the date of giving or mailing the notice and **all the conditions precedent** OR
- ▶ That there is no right of reinstatement and provides a statement of reasons for denial of reinstatement



# ASFA Notice Requirements

- ▶ Notice must state that upon written request, creditor shall extend for an additional 10 days the redemption or reinstatement period (if entitled to the conditional right of reinstatement)
- ▶ NOI must include a form for requesting the 10-day extension with instructions that it must be personally served or sent by certified or registered mail to the creditor's address and RECEIVED before NOI expires



# ASFA Requirements

- ▶ Notice **must** disclose the place at which the motor vehicle will be returned to those persons upon redemption or reinstatement.
- ▶ Notice must also designate the name and address of the person or office to whom payment shall be made.
- ▶ If any payments must be made to a 3<sup>rd</sup> party, the NOI must provide all information necessary to ensure member knows where to make the payment



# ASFA Requirements

- Notice must include the following in at least 10-point bold type reading as follows:
- “NOTICE. YOU MAY BE SUBJECT TO SUIT AND LIABILITY IF THE AMOUNT OBTAINED UPON DISPOSITION OF THE VEHICLE IS INSUFFICIENT TO PAY THE CONTRACT BALANCE AND ANY OTHER AMOUNTS DUE.”
- Informs those persons that upon the sale of the vehicle, they will be liable for the deficiency balance plus interest at the contract rate, or at the legal rate of interest pursuant to Section 3289 if there is no contract rate of interest, from the date of sale to the date of entry of judgment.



# Out of State Notice

- ▶ Notice must clearly state the intent to sell the vehicle and if the notice is sent to an address outside of California, the reinstatement or redemption period shall be 20 days instead of 15



# Case Review:

- Juarez v. Arcadia (2007 – 4<sup>th</sup> District Court of Appeal)
- Creditor liable for failing to provide all info necessary to reinstate contract

# ASFA- Post-Sale Requirements

- Unless automatically provided to the buyer **within 45 days** after vehicle sale, creditor shall provide to any person liable on the contract within 45 days after written request, if the request is made **within one year** after the disposition, a written accounting regarding the disposition.
- The accounting shall itemize:
  - (1) The **gross** proceeds of the sale.
  - (2) The reasonable and necessary expenses incurred for retaking, holding, preparing for and conducting the sale and
  - (3) To the extent provided for in the agreement and not prohibited by law, **reasonable attorney fees and legal expenses** incurred by the seller or holder in retaking the motor vehicle from any person not a party to the contract.



## ASFA – Post-Sale Requirements

- ▶ In all sales which result in a surplus, the seller or holder shall furnish an accounting whether or not requested by the buyer.
- ▶ Any surplus shall be returned to the buyer **within 45 days** after the sale is conducted.



# ASFA – Reinstatement Rights

- Generally – ASFA provides for a right to reinstate the loan UNLESS an exception applies
  - All reinstatement exceptions are set forth under Civil Code 2983.3
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# Reinstatement Exceptions

- ▶ The buyer or any other person liable on the contract by omission or commission **intentionally provided** false or misleading information of **material importance** on the buyer's or other person's credit application.



# Reinstatement Exceptions

- ▶ The buyer, any other person liable on the contract, or any permissive user in possession of the motor vehicle, in order to avoid repossession has **concealed** the motor vehicle or **removed it from the state**.



# Reinstatement Exceptions

- ▶ The buyer, any other person liable on the contract, or any permissive user in possession of the motor vehicle, has **committed or threatens to commit acts of destruction**, or has failed to take care of the motor vehicle in a reasonable manner, so that the motor vehicle **has** or **may become** substantially impaired in value.



# Reinstatement Exceptions

- ▶ The buyer or any other person liable on the contract has committed, attempted to commit, or threatened to commit criminal acts of violence or bodily harm against an agent, employee, or officer of the seller or holder in connection with the seller's or holder's repossession of or attempt to repossess the motor vehicle.
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# Reinstatement Exceptions

- ▶ The buyer has knowingly used the motor vehicle, or has knowingly permitted it to be used, in connection with the commission of a criminal offense, **other than an infraction**, and the motor vehicle has been seized by a federal, state, or local agency or authority pursuant to federal, state, or local law.



# Reinstatement Exceptions

- ▶ The motor vehicle has been seized by a federal, state, or local public agency or authority pursuant to federal, state, or local law and the seizing authority, as a precondition to the return of the motor vehicle to the seller or holder, prohibits the return of the motor vehicle.



# Reinstatement Restrictions

- Exercise of the right to reinstate the contract shall be limited to:
- Once in any 12-month period and
- Twice during the term of the contract.



# Reinstatement Litigation

- ▶ If a creditor denies the right to reinstatement, the creditor shall have the burden of proof that the denial was justified in that it was reasonable and made in good faith.
- ▶ If the seller or holder fails to sustain the burden of proof, the seller or holder **shall not** be entitled to a deficiency, but it shall not be presumed that the buyer is entitled to damages by reason of the failure of the seller or holder to sustain the burden of proof.



# Direct Loans

- ▶ Content of NOI is dictated by California Commercial Code 9614
- ▶ A notice that complies with Section 9614 will be deemed compliant
- ▶ Form which is described in Section 9614 is considered to be a “safe harbor” form if properly completed



# Class Action Risks

- ▶ ASFA violation cases have in the past been certified as class-actions and carry significant risks to credit unions
- ▶ Special care should be taken by credit union to ensure the NOI used is compliant with the requirements of the ASFA and;
- ▶ Staff must be trained to ensure that information on both the NOI and the Post-Sale Notices is accurate



# Defenses to Class Action

- Arbitration Clauses
  - Credit Unions should elect to buy dealer contracts that have Federal Arbitration Act Compliant arbitration clauses
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**LAW 553-CA-ARB-ea 7/16**

Stock No 800771A

Deal ID 26376

**RETAIL INSTALLMENT SALE CONTRACT - SIMPLE FINANCE CHARGE (WITH ARBITRATION PROVISION)**



**ARBITRATION PROVISION**

**PLEASE REVIEW - IMPORTANT - AFFECTS YOUR LEGAL RIGHTS**

- 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.**
- 2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.**
- 3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.**

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Provision, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Provision shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York 10019 ([www.adr.org](http://www.adr.org)), or any other organization to conduct the arbitration subject to our approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law and the applicable statute of limitations. The arbitration hearing shall be conducted in the federal district in which you reside unless the Seller-Creditor is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. We will pay your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of \$5000, unless the law or the rules of the chosen arbitration organization require us to pay more. The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims is frivolous under applicable law. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Provision, then the provisions of this Arbitration Provision shall control. Any arbitration under this Arbitration Provision shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration. Any award by the arbitrator shall be in writing and will be final and binding on all parties, subject to any limited right to appeal under the Federal Arbitration Act.

You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies, such as repossession, or by filing an action to recover the vehicle, to recover a deficiency balance, or for individual injunctive relief. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Provision shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Provision, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Provision shall be unenforceable.

Seller assigns its interest in this contract to _____		(Assignee) under the terms of Seller's agreement(s) with Assignee
<input type="checkbox"/> Assigned with recourse	<input checked="" type="checkbox"/> Assigned without recourse	<input type="checkbox"/> Assigned with limited recourse
Seller _____	By _____	Title FINANCE MANAGER



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