Summary Contents

Top Reasons to Use Your Digital Library Access ........................................ iii
NCLC Digital Library: The Leading Resource for All Consumer Law ........ iv

Contents ........................................................................................................ ix

Chapter 1 Introduction and Practice Checklists ........................................... 1
Chapter 2 Investigatory Techniques ............................................................. 17
Chapter 3 Automobile Title Law ................................................................. 79
Chapter 4 Yo-Yo (Spot-Delivery) Abuses and Sublease Scams ................... 101
Chapter 5 Federal and State Odometer Requirements ............................... 129
Chapter 6 Remedies for MVICSA and State Odometer Act Violations ....... 165
Chapter 7 Other Statutes Specifically Relating to Automobile Fraud .......... 183
Chapter 8 Common Law Fraud, Deceit, and Misrepresentation ................ 215
Chapter 9 Warranty, Mistake, UDAP, RICO, Unconscionability, Negligence,
and Contract Claims .................................................................................. 297
Chapter 10 Litigating Automobile Fraud Cases .......................................... 351
Appendix A Federal Statutes ...................................................................... 449
Appendix B Federal Regulations ................................................................. 461
Appendix C State Laws Relating to Automobile Fraud ................................. 495
Appendix D State Statutes and Regulations Relating to Yo-Yo Sales .......... 535
Contents

Top Reasons to Use Your Digital Library Access ........................................ iii

NCLC Digital Library: The Leading Resource for All Consumer Law .......... iv

Chapter 1 Introduction and Practice Checklists

1.1 About This Treatise ................................................................................. 1
   1.1.1 Nature of Automobile Fraud .......................................................... 1
   1.1.2 About This Treatise ....................................................................... 1
      1.1.2.1 All Subscribers Have Access to the Digital Version .............. 1
      1.1.2.2 Structure of the Chapters ......................................................... 2
      1.1.2.3 The Appendices and Indexes .................................................... 2
      1.1.2.4 Additional Pleadings, Primary Sources, and Practice Tools .... 2
      1.1.2.5 Clearinghouse and Other Unreported Cases ......................... 3

1.2 Types of Automobile Frauds Addressed in This Treatise .................... 3
   1.2.1 Introduction .................................................................................. 3
   1.2.2 Odometer Fraud .......................................................................... 3
   1.2.3 Salvage Fraud ............................................................................. 4
   1.2.4 Undisclosed Flood or Hurricane Damage .................................... 4
   1.2.5 Other Undisclosed Wreck Damage to Used Cars ...................... 5
   1.2.6 Undisclosed Damage to New Cars .............................................. 6
   1.2.7 Lemon Laundering ........................................................................ 6
   1.2.8 Other Failures to Disclose Preexisting Mechanical Problems .... 7
   1.2.9 Misrepresentations Concerning Demonstrators, Program Cars, and Other Low-Mileage Vehicles ....................................................... 7
   1.2.10 Misrepresentation of Number or Nature of Prior Users ........... 8
   1.2.11 Stolen Vehicles and Defective Title ........................................... 8
   1.2.12 Gray Market Vehicles ............................................................... 9
   1.2.13 Used Cars Sold with Missing Airbags ....................................... 9
   1.2.14 Yo-Yo Transactions ................................................................... 9
   1.2.15 Sublease Scams ........................................................................ 10

1.3 Automobile Frauds Analyzed in Other NCLC Treatises ...................... 10
   1.3.1 Introduction ................................................................................. 10
   1.3.2 Automobile Warranties and Repairs ......................................... 10
   1.3.3 Deceptive Pricing and Sales Techniques ..................................... 10
   1.3.4 Trade-Ins, Yo-Yo Sales, and Financing ....................................... 10
   1.3.5 Credit Insurance, GAP Insurance, and Service Contracts ......... 11
   1.3.6 Documentary Fees, Other Charges, Add-Ons and Options .......... 11
   1.3.7 Leasing ...................................................................................... 11
   1.3.8 Repossessions and Collection Activity ....................................... 12
   1.3.9 Force-Placed Automobile Insurance ......................................... 12
   1.3.10 Credit Reports .......................................................................... 12
   1.3.11 Discrimination ......................................................................... 12

1.4 Automobile Litigation Checklist ......................................................... 12
   1.4.1 Introduction ................................................................................. 12
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.4.2 Legal Claims</td>
<td>12</td>
</tr>
<tr>
<td>1.4.2.1 Dealer Sales Tactics</td>
<td>12</td>
</tr>
<tr>
<td>1.4.2.2 Financing, Add-Ons, and Insurance</td>
<td>13</td>
</tr>
<tr>
<td>1.4.2.3 Used Car Sales Abuses</td>
<td>13</td>
</tr>
<tr>
<td>1.4.2.4 New Car Sales Abuses</td>
<td>14</td>
</tr>
<tr>
<td>1.4.2.5 Vehicle Defects</td>
<td>14</td>
</tr>
<tr>
<td>1.4.2.6 Repossessions</td>
<td>14</td>
</tr>
<tr>
<td>1.4.2.7 Leasing Sales, Defects, and Termination</td>
<td>15</td>
</tr>
<tr>
<td>1.4.2.8 Auto Title Pawn Loans</td>
<td>15</td>
</tr>
<tr>
<td>1.4.2.9 Other</td>
<td>15</td>
</tr>
<tr>
<td>1.4.3 Investigation and Litigation</td>
<td>15</td>
</tr>
<tr>
<td>1.4.3.1 Investigation Techniques and Discovery</td>
<td>15</td>
</tr>
<tr>
<td>1.4.3.2 Litigation Issues</td>
<td>16</td>
</tr>
</tbody>
</table>

Chapter 2 Investigatory Techniques

2.1 Automobile Frauds Described                                      | 17   |
| 2.1.1 Introduction                                                   | 17   |
| 2.1.2 Odometer Fraud                                                 | 17   |
| 2.1.2.1 Extent and History                                           | 17   |
| 2.1.2.2 What Is an Odometer?                                         | 18   |
| 2.1.2.3 Rollbacks and Disconnects                                    | 19   |
| 2.1.2.4 Collusion by Subsequent Buyers                               | 20   |
| 2.1.2.5 More Subtle Forms of Odometer Fraud                          | 20   |
| 2.1.2.6 Most Common Forms of Odometer Fraud Today                    | 20   |
| 2.1.3 Undisclosed Flood Damage                                        | 20   |
| 2.1.4 Undisclosed Prior Wreck Damage                                  | 20   |
| 2.1.5 Hurricane Damage                                               | 22   |
| 2.1.6 Undisclosed Prior History of Mechanical Problems and Lemon Laundering | 22   |
| 2.1.7 Misrepresentations About Prior Owners or Prior Use            | 23   |
| 2.1.8 Undisclosed History As Stolen Car                              | 24   |
| 2.1.9 Undisclosed Damage to New Cars                                 | 24   |
| 2.1.10 Undisclosed Canadian or Other Foreign Origin                  | 24   |
| 2.1.10.1 Introduction                                                 | 24   |
| 2.1.10.2 Odometer Discrepancies in Canadian Vehicles                 | 24   |
| 2.1.10.3 Warranty and Other Problems                                 | 25   |
| 2.1.10.4 Identifying a Vehicle As Not Manufactured for the United States Market | 25   |

2.2 Investigating Fraud Based on Information Within the Consumer’s Control | 26   |
| 2.2.1 Interview with the Consumer                                     | 26   |
| 2.2.2 Stickers and Paperwork Found on and in the Car                 | 26   |
| 2.2.3 The Car’s Tires                                                | 27   |
| 2.2.4 The Vehicle Identification Number (VIN)                        | 27   |
| 2.2.4.1 Use of VINs in Automobile Fraud Investigations               | 27   |
| 2.2.4.2 How to Check a VIN                                            | 28   |
| 2.2.5 Cursory Physical Inspection of the Car                         | 29   |
| 2.2.6 A Haywire Odometer                                             | 30   |
| 2.2.7 Checking the Odometer History with a Franchised Dealer         | 30   |
| 2.2.8 Checking a Motor Home’s Engine Hour Meter                      | 30   |
| 2.2.9 Expert Inspection of the Vehicle                               | 30   |
| 2.2.9.1 Finding an Expert                                            | 30   |
| 2.2.9.2 What the Expert Should Check                                 | 31   |
2.9.3 Inspection Procedures and Techniques ........................................... 32
2.9.4 Defense Inspections ................................................................. 32
2.10 Looking at the Consumer’s Documents ........................................... 33
  2.10.1 The New Title ................................................................. 33
  2.10.2 Other Documents Relating to Title ......................................... 33
  2.10.3 Repair Documents ............................................................. 33
2.11 Used Car Pricing Guides .............................................................. 34
2.12 Advertisements .......................................................................... 34

2.3 Summary Title History ................................................................. 34
  2.3.1 When and When Not to Use Summary Title Reports ......................... 34
  2.3.2 Carfax .............................................................................. 35
  2.3.3 AutoCheck ....................................................................... 37
  2.3.4 The National Motor Vehicle Title Information System ..................... 37
  2.3.5 Information Sources for Canadian Vehicles .................................. 38
  2.3.6 Insurance Databases .......................................................... 38
  2.3.7 Other Quick Search Procedures .............................................. 39

2.4 Detailed Title Histories ............................................................... 39
  2.4.1 Introduction ................................................................. 39
  2.4.2 How a Chain of Title Works .................................................. 39
    2.4.2.1 General ................................................................. 39
    2.4.2.2 Information Found on the Title ...................................... 40
    2.4.2.3 Powers of Attorney, Registrations, Title Applications, 
          and Other Information Available Through a Title Search .......... 41
    2.4.2.4 How the DMV Stores Title Information ................................ 41
  2.4.3 Electronic Titling ............................................................. 42
  2.4.4 How to Obtain Detailed Title Histories .................................... 43
  2.4.5 How to Use Title Information to Uncover Fraud ......................... 44
    2.4.5.1 Reviewing the Consumer’s Own Signature on the Old Title ....... 44
    2.4.5.2 Names and Addresses of Prior Owners ............................. 44
    2.4.5.3 Odometer Discrepancies ............................................. 44
    2.4.5.4 Flood-Damaged, Wrecked, Rebuilt, 
          and Other Salvage Vehicles ............................................. 45
      2.4.5.4.1 General ......................................................... 45
      2.4.5.4.2 Understanding salvage brands ................................. 45
      2.4.5.4.3 When salvage brand still on the new title ................. 46
      2.4.5.4.4 When salvage brand is removed from title ............... 46
      2.4.5.4.5 When insurance company or body shop is a 
              transferor, but no title brand was applied for ......... 47
      2.4.5.4.6 When insurance company or 
              body shop is not listed in salvage 
              vehicle’s chain of title ...................................... 47
    2.4.5.5 Lemon Laundering .................................................... 47
    2.4.5.6 Number of Prior Owners; Demonstrators; 
          Lease or Rental Cars, Taxis, Police Cars, 
          and Other Unusual Prior Owners .................................... 48
    2.4.5.7 Duplicate Titles; Laundered Titles; Powers of Attorney .......... 48
    2.4.5.8 Suspicious Mileage on a Fleet Vehicle ................................ 49

2.5 Obtaining Information from Others Involved in Car’s History .............. 49
  2.5.1 Contacting the Prior Consumer Owners .................................... 49
  2.5.2 Automobile Dealers .......................................................... 50
    2.5.2.1 Records Dealers Are Required to Keep .......................... 50
    2.5.2.2 Other Dealer Records ............................................... 50
2.5.2.2.1 Introduction .............................................. 50
2.5.2.2.2 Deal files and file jackets .......................... 50
2.5.2.2.3 The worksheet, purchase order, and retail
installment sales contract ................................. 50
2.5.2.2.4 Recap sheets and charge backs ................... 51
2.5.2.2.5 Finance facsimiles, finance reserves,
credit application, and business
manager’s summary .......................................... 51
2.5.2.2.6 Log books, cash draw files,
and business manager’s penetration
and performance reports ............................... 52
2.5.2.2.7 Payroll records, policy and
procedure manuals, training manuals,
and advertising ............................................ 53
2.5.2.2.8 Dealer contracts with third parties;
association files .......................................... 53
2.5.2.2.9 Repair records ....................................... 53
2.5.2.3 Present Dealer Employees ............................ 54
2.5.2.4 Former Dealer Employees ............................ 54
2.5.2.5 Speaking the Dealer’s Language on Odometer Rollbacks ............................................... 55
2.5.2.6 Contacting the Selling Dealer and Prior Servicing Dealers
Concerning Mechanical Problems ......................... 55
2.5.2.7 When New Car Damaged Before Delivery ............. 55
2.5.3 Wholesalers and the Vehicle’s Other Dealer Transferors ......................................................... 55
2.5.4 Auctions ....................................................... 56
2.5.5 Secured Creditors .......................................... 56
2.5.6 Floor Plan Financers ..................................... 57
2.5.7 Lessors and Lessees ...................................... 58
2.5.8 Rental Car Companies .................................. 58
2.5.9 Insurance Companies and Body Shops ............... 58
2.5.10 Manufacturers ............................................. 59
2.5.11 Service Contract Companies ......................... 60
2.5.12 Information About Whether the Dealer Obtained a
Vehicle History Report ....................................... 60
2.5.13 Absence of Information from Vehicle History Report ............................................................ 60
2.5.14 Records of Insurance Claims .......................... 60
2.5.15 Information Available from Government Agencies............................................................... 60
2.5.16 Trade Associations ...................................... 62
2.5.17 Online Resources ........................................ 62
2.6 Uncovering a Party’s Special Culpability .................. 63
2.6.1 Introduction .................................................. 63
2.6.2 The Culpability of the Selling Dealer .................. 64
  2.6.2.1 General ................................................ 64
  2.6.2.2 Title Documents Known to the Dealer ............ 64
  2.6.2.3 The Car’s Physical Appearance ..................... 65
  2.6.2.4 Dealer’s Inspection or Duty to Inspect Car. ........ 65
  2.6.2.5 Price Paid by Dealer ................................ 66
  2.6.2.6 Dealer Knowledge of Carfax Report; Other Title Searches ............................................. 66
  2.6.2.7 Wholesaler or Other Seller’s Reputation ........ 66
  2.6.2.8 A Pattern of Misconduct ............................ 67
  2.6.2.9 Warnings from Dealer Associations or State Regulators .................................................. 67
  2.6.2.10 Dealer Knowledge of Service and Warranty History ...................................................... 67
## Contents

2.6.2.11 When Dealer Informed Service Contract or Warranty Is Void ............................................. 67  
2.6.2.12 Access to Computer Read-Out of True Mileage .................................................................. 68  
2.6.3 Wholesalers and Other Dealers Transferring the Car to Dealers ............................................. 68  
2.6.4 Automobile Auctions .................................................................................................................. 69  
2.6.4.1 Dealer-Only Automobile Auctions Described ....................................................................... 69  
2.6.4.2 Salvage Auctions ....................................................................................................................... 70  
2.6.4.3 Public Auctions .......................................................................................................................... 70  
2.6.4.4 Auction Culpability for Car Fraud ........................................................................................... 70  
2.6.5 Insurance Companies .................................................................................................................. 72  
2.6.6 Manufacturers ............................................................................................................................. 73  
2.6.7 Secured Creditors in the Chain of Title .................................................................................... 74  
2.6.8 Creditor Financing the Sale to the Consumer ............................................................................. 74  
2.6.9 Prior Private Owners .................................................................................................................. 74  
2.7 A Special Case: Cloned and Retagged Vehicles ............................................................................ 75  
2.7.1 Introduction ................................................................................................................................ 75  
2.7.2 Falsifying the VIN ....................................................................................................................... 76  
2.7.3 Falsifying the Title ...................................................................................................................... 76  
2.7.4 Investigatory Techniques ........................................................................................................... 77  
2.7.4.1 Examining the VIN on the Vehicle ......................................................................................... 77  
2.7.4.2 Checking Title History and Other Paperwork ....................................................................... 77  
2.8 Another Special Case: Used Cars Sold Without Airbags ............................................................... 78

### Chapter 3 Automobile Title Law

3.1 What Every Consumer Lawyer Needs to Know About Automobile Titles ........................................ 79  
3.2 How Automobile Titles Work ........................................................................................................ 79  
3.2.1 Introduction ................................................................................................................................ 79  
3.2.2 Titling a New Vehicle .................................................................................................................. 79  
3.2.3 Obtaining a New Title After Purchasing for Use ...................................................................... 80  
3.2.4 Title Transfers to Dealers and Others Purchasing for Resale ...................................................... 80  
3.2.5 Transfers Not Requiring Assignment of Title ........................................................................... 81  
3.2.6 Applicability of Federal Exemption for Certain Vehicles ............................................................. 81  
3.2.7 Vehicle Registration and License Plates ..................................................................................... 81  
3.3 Transferee Must Sign Title Documents .......................................................................................... 81  
3.3.1 Importance of the Issue ............................................................................................................. 81  
3.3.2 Consumer’s Signature When New Vehicle Is Transferred ............................................................ 82  
3.3.3 Standard Procedure When Used Vehicle Is Transferred .............................................................. 82  
3.3.4 When Transferee Signature Allowed to Be on Reassignment Form Instead of on Title ............... 83  
3.3.5 When Transferee Signature Allowed to Be on Power of Attorney Instead of on Title ............... 84  
3.3.5.1 General .................................................................................................................................. 84  
3.3.5.2 Form of a Valid Power of Attorney ......................................................................................... 84  
3.3.5.3 State Law Must Allow Use of Power of Attorney ................................................................. 84  
3.3.5.4 Consumer Must Consent to Use of Power of Attorney .......................................................... 84  
3.3.5.5 Part A of the Power of Attorney Must Already Be Completed ............................................ 84  
3.3.5.6 Use of Part A Allowed in Only Two Situations ..................................................................... 85  
3.3.5.7 Further Requirements for a Valid Power of Attorney ............................................................. 85  
3.3.6 Fallacious Argument That Buyer Cannot Legally Review All Information on the Title ............... 86  
3.4 Information That Must Be Provided to Transferee on Title Document .......................................... 86  
3.4.1 Risk of Forgery and Alterations ................................................................................................. 86
Chapter 4  Yo-Yo (Spot-Delivery) Abuses and Sublease Scams

4.1 Getting Started .................................................................101
  4.1.1 Introduction ..............................................................101
  4.1.2 Yo-Yo Transactions Explained ........................................101
  4.1.3 Organization of This Chapter ........................................102
  4.1.4 State Yo-Yo Laws ........................................................103

4.2 Dealer’s Right to Cancel the Yo-Yo Transaction ........................103
  4.2.1 Absent Valid Contingency Clause, No Right to Cancel ..........103
  4.2.2 Contingency Must Be in Writing ....................................104
  4.2.3 Cancellation Allegedly Based on Credit Application Misstatements 104
  4.2.4 Absence of Dealer Signature Does Not Create a Valid Contingency 104
  4.2.5 Does Contingency Clause Comply with State Law? ...............105
  4.2.6 When Contingency Placed in a Separate Document or Conflicts with Other Financing Terms 105
  4.2.7 Have the Exact Conditions Allowing Cancellation Occurred? 106
  4.2.8 When Dealer Knows in Advance That the Contingency Will Not Be Met 107
  4.2.9 Misrepresentations That the Sale Is Final .........................107
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.2.10 UDAP and Other Consumer Remedies When Cancellation Not Valid</td>
<td>108</td>
</tr>
<tr>
<td>4.3 Federal Disclosure and Notice Requirements</td>
<td>109</td>
</tr>
<tr>
<td>4.3.1 Introduction</td>
<td>109</td>
</tr>
<tr>
<td>4.3.2 The Truth in Lending Disclosure Form</td>
<td>109</td>
</tr>
<tr>
<td>4.3.3 ECOA and FCRA Notice Requirements</td>
<td>111</td>
</tr>
<tr>
<td>4.3.3.1 General</td>
<td>111</td>
</tr>
<tr>
<td>4.3.3.2 Is the Dealer a Covered Creditor Under the ECOA?</td>
<td>112</td>
</tr>
<tr>
<td>4.3.3.3 The Counteroffer Defense</td>
<td>113</td>
</tr>
<tr>
<td>4.3.3.4 Other Dealer Defenses</td>
<td>113</td>
</tr>
<tr>
<td>4.3.3.5 ECOA Remedies</td>
<td>113</td>
</tr>
<tr>
<td>4.4 Dealers Almost Always Improperly Structure the Yo-Yo Transaction</td>
<td>113</td>
</tr>
<tr>
<td>4.4.1 Dealers Improperly Mix and Match Two Different Types of Transactions</td>
<td>113</td>
</tr>
<tr>
<td>4.4.2 Is the Sale an Illegal Condition Precedent or an Illegal Condition Subsequent Yo-Yo Transaction?</td>
<td>114</td>
</tr>
<tr>
<td>4.4.3 Dealer Practices Inconsistent with a Condition Precedent Transaction</td>
<td>115</td>
</tr>
<tr>
<td>4.4.3.1 Introduction</td>
<td>115</td>
</tr>
<tr>
<td>4.4.3.2 Earning Interest Before the Financing Is Extended</td>
<td>115</td>
</tr>
<tr>
<td>4.4.3.3 TILA Disclosure of Loan Term and APR</td>
<td>115</td>
</tr>
<tr>
<td>4.4.3.4 Service Contract’s Term and Excessive Finance Charges Relating to That Contract</td>
<td>115</td>
</tr>
<tr>
<td>4.4.3.5 Excess Insurance Premiums and Related Finance Charges</td>
<td>115</td>
</tr>
<tr>
<td>4.4.3.6 Improper Treatment of the Consumer’s Trade-In</td>
<td>116</td>
</tr>
<tr>
<td>4.4.3.7 Improper Use of Temporary Tags</td>
<td>116</td>
</tr>
<tr>
<td>4.4.3.8 Improper Use of Dealer Plates</td>
<td>116</td>
</tr>
<tr>
<td>4.4.3.9 Dealer Misrepresentation As to Consumer’s Cancellation Rights</td>
<td>116</td>
</tr>
<tr>
<td>4.4.4 Dealer Practices Inconsistent with a Condition Subsequent</td>
<td>116</td>
</tr>
<tr>
<td>4.4.4.1 Titling Practices</td>
<td>116</td>
</tr>
<tr>
<td>4.4.4.2 Repossession Titles When Dealer Transferred Title</td>
<td>118</td>
</tr>
<tr>
<td>4.4.4.3 Condition Subsequent Sales Must Comply with UCC Article 9</td>
<td>118</td>
</tr>
<tr>
<td>4.4.4.4 Truth in Lending Violations in a Condition Subsequent Sale</td>
<td>119</td>
</tr>
<tr>
<td>4.5 Illegal Practices Accompanying a Cancellation</td>
<td>119</td>
</tr>
<tr>
<td>4.5.1 Refusing to Return Trade-Ins and Deposits</td>
<td>119</td>
</tr>
<tr>
<td>4.5.2 Malicious Prosecution When Consumer Does Not Return the Vehicle</td>
<td>122</td>
</tr>
<tr>
<td>4.6 Misrepresentations Involving a Second Transaction</td>
<td>122</td>
</tr>
<tr>
<td>4.6.1 Renegotiation Misrepresentations</td>
<td>122</td>
</tr>
<tr>
<td>4.6.2 Backdating Documentation of a Subsequent Sale</td>
<td>123</td>
</tr>
<tr>
<td>4.7 Yo-Yo Litigation</td>
<td>123</td>
</tr>
<tr>
<td>4.7.1 Must the Consumer Arbitrate Yo-Yo Sale Claims?</td>
<td>123</td>
</tr>
<tr>
<td>4.7.2 Discovery in Yo-Yo Sale Cases</td>
<td>124</td>
</tr>
<tr>
<td>4.7.3 Consumer Recoveries</td>
<td>125</td>
</tr>
<tr>
<td>4.8 Automobile Subleases</td>
<td>125</td>
</tr>
<tr>
<td>4.8.1 Described</td>
<td>125</td>
</tr>
<tr>
<td>4.8.2 Consumer Remedies</td>
<td>126</td>
</tr>
<tr>
<td>Chapter 5 Federal and State Odometer Requirements</td>
<td></td>
</tr>
<tr>
<td>5.1 First Matters</td>
<td>129</td>
</tr>
<tr>
<td>5.1.1 Scope of This Chapter</td>
<td>129</td>
</tr>
</tbody>
</table>
Automobile Fraud

5.1.2 Overview of the Federal Act ................................. 129
5.1.3 1994 Recodification Did Not Change the Act’s Substance .... 129
5.1.4 NHTSA Interpretations of the Act ............................... 130
5.1.5 State Odometer Acts and Their Relationship to the Federal Act .... 130
5.2 Scope of the Federal Act ........................................... 131
5.2.1 Persons Who Must Comply with the Federal Act ......... 131
5.2.2 Covered Motor Vehicles ....................................... 131
5.2.3 What Is an Odometer? ......................................... 131
5.3 Restrictions on Odometer Tampering ............................. 132
5.3.1 Disconnecting, Resetting, or Altering Odometers ............ 132
5.3.2 Operating a Motor Vehicle with Knowledge the Odometer Is
Disconnected or Nonfunctional ...................................... 133
5.3.3 Selling of Unlawful Odometer Devices ....................... 133
5.4 Repair or Replacement of an Odometer .......................... 134
5.5 False Statements Made Outside the Disclosure Form ............ 135
5.6 Disclosure Requirements ........................................... 135
5.6.1 Introduction ...................................................... 135
5.6.2 Parties Responsible for Making Disclosures ................. 136
5.6.2.1 In General ..................................................... 136
5.6.2.2 Transferor and Transferee ................................ 136
5.6.2.3 Lessees ....................................................... 137
5.6.3 Transfers for Which Disclosures Must Be Made ............... 137
5.6.3.1 Transfers Broadly Defined .................................. 137
5.6.3.2 Repossessions, Transfers to Insurers, and Other Involuntary Transfers ........................................ 138
5.6.3.3 When Vehicle Sold at Auction ............................... 138
5.6.3.4 Transfer of Component Parts ............................... 139
5.6.3.5 Exclusion for Transfers of New Cars to Rental Car Companies ........................................ 139
5.6.4 Transfers NHTSA Exempts from Disclosure Requirements .... 139
5.6.4.1 General ...................................................... 139
5.6.4.2 Relation of NHTSA Exemptions to State Law ............. 140
5.6.4.3 Can the Transferor Waive the Exemption? ................. 140
5.6.4.4 Exemption for Vehicles over Ten Years Old ................ 140
5.6.4.5 Exemption for Transfers of New Cars to Dealers .......... 141
5.6.4.6 Exemptions for Heavy Trucks and Motor Homes, Trailers, Manufactured Homes, and Government Vehicles .... 141
5.6.5 Method of Making Disclosures .................................. 141
5.6.5.1 Introduction ................................................... 141
5.6.5.2 Disclosure Procedure for New Cars ......................... 142
5.6.5.3 Used Car Transfers Typically Make Odometer Disclosures
on the Old Title ......................................................... 142
5.6.5.4 Use of Additional Disclosure Form in Transfer of Used Vehicle ........................................ 143
5.6.5.5 Dealer to Dealer Transfers and the Use of Reassignment Forms ........................................ 143
5.6.5.6 Disclosures When Old Title Unavailable—
Use of Power of Attorney .............................................. 144
5.6.5.6.1 When powers of attorney are allowed ................. 144
5.6.5.6.2 Requirements for “first” powers of attorney .......... 145
5.6.5.6.3 Requirements for “second” powers of attorney ....... 146
5.6.5.6.4 Subsequent purchaser’s access to first power of attorney .................................................. 147
5.6.5.7 Alternative State Disclosure Systems for Electronic Titles ........................................... 147
5.6.6 Content of Mileage Disclosures .......................................................... 148
  5.6.6.1 General ........................................................................................................ 148
  5.6.6.2 Disclosure When Odometer Has “Turned Over” ........................................ 148
  5.6.6.3 Disclosure of Odometer’s Reading When Transferor Indicates That Reading Is Inaccurate ............................................................... 149
  5.6.6.4 Dealer Must Have Sufficient Basis to Claim That Odometer Is Not Accurate .................. 150
  5.6.6.5 When Lessor Transfers Ownership Without First Recovering Possession from the Lessee .............................................................. 150
  5.6.6.6 Cars Sold for Salvage ............................................................................. 151
  5.6.6.7 When a Used Vehicle Is Assembled from Parts or Restored ........................................ 152
  5.6.6.8 When a Repair Shop Resets the Odometer .................................................. 152
  5.6.6.9 When Vehicles Have Been Towed .................................................................. 152
  5.6.6.10 When Odometer Formerly Measured Kilometers Instead of Miles ............................ 153
5.6.7 Non-Mileage Disclosures ........................................................................................................ 153
  5.6.7.1 Content of Non-Mileage Disclosures ......................................................... 153
  5.6.7.2 Signature Requirements ........................................................................... 154
  5.6.7.3 NHTSA Authority to Require Non-Mileage Disclosures .............................. 154
5.6.8 Acceptance of Incomplete Disclosures ............................................................................. 155
5.6.9 Record Retention Requirements for Dealers, Distributors, Auction Companies, and Lessors ..................................................... 155
5.7 Conspiracy ............................................................................................................................ 155
5.8 The Intent Requirement ........................................................................................................ 156
  5.8.1 When Intent Must Be Shown Under the Federal Act ............................................ 156
  5.8.2 Need Intent Be Proven Under State Odometer Statutes? ..................................... 156
  5.8.3 General Standards Concerning Proof of Intent .................................................... 157
  5.8.4 Inferring Intent from Proof of Odometer Tampering ......................................... 158
  5.8.5 Inferring Intent When Disclosure Conflicts with Prior Disclosures ...................... 159
  5.8.6 Inferring Intent from Failure to Disclose or from Dealer’s Circumvention of Disclosure Requirement ..................................................... 159
  5.8.7 Inferring Intent When Inaccurate Disclosure Made Based on Incomplete Prior Disclosure ................................................................................... 160
  5.8.8 Inferring Intent from Dealer’s Failure to Investigate .......................................... 160
  5.8.9 Inferring Intent from a Carfax Report .................................................................. 162
  5.8.10 Does a Repossessing Creditor’s Lack of Investigation Show Intent? .................... 162
  5.8.11 When There Is a Pattern of “Clerical Errors” .................................................... 162
  5.8.12 Did the Dealer Attempt to Correct the Error? .................................................... 162
  5.8.13 Reliance on Invalid NHTSA Advice Makes Proof of Intent Difficult .................. 163
  5.8.14 Examples of Dealers Overcoming Presumption of Intent .................................... 163
  5.8.15 Courts Are Less Likely to Infer a Consumer’s Intent to Defraud ......................... 163
5.9 Consumer’s Waiver of Rights Under the Act ........................................................................ 164

Chapter 6 Remedies for MVICS A and State Odometer Act Violations

  6.1 Introduction ......................................................................................................................... 165
  6.2 Standing in Private Actions; No Privity Required .......................................................... 165
    6.2.1 Federal Act Does Not Restric t Standing ................................................................. 165
    6.2.2 Transferee Can Sue Prior Transferors; No Privity Required ................................... 166
    6.2.3 Plaintiff Need Not Be Current Title Owner ............................................................. 166
6.2.4 Parties Indirectly Affected by Odometer Violation ........................................ 166
6.2.5 Lessor and Lessee Suits Against Each Other ............................................... 167
6.2.6 Can Wrongdoer Sue Its Transferee or Transferor Under the Act? .................. 167
6.3 Do All Disclosure Violations Lead to a Private Right of Action? ....................... 167
6.4 Statute of Limitations .......................................................................................... 167
6.4.1 The Two-Year Rule Under the Federal Act ..................................................... 167
6.4.2 Statute of Limitations Under State Odometer Acts ...................................... 168
6.4.3 Use of Counterclaim or Recoupment When Statute of Limitations Has Run .... 169
6.5 Jurisdiction, Venue, and Right to Jury Trial Under the Federal Act ................. 169
6.5.1 Federal Court Jurisdiction .............................................................................. 169
6.5.2 Venue ............................................................................................................ 169
6.5.3 Right to Jury Trial .......................................................................................... 169
6.6 Choosing Between State and Federal Claims and Courts ............................... 169
6.6.1 Claim Selection Largely Determines Court Selection ..................................... 169
6.6.2 Factors in Choosing Between State and Federal Claims and Courts ............. 170
6.6.3 Benefits of Adding a State Odometer Claim to a Federal Act Claim ............. 171
6.7 Drafting the Complaint ...................................................................................... 171
6.8 Private Remedies ............................................................................................... 172
6.8.1 Treble Damages .............................................................................................. 172
6.8.1.1 General ....................................................................................................... 172
6.8.1.2 Diminished Value of the Vehicle ............................................................... 172
6.8.1.3 Computing Diminished Value When True Mileage Cannot Be Determined ... 174
6.8.1.4 Availability of Treble Damages When Consumer Seeks to Rescind the Transaction ................................................................. 174
6.8.1.5 Cost of Service Contracts, Other Voided Coverages ................................ 175
6.8.1.6 Costs to Determine Odometer Discrepancy ............................................ 175
6.8.1.7 Repair Costs and Substitute Transportation Expenses .......................... 175
6.8.1.8 Financing Costs and Other Charges That Are Higher Than Warranted Because of Vehicle’s Diminished Value ................................. 176
6.8.1.9 Other Consequential Damages .................................................................. 176
6.8.1.10 Prejudgment Interest ............................................................................... 176
6.8.2 Minimum Statutory Damages Awards Under the Federal Act ..................... 176
6.8.2.1 $10,000 Minimum Damages ...................................................................... 176
6.8.2.2 Prerequisites for Minimum Damage Award ............................................. 177
6.8.2.3 Statutory Damages Awarded Against Each of Multiple Defendants ........ 177
6.8.2.4 Each Transferee of a Vehicle Can Obtain Statutory Damages .................. 177
6.8.2.5 Multiple Statutory Damages Awards to One Plaintiff for One Defendant’s Multiple Violations ...................................................... 178
6.8.3 Statutory Damages Awards Under State Statutes ........................................ 178
6.8.4 Attorney Fees ................................................................................................ 178
6.8.5 Costs ............................................................................................................. 179
6.8.6 Class Actions ................................................................................................. 180
6.9 Government Enforcement .................................................................................. 180
6.9.1 Federal Enforcement ....................................................................................... 180
6.9.1.1 Inspections, Impoundments, and Investigations ....................................... 180
6.9.1.2 Civil Penalties Sought by the United States Department of Transportation ................................................................. 180
6.9.1.3 Federal Criminal Penalties .......................................................... 181
## Contents

6.9.1.4 Injunctive Relief Sought by United States Attorney General ............... 181
6.9.2 State Attorney General Enforcement of the Federal Act .......................... 182
6.9.3 State Attorney General Enforcement of State Act ................................... 182

Chapter 7

### Other Statutes Specifically Relating to Automobile Fraud

7.1 Introduction; Enforcement of State Automobile Fraud Statutes .................. 183
7.2 Statutes Dealing with Disclosure of Vehicle’s Prior Physical Damage ........... 184

#### 7.2.1 State Salvage Vehicle Statutes

7.2.1.1 Introduction ................................................................. 184
7.2.1.2 Constitutionality ............................................................ 184
7.2.1.3 Persons Covered ............................................................ 184
7.2.1.4 Definition of Salvage Vehicle .......................................... 185
7.2.1.5 Requirement That Title Be Exchanged for Salvage Certificate ............... 186
7.2.1.6 Titling, Resale, and Disclosure ........................................ 186
7.2.1.7 Buyer’s Waiver of Statutory Protections .............................. 188
7.2.1.8 State Vehicle Identification Number Laws .............................. 188
7.2.1.9 Interstate Transfers of Salvage Vehicles ............................... 189
7.2.1.10 Remedies ................................................................. 189

7.2.2 Used Car Damage Disclosure Statutes .............................................. 191

7.2.2.1 Overview ................................................................. 191
7.2.2.2 Requirements and Interpretations ..................................... 191
7.2.2.3 Remedies for Violations of Used Car Damage Disclosure Statutes .......... 194
7.2.2.4 Used Vehicles Such As Demonstrator Vehicles Covered by New Car Damage Disclosure Laws .......... 194

7.2.3 New Car Damage Disclosure Statutes .............................................. 195

7.2.3.1 Practices Covered .......................................................... 195
7.2.3.2 Threshold Amounts of Damage Requiring Disclosure ..................... 195
7.2.3.3 Type of Damage That Must Be Disclosed ................................ 196
7.2.3.4 Timing of Disclosure Requirement ...................................... 196
7.2.3.5 Actual Knowledge Precondition .......................................... 196
7.2.3.6 Remedies ................................................................. 197
7.2.3.7 Statutes Shield Dealers from Consumer Remedies When Threshold Damage Amount Is Not Reached .......... 197

7.2.4 Special Requirements for Water-Damaged Vehicles ............................... 198
7.2.5 Dealer Responsibility to Inspect Vehicles ......................................... 198

7.3 Statutes Dealing with Disclosure of Vehicle’s Prior Use ............................ 199

7.4 State Laws Requiring Disclosure of Gray Market Origin ........................... 201

7.5 State Airbag Laws .............................................................................. 202

7.6 State Lemon Laundering Statutes ........................................................... 203

7.6.1 General ...................................................................................... 203
7.6.2 Application to “Goodwill” and Other “Voluntary” Buybacks .................. 203
7.6.3 Must the Manufacturer Be the Entity Buying Back the Vehicle? ............... 204
7.6.4 Lack of Privity Should Not Be a Defense to a Lemon Laundering Claim .......... 204

7.6.5 Application of Lemon Laundering Statutes to Multistate Transactions .......... 204
7.6.6 Remedies for Violations of Lemon Laundering Laws .............................. 205

7.7 Dealer Licensing Statutes ....................................................................... 206

7.7.1 Relevance of Dealer Licensing Statutes to Consumer Claims ................. 206
7.7.2 Liberal Interpretation of Licensing Statutes and Regulations .................... 206
Automobile Fraud

7.7.3 Scope .................................................................................. 206
7.7.4 Compliance with State Title Laws .......................................... 207
7.7.5 Performance of Sales Contracts, Violations of Odometer Laws,
    and Fraud .............................................................................. 207
7.7.6 Recordkeeping Requirements .................................................. 208

7.8 Statutes Regulating Automobile Auctions ....................................... 208
7.8.1 Recordkeeping Requirements .................................................. 208
7.8.2 Disclosure and Title-Branding Requirements .............................. 209
7.8.3 Other Requirements ............................................................... 209
7.8.4 Private Remedies ................................................................. 209

7.9 Special Statutory Causes of Action for Automobile Fraud ............... 209

Chapter 8

Common Law Fraud, Deceit, and Misrepresentation

8.1 Advantages and Disadvantages .................................................... 215
8.2 Basic Elements of a Fraud Action .................................................. 216
8.3 Material Misrepresentations ............................................................. 216
    8.3.1 Representation Must Have Been Misleading ............................ 216
    8.3.2 Representation Must Have Been Material .................................. 217
    8.3.3 Fraud by Affirmative Statements .............................................. 217
        8.3.3.1 General; What Is a Statement ........................................... 217
        8.3.3.2 Fact Versus Opinion; Promissory Fraud ............................... 218
        8.3.3.3 Examples of Actionable Statements .................................... 219
    8.3.4 Fraud by Active Concealment ............................................... 220
    8.3.5 Fraud by Silence (Nondisclosure) .......................................... 220
        8.3.5.1 General ................................................................. 220
        8.3.5.2 Half-Truths .......................................................... 221
        8.3.5.3 Seller’s Superior Knowledge ........................................... 222
        8.3.5.4 Statutory Duty to Disclose ............................................ 225
    8.3.6 Automobile Fraud Precedent Listed by Type of Misrepresentation .. 226

8.4 Scienter—the Seller’s Knowledge That the Representation Is Misleading .. 230
    8.4.1 General ................................................................. 230
    8.4.2 Whose Knowledge? ...................................................... 230
    8.4.3 Degree of Knowledge ...................................................... 231
        8.4.3.1 General .......................................................... 231
        8.4.3.2 Actual Knowledge ................................................ 231
        8.4.3.3 Recklessness ....................................................... 232
        8.4.3.4 Duty to Inspect As Aid to Finding of Recklessness ............ 233
        8.4.3.5 Negligent Misrepresentation ....................................... 235
        8.4.3.6 Innocent Misrepresentation ......................................... 237

8.5 Intent to Induce ........................................................................ 238
    8.5.1 General ................................................................. 238
    8.5.2 Remote Sellers and Others Not in Privity with Buyer ............... 238

8.6 Justifiable Reliance ................................................................ 240
    8.6.1 General ................................................................. 240
    8.6.2 Proving Reliance ...................................................... 240
    8.6.3 When Is Reliance Justifiable? ............................................ 241
    8.6.4 Puffery ................................................................. 243

8.7 Proof of the Fraud Claim ............................................................ 244
    8.7.1 Standard of Proof: Clear and Convincing Evidence Versus
        Preponderance of Evidence ............................................. 244
    8.7.2 Parol Evidence Rule ...................................................... 245

8.8 Defenses .................................................................................. 245
## Contents

8.8.1 Effect of Merger Clause or Disclaimer of Oral Representations ........................................... 245
8.8.2 Effect of “As Is” Clause ........................................................................................................... 247
8.8.3 Disclosure of the Existence or Possibility of Defects or Repairs ........................................... 249
8.8.4 Custom of Trade ....................................................................................................................... 249
8.8.5 Preemption by Other Statutes and Election of Remedies ..................................................... 250
8.8.6 Fraud by the Consumer .......................................................................................................... 251

8.9 Actual Damages .......................................................................................................................... 251
8.9.1 General .................................................................................................................................. 251
8.9.2 Measure of Actual Damages: Benefit-of-the-Bargain Versus Out-of-Pocket Damages ........... 253
8.9.3 Causation ............................................................................................................................... 253
8.9.4 Plaintiff’s Duty to Mitigate Damages ..................................................................................... 254

8.10 Punitive or Exemplary Damages .............................................................................................. 254
8.10.1 Availability of Punitive Damages ......................................................................................... 254
8.10.2 Actual Damages As Precondition to Punitive Damages ...................................................... 255
8.10.3 Are Punitive Damages Available When the Plaintiff Seeks Rescission? .............................. 256
8.10.4 State Criteria for Award of Punitive Damages ..................................................................... 257
8.10.5 Liability of Principals for Punitive Damages Due to the Conduct of Their Agents .......... 259
8.10.6 State Statute May Limit Size of Punitive Damages Award .................................................. 259
8.10.7 Effect of Treble Damages Provision of State Odometer Statute ........................................... 264
8.10.8 Examples of Punitive Damages Awards in Automobile Fraud Cases ................................. 265

8.11 Constitutional Limits on Punitive Damages ............................................................................. 266
8.11.1 Overview of the Supreme Court’s Decisions on Substantive Limits on Punitive Damages. 266
8.11.2 Reprehensibility .................................................................................................................... 268
8.11.2.1 Factors to Determine Reprehensibility .......................................................................... 268
8.11.2.2 Physical Versus Economic Harm .................................................................................... 268
8.11.2.3 Risks to Health or Safety of Others .............................................................................. 268
8.11.2.4 The Vulnerability of the Plaintiff ................................................................................... 270
8.11.2.5 Evidence of Repetition ....................................................................................................... 270
8.11.2.5.1 Relevance of evidence of repetition .......................................................................... 270
8.11.2.5.2 Limits on use of evidence of repetition ...................................................................... 271
8.11.2.6 Intent, Malice, Trickery, or Deceit ................................................................................. 272
8.11.2.7 Reprehensibility When There Are Multiple Claims ......................................................... 272
8.11.3 The Ratio of Punitive Damages to Compensatory Damages .............................................. 272
8.11.3.1 The Supreme Court’s Ratio Rulings .............................................................................. 272
8.11.3.1.1 *Gore, State Farm,* and *Philip Morris* .................................................................... 272
8.11.3.1.2 *Exxon Shipping Co. v. Baker* as interpreting maritime law.......................................... 273
8.11.3.2 Justifying a High Ratio .................................................................................................... 274
8.11.3.3 Treatment of Emotional Distress and Other Intangible Harm ......................................... 278
8.11.3.4 Increasing the Ratio When Previous Awards Have Not Achieved Deterrence ................ 279
8.11.3.5 Including All Actual and Potential Harm to the Plaintiff in the Ratio ............................ 280
8.11.3.5.1 Potential harm to the plaintiff ....................................................................................... 280
### Chapter 8

#### 8.11.3.5.2 What can be included in the compensatory damages award to which punitive damages are compared? 281

#### 8.11.3.5.3 Harm that the plaintiff suffers but that cannot be included in the compensatory award. 282

#### 8.11.3.5.4 Treatment of multiple claims 283

#### 8.11.3.5.5 Using the right ratio for the right defendant. 283

#### 8.11.4 Presenting Evidence of Other Penalties for the Specific Conduct at Issue 284

##### 8.11.4.1 The Supreme Court’s Description of This Guidepost 284

##### 8.11.4.2 Comparable Penalties in Automobile Fraud Cases 285

###### 8.11.4.2.1 Revocation of business license. 285

###### 8.11.4.2.2 Civil penalties under UDAP statutes and FTC Act 286

###### 8.11.4.2.3 Statute that caps punitive damages can give defendant fair notice of potential liability 286

##### 8.11.4.2.4 Criminal penalties 287

#### 8.11.5 Presenting Evidence of Defendant’s Wealth When Appropriate 287

#### 8.11.6 Framing Jury Instructions 289

#### 8.11.7 Trial Court and Appellate Review of Punitive Damages Awards 290

#### 8.11.8 *Gore* Standards Do Not Limit Statutory or Multiple Damages 290

##### 8.11.8.1 Introduction 290

##### 8.11.8.2 The Supreme Court Has Upheld the Constitutionality of Statutory Damages Without Regard to Their Ratio to Actual Harm 291

##### 8.11.8.3 Fair Notice Is Provided by Statutory Damage Provisions 291

##### 8.11.8.4 Comparison of Actual Harm to Punitive Damages May Be Impossible 292

##### 8.11.8.5 Many Statutory and Multiple Damages Provisions Are Compensatory Rather Than Punitive in Nature 292

##### 8.11.8.6 Statutory Damages Are Not Decided in an “Imprecise Manner” 292

#### 8.12 The Rescission Remedy 293

##### 8.12.1 Advantages and Disadvantages 293

##### 8.12.2 Consumer’s Slowness in Responding, Other Conduct May Preclude Rescission 294

##### 8.12.3 Election of Damages Versus Rescission Remedy After Case Is Filed 295

---

### Chapter 9

Warranty, Mistake, UDAP, RICO, Unconscionability, Negligence, and Contract Claims

#### 9.1 Introduction 297

#### 9.2 Warranty Claims 297

##### 9.2.1 Advantages and Disadvantages in Automobile Fraud Cases 297

##### 9.2.2 Dealer’s Breach of Warranty of Title 298

###### 9.2.2.1 Nature of Warranty of Title 298

###### 9.2.2.2 Application of Warranty of Title to Automobile Fraud Cases 299

###### 9.2.2.3 Disclaimer of Warranty of Title 301

###### 9.2.2.4 Remedies for Breach of Warranty of Title 301

###### 9.2.2.4.1 UCC remedies 301
Contents

9.8 Negligence .......................................................... 348
9.9 Breach of Contract ............................................... 349

Chapter 10 Litigating Automobile Fraud Cases

10.1 Introduction ......................................................... 351
10.2 Advising the Automobile Fraud Client .................................. 351
  10.2.1 Need for Expert Inspection ................................... 351
  10.2.2 Consumer Must Decide Whether to Withhold Payments and
         Whether to Return the Car ...................................... 351
  10.2.3 How to Return the Vehicle ..................................... 352
  10.2.4 Withholding Payments ......................................... 352
  10.2.5 Asking the Consumer to Perform Preliminary Steps .......... 353
  10.2.6 Placing the Attorney-Client Relationship on a Sound Footing .... 353
  10.2.7 Documenting Damages ......................................... 353
10.3 Pleading and Jurisdiction .......................................... 354
  10.3.1 Selecting Claims to Plead ..................................... 354
  10.3.2 Drafting the Complaint to Preserve Consumer’s Choice of Forum ... 355
  10.3.3 Federal Jurisdiction ........................................... 355
     10.3.3.1 Advantages and Disadvantages of Federal Court .......... 355
     10.3.3.2 Supplemental Jurisdiction over State Law Claims ....... 356
     10.3.3.3 Framing Misrepresentation Claims As Federal Odometer
            Claims .......................................................... 356
  10.3.4 Personal Jurisdiction over Out-of-State Defendants ............ 356
     10.3.4.1 General Rules ............................................ 356
     10.3.4.2 Long-Arm Jurisdiction over Out-of-State Vehicle Sellers .. 357
     10.3.4.3 Internet Sales ............................................ 359
  10.3.5 Mandatory Arbitration Clauses ................................ 360
     10.3.5.1 Introduction .............................................. 360
     10.3.5.2 Arbitration Agreement’s Existence and Application
            to the Parties and the Dispute .............................. 360
     10.3.5.3 Unconscionability or Denial of Federal Statutory Rights ... 361
     10.3.5.4 Are Magnuson-Moss Act Claims Subject to Arbitration? ... 362
     10.3.5.5 Federal Laws Limiting Mandatory Arbitration ............ 362
     10.3.5.6 Waiver of the Arbitration Requirement ................... 363
     10.3.5.7 Who Decides Arbitrability—the Court or the Arbitrator? .... 363
     10.3.5.8 Class Arbitration ......................................... 363
     10.3.5.9 Individual Arbitration Seeking Punitive Damages .......... 363
10.4 Liability of Potential Defendants ................................ 364
  10.4.1 Strategic Considerations ....................................... 364
  10.4.2 Potential Defendants .......................................... 364
  10.4.3 Ratification, Acceptance of Benefits, Civil Conspiracy,
         and Aiding and Abetting ........................................ 365
     10.4.3.1 Introduction .............................................. 365
     10.4.3.2 Ratification .............................................. 365
     10.4.3.3 Knowing Acceptance of Benefits of Fraud ............... 366
     10.4.3.4 Civil Conspiracy ......................................... 366
     10.4.3.5 Aiding and Abetting ..................................... 367
  10.4.4 Recovering from the Creditor for the Dealer’s Misconduct .... 367
10.4.5 Liability of Automobile Auctions ................................ 368
  10.4.5.1 Liability for Its Own Acts and the Acts of an
           Undisclosed Principal ........................................ 368
  10.4.5.2 Liability Under Federal Odometer Act ..................... 369
Contents

10.8.7 Witness Testimony ................................................. 393
  10.8.7.1 Previous and Subsequent Owners ......................... 393
  10.8.7.2 Testimony and Statements of Adverse Parties and
           Persons Associated with Adverse Parties .................. 394
  10.8.7.3 Mechanic Testimony ........................................ 394
  10.8.7.4 Questioned Document Examiners .......................... 395
  10.8.7.5 Other Expert Witnesses ................................. 397
  10.8.7.6 Meeting Daubert Standards .............................. 398
  10.8.7.7 Witnesses Who Have Received Use Immunity for
           Previous Testimony ....................................... 398
  10.8.7.8 Defendants’ Assertion of Fifth Amendment Privilege .... 399

10.8.8 Documentary Evidence .......................................... 401
  10.8.8.1 Title and Registration Documents ....................... 401
  10.8.8.2 Summary Title History Reports ........................... 402
  10.8.8.3 Records of Dealer, Manufacturer, Auction House,
           Repair Shop, and Other Business Entities .................. 402
  10.8.8.4 Simplifying Admission of Documentary Evidence ......... 403

10.8.9 Use of Criminal Conviction to Establish Liability by
        Collateral Estoppel ............................................ 403

10.9 Trial of Automobile Fraud Cases .................................. 404
  10.9.1 Preparing for Jury Trial ..................................... 404
  10.9.2 Motions in Limine ............................................. 404
  10.9.3 Voir Dire ....................................................... 405
  10.9.4 Conduct of the Trial .......................................... 407
  10.9.5 Use of Exhibits at Trial ...................................... 407
  10.9.6 Countering Defense Arguments .............................. 408
  10.9.7 Arguing for Punitive Damages .............................. 409
  10.9.8 Helping Fraud Victims Prepare to Testify ................. 410
  10.9.9 Opening Statements .......................................... 411
  10.9.10 Order of Witnesses .......................................... 411
  10.9.11 Defense Attempts to Limit Use of the Word “Lemon” ...... 411
  10.9.12 Should the Jury Be Told That Actual Damages Will Be Trebled? 412
  10.9.13 Closing Arguments ........................................... 413

10.10 Damage Awards ..................................................... 414
  10.10.1 Direct Actual Damages ......................................... 414
    10.10.1.1 Benefit of the Bargain Versus Out-of-Pocket Damages 414
    10.10.1.2 Proving Diminished Value of Vehicle ................. 415
    10.10.1.3 When to Utilize Used Car Valuation Guides .......... 417
    10.10.1.4 Introduction of Used Car Guides into Evidence .... 418
  10.10.2 Cancellation and Recovery of Amount Paid ............... 419
    10.10.2.1 In General ............................................... 419
    10.10.2.2 Relation to Recovery for Diminished Value .......... 419
    10.10.2.3 Treble Damages and Restitution ...................... 419
  10.10.3 Incidental and Consequential Damages ....................... 420
    10.10.3.1 General .................................................. 420
    10.10.3.2 Emotional Distress Damages ........................... 421
  10.10.4 Damages in Lease Transactions .............................. 424
    10.10.4.1 In General ............................................... 424
    10.10.4.2 Damages When the Consumer Cancels the Lease ....... 425
    10.10.4.3 Incidental and Consequential Damages ............... 425
  10.10.5 Statutory Damages ............................................ 425
  10.10.6 Punitive Damages ............................................. 425
Automobile Fraud

10.11 Settlement ......................................................................................................................... 426
  10.11.1 Settlement Negotiations ............................................................................................... 426
    10.11.1.1 Negotiation Strategy ............................................................................................... 426
    10.11.1.2 Settlement with Financially Shaky Defendants ...................................................... 427
    10.11.1.3 Last-Minute Settlements ....................................................................................... 428
    10.11.1.4 Seeking Partial Summary Judgment to Speed Settlement .................................... 428
    10.11.1.5 Mediation ................................................................................................................ 428
    10.11.1.6 Dealing with Multiple Defendants and the Dealer’s Insurer ................................. 429
  10.11.1.7 Settlements Without Adequate Attorney Fees ......................................................... 430
  10.11.2 Settlement Terms ........................................................................................................... 430
    10.11.2.1 Prompt Payment ..................................................................................................... 430
    10.11.2.2 Dealer’s or Consumer’s Subsequent Resale of Suspect Vehicle ............................. 431
    10.11.2.3 Protecting the Consumer’s Credit Report .............................................................. 431
    10.11.2.4 Confidentiality Agreements .................................................................................... 431
    10.11.2.5 Other Terms and Clauses ....................................................................................... 432
    10.11.2.6 Court Costs and Financing Costs ......................................................................... 432
    10.11.2.7 Protecting Against the Defendant’s Bankruptcy .................................................... 432
  10.12 Attorney Fees in Automobile Fraud Cases ..................................................................... 433
    10.12.1 Availability of Attorney Fees ..................................................................................... 433
    10.12.2 Pleading Attorney Fees and Other Initial Steps to Obtain Fees ............................... 433
    10.12.3 Standards for Determining Fees .............................................................................. 434
    10.12.4 Procedure for Requesting Fees .................................................................................. 435
    10.12.5 Attorney Fees When Case Is Settled ......................................................................... 435
  10.13 Collecting the Judgment .................................................................................................. 436
    10.13.1 Collecting Against the Defendant’s Assets ................................................................. 436
      10.13.1.1 Locating Dealer Bank Accounts .......................................................................... 436
      10.13.1.2 Collecting from Debts Owed to the Dealer ........................................................... 436
      10.13.1.3 Finding Hidden Dealer Assets ............................................................................ 436
        10.13.1.3.1 Information from and payments owed by manufacturer ................................ 436
        10.13.1.3.2 Dealer assets on the premises .................................................................... 436
        10.13.1.3.3 Information from dealer’s former and current employees ............................ 437
        10.13.1.3.4 Information held by auction houses ............................................................... 437
        10.13.1.3.5 Information from public agencies and lending institutions ........................... 438
      10.13.1.4 Collecting Against Manufacturers ....................................................................... 438
    10.13.2 Effect of Defendant’s Appeal on Collection ............................................................... 438
    10.13.3 Reaching the Dealer’s Insurance Policy .................................................................... 438
    10.13.4 Collecting on a State-Mandated Bond ..................................................................... 439
      10.13.4.1 In General ............................................................................................................. 439
        10.13.4.1.1 Requirement to post a bond; construing bonding statutes ........................... 439
        10.13.4.1.2 Procedure for invoking bond ...................................................................... 439
      10.13.4.2 What Claimants Does the Dealer’s Bond Protect? .............................................. 440
      10.13.4.3 Necessity to Prove Fraud or Specific Type of Conduct ....................................... 441
        10.13.4.3.1 Types of misconduct covered by the bond .................................................... 441
## Contents

10.13.4.3.2 Whether a judgment establishes the qualifying misconduct .......................... 442
10.13.4.4 Recovery of Different Types of Damages Under a Bond ......................... 442
10.13.4.5 Attorney Fees Collectable Under a Bond .............................................. 443
10.13.4.6 Bond Limitations on the Size of a Recovery ........................................ 444
10.13.4.7 Surety’s Liability After a Bond Has Expired ........................................ 445
10.13.4.8 Statute of Limitations for Claims on a Bond ......................................... 446
10.13.4.9 Other Limitations on a Bond’s Applicability .......................................... 446
10.13.4.10 Recovery Against a Bond When Dealer Files Bankruptcy ..................... 446
10.13.4.11 Tips for Recovering Against a Bond ..................................................... 447
10.13.5 Consumer Recovery Funds .......................................................................... 447

### Appendix A Federal Statutes

A.1 The Motor Vehicle Information and Cost Savings Act ........................................ 449
  A.1.1 Introduction ......................................................................................... 449
  A.1.2 Text of the Act .................................................................................. 449
  A.1.3 Conversion Table ............................................................................. 453
    A.1.3.2 49 U.S.C. Sections to 15 U.S.C. Sections ................................. 454
  A.1.4 Legislative History ............................................................................ 454
    A.1.4.1 Introduction ................................................................................. 454
    A.1.4.2 1972 Act ..................................................................................... 454
    A.1.4.3 1976 Amendments .................................................................. 455
    A.1.4.4 1986 Amendments .................................................................. 455
    A.1.4.5 1988 Amendment .................................................................... 456
    A.1.4.6 1990 Amendment .................................................................... 456
    A.1.4.7 1994 Recodification ................................................................ 456
    A.1.4.8 1996 Appropriations Bill .............................................................. 456
    A.1.4.9 1998 Amendments ................................................................ 456
    A.1.4.10 2012 Amendments ................................................................ 456
    A.1.4.11 2015 Amendment ................................................................ 456
A.2 Driver’s Privacy Protection Act, 18 U.S.C. §§ 2721–2725 ................................. 456

### Appendix B Federal Regulations

B.1 Regulations Under the Motor Vehicle Information and Cost Savings Act
  (Odometer Disclosures) ........................................................................... 461
  B.1.1 Odometer Disclosure Requirements, 49 C.F.R. §§ 580.1–580.17 .............. 461
  B.1.2 Selected Excerpts from Supplementary Information to Odometer Disclosure Requirements ............................................................................................................. 467
    B.1.2.1 Supplementary Information to Proposed Revisions of Odometer Disclosure Requirements, 52 Fed. Reg. 27,022 (July 17, 1987) ........................................ 467
B.1.2.6 Supplementary Information to Interim Final Rule on Exemptions, 62 Fed. Reg. 47,763 (Sept. 11, 1997) .........482
B.1.2.7 Supplementary Information to Final Rule on Exemptions, 63 Fed. Reg. 52,630 (Oct. 1, 1998) .................................482

B.1.3 Administrative History ........................................483

B.2 Vehicle Identification Number (VIN) Requirements, 49 C.F.R. §§ 565.1–565.26 .........................................................484


Appendix C State Laws Relating to Automobile Fraud .........................495

Appendix D State Statutes and Regulations Relating to Yo-Yo Sales ........535

Appendix E State-by-State Information on Requesting Title Histories ........541

Appendix F State Automobile Dealer Licensing Offices ..................549

Appendix G Sample Pleadings Available Online
G.1 Sample Complaints .........................................................555
G.2 Sample Discovery ..........................................................555
G.3 Sample Jury Trial Documents .............................................555
G.4 Sample Motions and Briefs ...............................................556
G.5 Sample Class Action Pleadings for Odometer Rollback Cases ........556
G.6 Sample Attorney Fee Documents ........................................557

Appendix H Websites Related to Automobile Fraud .........................559

Index .................................................................561