
CONSUMER FINANCE PODCAST – FTC CONSENT ORDER WITH AUTO DEALER AND PROPOSED RULE**HOST: CHRIS WILLIS****GUEST: BROOKE CONKLE****POSTED: NOVEMBER 3, 2022****Chris Willis:**

Welcome to the Consumer Finance Podcast. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. And I'm really happy that you've joined us for our episode today on the new FTC Consent Order with Passport, which is an auto dealership.

But before we jump into that, let me remind you to visit and subscribe to our blog, ConsumerFinancialServicesLawMonitor.com, where we cover everything that's going on in the consumer finance industry every day. And don't forget to check out our other podcasts. We have several of them. We have *FCRA Focus* all about credit reporting, *The Crypto Exchange* about all things crypto and our privacy and data security podcast called *Unauthorized Access*. All of those are available on all popular podcast platforms. So please go check them out.

And if you like our podcast, let us know. Leave us a review on the podcast platform of your choice so we can hear your comments. So as I said today, we're going to be talking about the most recent of the Federal Trade Commission's consent orders with an auto dealership called Passport. And joining me to talk about that is one of my colleagues, Brooke Conkle. Brooke is a member of our Consumer Financial Services Group in our Richmond office and does lots and lots of work in the auto finance space. And so, she's the perfect person to talk to us about this development. So, Brooke, thanks for being on the podcast today.

Brooke Conkle:

Hi, Chris. Thanks for having me.

Chris Willis:

We've seen the FTC come out with a number of these auto dealer cases, *Napleton* being the one that's most recent before this one, *Passport*. So just give the audience a little bit of background about what happened in the *Passport* case. What's this consent order all about?

Brooke Conkle:

There are really three areas where the FTC said that Passport violated the law. The first is that according to the FTC, in numerous instances where consumers tried to purchase particular vehicles for the advertised price, Passport would then charge, essentially a markup in fees.

And then secondly, the FTC argued that Passports had a discretionary markup practice that resulted in Black and Latino customers having to pay higher markups. According to the FTC, the disparities were pretty significant. And the FTC alleged that Passport charged Black customers on average close to \$300 more than their White counterparts, and on average \$235 more for Latino customers.

And then finally, the FTC alleged that Passport charged Black and Latino customers additional fees for markups like extra inspections, reconditionings, vehicle preparation and certification

fees that their White counterparts were not charged. And so, because of these allegations, the FTC entered into a consent order with Passport that will require Passport to pay \$3.38 million and the FTC will redistribute that to affected customers.

And then there are injunctive terms to the consent order as well that will require Passport essentially to stop these practices, a broad prohibition on misrepresenting the costs or terms to buy vehicles, requirements that the Passport dealerships get consumer's express informed consent before charging them any fees.

And Chris, we'll talk about how that kind of dovetails with the proposed rule that the FTC has made. And then finally, prohibitions on the dealership charging different groups for different markups and a requirement that all employees involved in the extension of credit receive fair lending training.

Chris Willis:

Okay. So, thanks for that summary of the consent order. And you've already teased the next thing that I was thinking to ask you about, which was part of this consent order relates to the sale of ancillary or optional products in connection with the auto purchase and finance transaction. And we've got a proposed rule sort of churning with the FTC about that, give the audience a little bit of a reminder of what that proposed rule would do and how it relates to the allegations and the relief in the *Passport* case.

Brooke Conkle:

The proposed rule would require dealerships to provide a number of disclosures about fees including add-on products before the sale of a vehicle is consummated. So, what we see here is the FTC essentially previewing what they will require in the FTC order in this consent order where Passport is required to get consumers express informed consent before charging any fees.

That is essentially kind of in a nutshell, one of the standard requirements of the FTCs proposed rule. And as we've discussed previously, that's going to be a rule that's going to have a lot of burdens on dealerships specifically with regard to paperwork. And one of the FTCs problems with the sales transactions at dealerships is all of the paperwork that's involved.

And as we've joked, what's the FTC solution to that? More paperwork, so we see that here that Passport is going to be required to get express informed consent, usually in writing, before charging add on fees for any sort of ancillary products. And that's something that is inherent in the new proposed FTC rule.

Chris Willis:

And Brooke, you make the point that there's going to be a lot more paperwork for dealers, but I don't think that they're going to be alone in dealing with the burden of this new FTC rule. Because even though the FTC rule is not explicitly directed at auto finance companies, indirect auto finance companies, I note that the proposed rule has all these record keeping requirements, which you just mentioned.

And one would think that provision in the proposed rule is sort of an overture to allowing the CFPB or the FTC if it wants for a non-bank to basically say, well, as a matter of dealer oversight, you need to be looking at all this record keeping to make sure that the auto dealers are complying with the new FTC rule. And so, my belief is that the record keeping requirements

are there not just for that purpose, but that's one of the purposes for it. Are you on board with me with that?

Brooke Conkle:

Absolutely. And I'll say looking at it from a litigation perspective, the proposed rule dovetails with additional pronouncements from the FTC that are recent for this administration. And specifically looking at the Holder Rule, historic understanding of the Holder Rule was that an auto finance company's liability would be limited to the amount that a customer has paid under the retail installment sales contract.

The FTC sort of reversed that historic understanding that has been around for 50 years in a quietly published paper that said, actually no, if a consumer protection statute permits the recovery of attorney's fees, then a consumer can recover their attorney's fees above and beyond what they paid under the retail installment sales contract.

They can recover that against the holder of the contract, so the auto finance company. So we see all of these additional burdens that are being placed on dealers. And then we're going to see that just as you said, translate to the auto finance companies too.

Where just as you said, there are going to be compliance challenges related to maintaining kind of an overview and oversight of what is happening on the dealer level, but also translating that exposure for potentially above and beyond what folks have paid under the contract, translating that exposure into litigation as well.

Chris Willis:

As we've been talking about the Passport consent order, I felt a strange sense of similarity to things that I feel like I've been hearing from the CFPB over the course of the last year. Can you tell me, is that feeling correct? Are there commonalities between what we've seen the FTC do in this *Passport* case and stuff we've been seeing and hearing from the CFPB over the course of the last 12 months or so?

Brooke Conkle:

Chris, you've hit the nail on the head. There are two areas in this consent order that dovetail perfectly with the aims and the strategies of the CFPB and its fees and its discrimination. You and I've talked about this before, but the CFPB has declared war on what they term junk fees.

You see the same language and the same initiatives in this order where the FTC is saying that Passport charged customers for fees that were kind of above and beyond what other customers were being charged. And the FTC is looking at those fees and saying, those are junk fees.

And then to go along with that, the FTC is using the FTC order in a way that historically it really has not been used, and that's to target discrimination. And you look at those two areas of emphasis, fees and discrimination, and that's going hand in hand with what the CFPB is looking at right now.

Chris Willis:

When honestly, it seems like in so many areas, the CFPB and the Federal Trade Commission are marching arm in arm now. They've adopted some of the same terminology like junk fees or dark patterns, for example, which is a term coined by the FTC several years ago that the CFPB is now using.

And you've mentioned something else that I think is especially important for our listeners that I want to talk with you about for a moment. And that is the idea of the FTC asserting in this consent order that discrimination is unfair within the meaning of section five of the Federal Trade Commission Act. First of all, that's the first time the FTC has officially done this, right?

Brooke Conkle:

Yes, that's exactly right. What's interesting about the complaint in this case, there are four counts. Three are under the FTC Act and one is under ECOA. So, the three claims under the FTC Act go to the first one, misrepresentations regarding advertised prices, the second count, representations regarding charges, and the third count, unfair discrimination.

And just as you mentioned, that's really the first time that we've seen the FTC take the FTC Act and use its elasticity to cover unfair discrimination. And a lot of the comments that are in the dissent to the consent order really hammer this home. Commissioner Phillips, who was a Trump appointee, looks at count three and says in his words, "This count is entirely gratuitous, that we already have these allegations covered by ECOA, how is this also falling under the FTC Act?"

Commissioner Phillips highlights the difference between disparate treatment and disparate impact. And he looks at the complaint and says, we don't have allegations necessarily of disparate treatment, we have allegations of disparate impact. And according to Commissioner Phillips, the FTC has not made the appropriate findings that it needs to find that these acts and allegations constitute disparate impact. But what he really highlights is just as you mentioned, Chris, this is the first time that the FTC Act has been stretched to include discrimination.

And the three commissioners who are in the majority really said, absolutely not, the FTC Act has historically been understood to be read broadly, and the FTC when implementing the act is supposed to be considering public policies as evidence. And that's kind of what they're pointing to, to sort of add all of these new understandings of what's covered by the FTC Act into this consent order.

Chris Willis:

Well, and here again we have another similarity with the CFPB, don't we? Because in March of 2022, the CFPB made basically the identical announcement, that it considered the use of the word unfair in its UDAP statute in Title X of the Dodd-Frank to also prohibit discrimination. And it amended its UDAP examination manual to reflect this.

And so, you've got both agencies taking the same position under essentially identical statutes. But of course, this is not free from controversy as you have foreshadowed. Not only do you have this dissenting opinion from one of the FTC commissioners, but you recently had a bunch of trade associations, including the US Chamber of Commerce file a lawsuit against the CFPB in the Eastern District of Texas to actually have the court declare that discrimination is beyond the purview of the word "unfair" in Dodd-Frank.

And one of the points that's raised in that complaint is the recent Supreme Court decision in *West Virginia v. EPA*, which I'll just paraphrase for a second, but it says, hey, when an agency takes a long standing statute and interprets it in a novel and very impactful way, we, the Supreme Court will not merely ask if the agency's interpretation of the statute is a permissible reading of the words, but we will look for some sort of affirmative evidence of congressional authorization for this new expansive interpretation.

And although the CFPB statute isn't that old, it was just passed 2010, Section 5 of the FTC Act is a hundred years old. And it seems to me that the FTC's action here is even more vulnerable

to an attack based on *West Virginia v. EPA* than the CFPB'S announcement was. And it's already in litigation by these trade associations. Can you give us your take on that?

Brooke Conkle:

I would agree wholeheartedly, and I think Commissioner Phillips would agree with you too. And in his dissent, he mentioned if the FTC Act is an anti-discrimination statute that brings in disparate impact, then the commission all of a sudden has much more power than they have had historically.

One of the examples that he provides in his dissent is, if Spotify chooses to promote Ed Sheeran more than it chooses to promote our national treasurer, Taylor Swift, then that could be considered discrimination under the FTC Act and under the new commission's interpretation of just how broad we can take the FTC Act.

And he closes his dissent by saying, I guess, we'll just have to wait and see what this new commission declares illegal because it is not bounded in any sort of historical interpretation of the FTC Act.

Chris Willis:

Yeah. Well, we will have to wait and see not just in what the commission does, but what the courts do with this, because this strikes me to be a position that is extreme enough that it's likely to draw a court challenge at some point, like the one that's pending against the CFPB now.

And again, I don't see how you have a great argument to sustain this in the face of what the Supreme Court said in that *West Virginia* case. We'll just take a look and see what happens. But it's interesting that even on this issue, the idea that discrimination is unfair, you've got the FTC and the CFPB, again marching lockstep with one another as they are in these other issues that you mentioned, Brooke.

Brooke, thanks very much for joining us on the podcast today, and I think it's evident to the audience just how expert you are on these matters, and it's really wonderful to have you on the podcast to share your insights with the audience.

And of course, thank you to our audience for listening as well. Don't forget to visit us at our blog, ConsumerFinancialServicesLawMonitor.com and hit that subscribe button so that you can get all of our daily updates about what's going on in the world of consumer finance.

And while you're at it, go and visit us over at Troutman.com and add yourself to our Consumer Financial Services email list so that you can get alerts that we send out and invitations to our industry only webinars. And of course, stay tuned for a great new episode of this podcast coming out every Thursday afternoon. Thank you all for listening.

Copyright, Troutman Pepper Hamilton Sanders LLP. These recorded materials are designed for educational purposes only. This podcast is not legal advice and does not create an attorney-client relationship. The views and opinions expressed in this podcast are solely those of the individual participants. Troutman Pepper does not make any representations or warranties, express or implied, regarding the contents of this podcast. Information on previous case results does not guarantee a similar future result. Users of this podcast may save and use the podcast only for personal or other non-commercial, educational purposes. No other use, including, without limitation, reproduction, retransmission or editing of this podcast may be made without the prior written permission of Troutman Pepper. If you have any questions, please contact us at troutman.com.