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**THE CONSUMER FINANCE PODCAST: AG'S OFFICE SUES AUTOMOBILE DEALERSHIP FOR PRICING DISCRIMINATION****HOST: CHRIS WILLIS****GUESTS: STEFANIE JACKMAN AND CHRIS CARLSON****POSTED: NOVEMBER 10, 2022****Chris Willis:**

Welcome to the *Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Group. I'm really glad that you joined us today for our episode on our recent Massachusetts Attorney General case that we think has broader implications for the auto finance industry.

But before we jump into that, let me remind you to subscribe to our blog, [consumerfinancialserviceslawmonitor.com](http://consumerfinancialserviceslawmonitor.com), where you're going to get daily updates about everything that's going on in the consumer financial services industry. And don't forget to check out our other podcasts. We have lots of them. We have [FCRA Focus](#) that's all about credit reporting, [The Crypto Exchange](#), which, is all about crypto, and our privacy and data security podcast called [Unauthorized Access](#), all of which are available on all the popular podcast platforms.

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So as I said, today we're going to be talking about a recent action by the Massachusetts Attorney General involving the auto finance industry and auto dealers. I have two of my colleagues on the podcast with me today that are perfectly suited to discuss this issue with the Massachusetts AG.

We have my partner, Stefanie Jackman, who is in the Atlanta office with me, and who's a member of our Consumer Financial Services Group, but also a member of our RISE Group, which stands for Regulatory Investigation Strategy and Enforcement. That's the group that houses our very significant expertise dealing with state attorney general investigations.

And we have Chris Carlson, who sits in our Richmond office, who's also a member of that group, and who does state attorney general investigations literally all the time.

So, Stefanie, Chris, thanks for being on the podcast today to talk about this development.

**Stefanie Jackman:**

Happy to be here. Thanks for having us.

**Chris Carlson:**

Of course, Chris.

**Chris Willis:**

So, Chris, let's jump right into what we're going to talk about today. The Massachusetts Attorney General recently filed an action against an automobile dealer, which in and of itself isn't necessarily that big of a deal, but this particular case seems to have broader implications. Can you tell the audience a little bit about the Massachusetts lawsuit?

**Chris Carlson:**

Last month... And as you say, Consumer Protection Divisions and the Massachusetts AG generally suing an automobile dealer, not novel, but the allegations themselves were novel, the fact that the Attorney General sued and alleged that there were discriminatory pricing that the automobile dealer was offering to Black and Hispanic consumers again, not a novel issue. The Massachusetts Attorney General also has a very robust Civil Rights Division.

But what was really interesting was what was discriminatory pricing. That related to add-on products or ancillary products that are being offered at the end of a sale, not just the vehicle transaction itself, but the products that are also being sold as part of the transaction.

**Chris Willis:**

Got it. Well, that definitely does sound pretty novel. Before we jump further into sort of the allegations that are made in this lawsuit by the Massachusetts AG, Stefanie, would you mind just giving the audience sort of a brief description of how ancillary or optional products are typically offered in an auto sales and finance transaction?

**Stefanie Jackman:**

When you talk about ancillary products, or they're sometimes called add-on products, optional products, they're things like gap insurance coverage, tire and wheel coverage, windshield coverage, paintless dent repair, and other sorts of vehicle appearance products that can be marketed to customers as part of their vehicle purchase as providing certain protections, warranties and what have you. Something that is a value add to the customer's purchase of the vehicle and will help extend the longevity, the look, protect against a total loss, like a gap insurance type of product.

Often these are products that will be financed as part of the overall sale by the customer. They don't have to be. The customer can pay directly for these products. Often, they could be part of the overall financing of the vehicle and the purchase, and they're usually something that the dealer is offering but actually provided by a third party that they have a relationship with.

It doesn't have to be that way. You could have a captive finance company or some branded products, but most of the time, almost all the time, it'll be something that is offered provided by a third party, and also if the consumer needs to exercise the benefit that the ancillary product provides it'll be the third party that's making it available.

**Chris Willis:**

Okay. Thanks for the explanation. Now that we have that sort of in mind as framing, Chris, can you go into a little bit more detail about the basis for Massachusetts' claims against this particular auto dealership?

**Chris Carlson:**

Yeah. Sure. The allegations don't relate to there being some underlying racist issue related to discriminatory pricing, that there's a certain price for white consumers and a certain price for minority consumers. Essentially what they're saying is there were three components that led to that discriminatory pricing when add-on products were offered.

First, there was unfettered discretion by the sales employees, essentially allowing sales employees to offer whatever prices and markups they wanted, that created an environment that

allowed for higher markups of minority consumers. On that backdrop, though, there were two components that the Massachusetts Attorney General really took issue with for the company as a whole.

First, there was no compliance or trainings that required there to be some overall structure by which these add-on products were being offered. And even more, after the products were sold there was no background checks to ensure that there was no indicia of discriminatory pricing.

**Chris Willis:**

Thanks, Chris. So, Stefanie, this idea of discriminatory pricing of optional products in auto finance transactions seems like something I've heard before from another regulator. Is there another regulator that has taken this position in another recent enforcement action?

**Stefanie Jackman:**

You're correct, Chris. It's not a new theory. I think that's why Chris Carlson was saying this isn't exactly novel, but it's a big developmental reminder that this is an area we need to be attentive to, and we'll share some thoughts on that, and that these things haven't gone away, because the first time that we started to see this in 2014, '15, '16, from the CFPB and the FTC. More recently it's come up again with the FTC, and there have been other state attorneys general that have paid attention to how these ancillary products are marketed, how they are refunded when a consumer... If their car is a total loss.

If your car is totaled you don't need tire repair, right, or paint and dent coverage. You may need gap. If you pay off your automobile you might not need gap, so we've seen attention to these products through a variety of sources and avenues about are they providing value? Are they being marketed in a transparent way? Is the pricing transparent?

Then getting to what Massachusetts is focusing on again, are these being evenly marketed and purchased across the consumer customer base I should say, or are there people that appear... And this is what Massachusetts seems to have concluded, people who appear to be getting targeted more, or differential pricing, and if that breaks down where it looks like a protected class is being treated differently, that will give attention because of this almost not quite a decade, Chris, but almost a decade of attention by federal and state regulators to these products generally, and whether they actually give value to customers or not.

**Chris Willis:**

Stefanie, you've talked about that long history of regulator attention to ancillary products and we've seen it, as you've noted, from enforcement actions from the FTC, from the CFPB, and supervisory highlights from the CFPB, as well as from state regulatory supervisory efforts, but let's also keep in mind that the subject of add-on product sales is at the center of the FTC's pending rule making relating to auto sales and auto finance transactions.

That proposed rule is sitting out there and would require significant disclosures and record keeping related to the sales of these products, including extra forms for the customer to fill out saying yes, I really want the product and things like that, and so I think all the efforts and concerns you've talked about on the regulatory standpoint seem to be culminating in that rule making that's before the FTC right now.

**Stefanie Jackman:**

You're absolutely right. It really was foretold in the Bronx Honda, Tate Auto, and Napleton matters with the FTC that were leading up to, and many watching industries telegraphing where the FTC was going on this.

**Chris Willis:**

Now, Chris, back to you. We know that the Massachusetts Attorney General's Office has a long history of taking novel consumer enforcement initiatives in the financial services industry. We've been seeing it as long as I can remember, from the fallout of the subprime mortgage crisis forward. But with respect to this particular case, is there anything about it that makes you think this action is part of a broader campaign by the Massachusetts AG's Office?

**Chris Carlson:**

I definitely think it is, and I think that's for two reasons. But before I go further, I think when you pointed to the FTC's proposed rule on how these regulators are communicating, I think one other data point to put forward is that 18 Democratic attorneys general wrote in support of that FTC rule.

I think when you're seeing these regular communications in coordination, I think you're absolutely right, this is an area of regulatory scrutiny in the state and federal side, that they're trying to respond to it.

**Chris Willis:**

In would also say in addition to that, Chris, which I totally agree with what you just said, if we look at the record keeping provisions in the FTC's proposed rule, my interpretation of those when I read them was that they are designed to create the record to facilitate further enforcement on these sorts of issues by state attorneys general, by the FTC itself, even by the CFPB imposing oversight obligations on auto finance companies.

So, I'm right with you on thinking that this is part of a broader, longer-term effort to set up the sale of optional products in auto finance transactions for continued enforcement scrutiny in the future.

**Stefanie Jackman:**

Chris, if I can add a thought as well, because of a very recent development with the Fifth Circuit CFSA decision, and we'll see where it goes, but holding that the CFPB is unconstitutionally funded, many are predicting that state attorneys general are going to be even more robust in their enforcement generally of federal regulatory agenda items, it will transition over to either the FTC, state agencies, if the CFPB is unable to continue going forward, or temporarily is delayed in doing so.

Already in the auto lending space and auto servicing space, we have this very robust history of the FTC and state AG's already being there, so in my view there's every reason to expect it's only going to continue, and that's where the attention is going to come from, and we could see more states coming in here as well, taking positions like Massachusetts is doing and looking at these products, and how they're marketed, and who buys them. Is it disproportionately this type of consumer versus this type of consumer? Who's actually getting the benefits of them?

I know you and I have talked about in the past with clients that one of the really important things to think about is how many people are actually buying these? Are they on 95% of contracts or 10? Do they break down according to certain demographics or other information about the consumers? And then how many of these are actually resulting in payments, or value, or coverage, or whatever the right term for each product would be, at the end of the day, and being mindful of that, because I think states will look at it in examinations.

**Chris Willis:**

So, Chris, one more detail about this case that I'm curious about. Did the Massachusetts complaint identify what tests, if any, that the AG's Office is using to determine whether the sale of an optional product potentially violates its state UDAAP statute?

**Chris Carlson:**

The answer is no and let me try to answer this question. I think I've took us down a healthy rabbit hole, but I want to also talk a little bit about where this came from and why we think this is a broader initiative. I think the staple of that was the auto dealer put in the press immediately afterwards there's never been a complaint against them, and they asked the Massachusetts Attorney General for a complaint, and none was provided to them.

I think this, coupled with when you look at the complaint it's a pretty robust complaint not only that includes allegations, but about a five-page assessment of what the regulatory history is of add-on products, and it definitely demonstrates that there is a scrutiny and a focus on this area in a way that you could see that same five-pages really encapsulated against any target of an enforcement action, not just this auto dealer.

So, I think the amount of time that has been put into this action isn't a simple auto dealer complaint or a civil rights complaint. I think this is definitely a demonstration of something more.

To your second question of what test was involved, as I said there wasn't a test. Essentially what was laid out was there were three things that they should have known based on the lack of policies. One, that there was total discretion. Therefore, they should have known that discrimination occurred.

Two, that there was a compensation structure that emphasized markups. Therefore, they should have known discrimination was likely to occur. Three, the company failed to implement any training or controls to evaluate potential discriminatory pricing. Essentially because of the totality of that, there are allegations of violations of UDAAP.

But as we all know, UDAAP is undefined. What unfair means and what deceptive means is right now in the mind of Massachusetts, not before a court or defined by Massachusetts' statutes. So, I think we're all kind of waiting and reading the tea leaves to see what really would be in compliance.

**Chris Willis:**

Yeah. Thanks, Chris. There's one other thing that I think I'd like to remind our audience of, and that is the possibility of auto finance companies being asserted to violate some law, whether it's a state UDAAP law or a federal law, relating to this alleged practice of differential dealer pricing on optional products.

In that vein, I'd point out that just very recently the New York Department of Financial Services entered into another consent order with a New York State chartered bank, holding it liable for

differential pricing on retail installment contracts by dealers. So that theory is still alive and well, even though the CFPB hasn't pursued it in a number of years.

So it doesn't seem to me to be that big of a jump from the New York DFS for another state regulator holding an acquirer of retail installment contracts liable for differential pricing on their contracts to saying, well, I'm also going to hold you liable for differential pricing on gap, or extended service contracts, or things like that.

To me, I understand this Massachusetts dealer case to be not just something for auto dealers to worry about, but also for auto finance companies to worry about. Again, the desperate impact based on dealer discretion theory is alive and well in the state regulators' minds, even though the CFPB doesn't seem to have wanted to touch it since around 2016. So that's, I think, an important reminder for our audience as well.

I think that probably brings us to the end of our discussion today. I want to thank Stefanie and Chris Carlson both for being on the podcast with me today. It's been a great opportunity for me to continue to show off what an incredible and extensive state attorney general practice Troutman Pepper has with really a group of people who do it full time all the time as part of our RISE Group.

Of course, thank you to our listeners for listening to this episode as well. Don't forget to visit us on our blog [consumerfinancialserviceslawmonitor.com](http://consumerfinancialserviceslawmonitor.com), and hit that subscribe button so that you can get all of our daily updates on what's going on in the industry.

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