

***Moving the Metal: Investigation Tag Team: The FTC and the State of Arizona*****Hosts: Brooke Conkle and Chris Capurso****Guest: Chris Carlson****Recorded: 8/29/24****Date Aired: 9/17/24****Brooke Conkle:**

Welcome to [Moving the Metal](#), the premier legally focused podcast for the auto finance industry. I'm Brooke Conkle, a partner in Troutman Pepper's Consumer Financial Services Practice Group.

**Chris Capurso:**

And I'm Chris Capurso, an associate in Troutman Pepper's Consumer Financial Services Practice Group.

**Brooke Conkle:**

Today we're joined by Chris Carlson, a Senior Associate in the RISE Group here at Troutman, and we will be discussing a recent AG and FTC investigation and Order in Arizona.

But before we jump into that, let me remind you to please visit and subscribe to our blogs. We have two great ones that may be of interest to you, [TroutmanPepperFinancialServices.com](#) and [ConsumerFinancialServicesLawMonitor.com](#). Also, let me remind you about our other podcasts that you might find interesting. We have [The Consumer Finance Podcast](#), which as you might guess, is all things consumer finance related. [FCRA Focus](#), a podcast dedicated to all things credit reporting. [Unauthorized Access](#), a deep dive into the personalities and issues in the privacy, data, and cybersecurity industry. Finally, [Payments Pros](#), a great podcast focused exclusively on the payments industry. All of these insightful shows are available on your favorite podcast platform, so please check them out.

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**Brooke Conkle:**

Today, as I mentioned, we're joined by Chris Carlson from the RISE Group.

One of my personally favorite people here at Troutman, who I've known for close to 10 years. Chris, welcome to the show.

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**Chris Carlson:**

Thanks for having me, Brooke.

**Chris Capurso:**

Before I get you to describe your practice and what you do, we should note that this is historical in two ways. One, you are the first guest who is not a member of the Consumer Financial Services practice group. So, this is our first time branching out to the broader reaches of the firm. Second, this is the first time we've had a guest in Richmond. So, this is a fun instance where three of us are literally on the same floor, in three different rooms recording this podcast. So, this is a fun bit of history. With that, it'll be hard to top that specific type of history. But Chris, could you describe a little about your practice and what you do in daily life here at Troutman?

**Chris Carlson:**

Sure, Chris. Before we talk about all the excitements of my practice, I want to talk first about one first that may never be broken, which is you have three people with last name C on this auto finance podcast. Please make sure no other last-name Cs ever make it to the AF podcast.

**Chris Capurso:**

It's already too late.

**Brooke Conkle:**

Yea, we'll see what Jason Cover has to say about that, but –

**Chris Capurso:**

He will be changing his name imminently.

**Chris Carlson:**

Thanks, Chris and Brooke for having me. I hope to quizzically have one first that remains until the Honorable Ashley Taylor comes and joins us, which is that Brooke Conkle and I served with the same judge, the best judge ever, the Honorable David A. Faber in the Southern District of West Virginia. We've both started careers there. And now, we get the benefit of being on the same floor.

In terms of my practice, my practice revolves around all things state attorneys general. I started my practice in the West Virginia Attorney General's office, splitting time between the Solicitor General's office where you work on appeals and appellate matters on behalf of the state and the Consumer Protection Division, where you handle all things consumer protection, and you defend state laws and you prosecute companies that allegedly violate state laws in West Virginia.

We also, in doing so, had a lot of coordination with federal government actors, and this is the perfect kind of opportunity to talk about the coordination between federal and state government.

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**Brooke Conkle:**

Chris, you segued perfectly into what we're going to talk about today. But before we jump into the Order that came out of Arizona, can you explain for us a little bit about what an AG investigation usually looks like?

**Chris Carlson:**

Sure. Well, typically investigations look like a company receiving a subpoena or just a simple letter asking and inquiring about the company's practices. What a state AG is typically looking at is whether the company violates state consumer protection laws. Each state has these laws that are referred to as UDAP laws that prosecute potential violations of unfair and deceptive practices. What that really means, are you misrepresenting? Are you saying something that's untruthful to consumers?

**Chris Capurso:**

Well, that's really helpful information going into just the basic details about this specific action, which was a joint action with the Federal Trade Commission and the state of Arizona. It's interesting. I mean, anybody who's been listening to this for the couple months we've been doing it, there have been a lot of FTC actions we've covered, whether it's a report or something like this where it's an action. So, the FTC is really looking deep into the auto industry, and we'll hear a little bit later from Chris about AG activity in auto. But first, I'm just going to describe some of the basic facts of this case. And, I kind of mentioned this last time. Sometimes you feel like you're hearing greatest hits, like we're repeating ourselves. It's because this action hits the greatest hits. It hits all of them that we've heard before, whether it's the Bronx Honda case, whether it's the case last year out of Wisconsin. These types of things, they have specific things that the FTC is looking for.

So, here the Action is against a dealer and its former general manager. There's some personal liability here, for engaging in deceptive pricing practices and discriminatory financing treatment of Latino customers. That sort of deceptive prong of what Chris was describing, unfair and deceptive acts or practices. Specifically, the FTC and the state of Arizona targeted three kind of buckets of claims. The first is related to deceptive online pricing. In this, they alleged that the dealer had advertised vehicles online at significant discounts, leading the consumers to believe that they could purchase the cars at advertised prices, which that dealer called their named price, to make it sound like it was something exclusive to them.

However, when the consumers arrived at that dealership, they were informed that the advertised prices weren't actually available. Instead, the dealership added hundreds or even thousands of dollars in what they called market adjustments or pre-installed add-ons or even other miscellaneous fees to raise whatever that advertised price was to get them in the door. Kind of a bait and switch, which you see a lot in a UDAP statute, that is one of those things that's prevalent in a lot of state UDAP statutes.

To kind of tack onto that problem, any references to those additional fees were allegedly obscured at the bottom of a web page or behind small gray hyperlink. We usually see a blue hyperlink or some other color. This was a gray one, which doesn't exactly stick out on a white background. Even if a consumer found these references to these additional fees, there was no

kind of clarification whether that was in the price, outside the price. It was just there were these fees out in the open. So, that's kind of the first bucket. Deceptive online pricing.

The second one, and this is a favorite. We've covered it a lot. Unauthorized add-ons. The complaint alleged that the dealer charged consumers for add-ons such as vehicle identification number etching, window tinting, nitrogen-filled tires, which Brooke has mentioned many times, and theft recovery services without authorization. In some instances, the dealer charged consumers for add-ons that they had not agreed to purchase, falsely claimed that add-ons were required, and charged consumers twice for the same add-on.

There was also an allegation that the dealer engaged in what's called payment packing. In this case, it was, they would quote a higher price than what the actual price of the vehicle might be and then try to find add-ons to kind of bridge that gap to make it up to that inflated price. So, obviously, not a great practice alleged. That's the unauthorized add-ons bucket.

The final one is, and it was highlighted earlier, is discriminatory practices. And the FTC and the state of Arizona allege that the dealership discriminated specifically against Latino consumers by charging them higher interest rates and add-on costs compared to non-Latino White consumers. So, we have higher rates and higher costs for these add-on products that may not have been authorized, may have been told they're required when they're actually not. It's kind of two buckets of charges that were supposedly discriminatorily priced.

On average, the agencies alleged that Latino consumers allegedly paid nearly \$1,200 more in interest and add-on charges. Actually, they kind of bifurcated that even lower, that it was \$800 in add-ons alone on average that were paid, \$800 more paid by Latino consumers than non-Latino consumers. So, there's a lot in that and a lot of items that we've seen before. Brooke, is there anything particularly noticeable? Maybe it's everything. Is there anything particularly noticeable about these hot-button issues in the order?

**Brooke Conkle:**

Chris, that's exactly right. I think when we listen to these, there are really two things that come to mind. One, as you mentioned, this is the CARS Rule's greatest hits. We've got nitrogen-filled tires., we've got VIN etching, we've got bait and switch on the prices. The disclosures, they're hidden in gray print that no one can find. All of this stuff is things that have been cited by the FTC time and time again, specifically in the CARS Rule and in the Commentary supporting the CARS Rule.

Then secondly, as the FTC explained in the CARS Rule commentary, their position is that the CARS Rule is just a codification of existing UDAP law that is already in effect. When we weigh this order against the challenge that's ongoing in the Fifth Circuit, what we're really seeing here is, one, the FTC believes that this is already the law, that all of these add-ons, the deceptive pricing, that that is already prohibited under existing FTC law. And, then second, if the Fifth Circuit challenge is successful for the challengers, so if NADA and TADA, if they are successful in getting this rule knocked out, does that really change anything, frankly? You know, the FTC is making clear that these initiatives and their sort of regulatory agenda probably is going to move forward whether or not it's really fully codified in the CARS Rule or not.

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**Chris Carlson:**

Brooke, let me jump in here because I think what you said makes perfect sense from the state AG perspective as well. The CARS Rule, while it may be in limbo, the state AGs aren't relying on the CARS Rule here. Arizona isn't relying on the CARS Rule. They have determined that this is unfair and deceptive based on their own state consumer protection laws.

To dig in a little bit into consumer protection laws, you allow you to prosecute unfair and deceptive. Interestingly, neither of those words are defined. Arizona has taken on itself to decide the CARS Rule fits within unfair and deceptive conduct. And that's exactly what's happening here. I think also you're seeing state AGs play in the space of the FTC by writing an amicus brief in support of the CARS Rule all in December of 2022. Eighteen state AGs are supporting the CARS Rule.

Interestingly, of those state AGs, all democratically elected, Arizona is not there, which is interesting. Because three weeks later, the Arizona AG switches from a Republican to a Democrat. While this regulatory regime may be focused on the CARS Rule. Outside of that, punching the consumer protection ticket of, does this conduct violate state law? It doesn't matter. The CARS Rule really doesn't impact where state AGs view this case.

**Brooke Conkle:**

Yes. Thanks for that, Chris. What's interesting to me was, we see, obviously, a state regulator and a federal regulator pairing up here. We tend to see that partnership kind of in the big cases and the big ones that are across the national headlines. But is it becoming more common for sort of a one-on-one combo of federal and state regulators with essentially a single AG, is that standard? Is that new? Is that something that's becoming more common?

**Chris Carlson:**

Unlike lawyers that typically want to say, "It depends." I can actually say the answer is "yes" here. The answer is "yes," because earlier this year, the FTC released a report of collaboration between state AGs and the FTC. You saw in 2021, there were only six collaborative efforts. Over the last two years. That's increased to ten. That report was issued in March of 2024. There were already five collaborative efforts in those first three months. So, you're seeing that ratchet up. And, I think the reason you're seeing that ratchet up is the AMG Capital case, where the FTC doesn't have the authority to get money penalties.

In this case specifically, you're seeing \$2.6 million in restitution that Arizona consumers are going to get. Unfortunately, the FTC doesn't have authority to get restitution. So, how are they going to get an end around and get restitution in this case? They're bringing on behalf of State Consumer Protection Laws. They're using restitution there. But, what Arizona doesn't have that the FTC does have, is the FTC has its own office of claims. The Arizona AG's office only has nine consumer lawyers in their office last time I talked with them. They don't have the ability to go push these restitution checks of however many dollars back to consumers. They rely on the FTC here, and so that's why that partnership works. Both are working together in a way that support consumers.

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**Chris Capurso:**

That's really interesting. And, kind of going back to the beginning talking about this partnership, how is the initial investigation process different having both a federal and a state regulator involved?

**Chris Carlson:**

The answer is, now, I'm going to have to say, "it depends." It all depends on who is initiating this and what was the initiatory conduct. Whether it was consumer complaints, fraud that the Arizona Attorney General's office received, or the FTC has this initiative across the country. They identified a dealership in Arizona and they said, "Arizona, do you want to team up with us on this case?"

My gut on this case is that the FTC brought it, not Arizona. And, the reason why you see that is because, Arizona is only receiving \$250,000 of that \$2.6 million penalty. That's just me reading the tea leaves here. On the other hand, we have seen cases, and I think you guys remarked on them, that state AGs have brought on these add-on products without the FTC. We talked in 2022, Jafarian was hit for add-on products like ding and dent, and the Massachusetts Attorney General got \$350,000 there, and they brought it by themselves. I can't tell you why the FTC wasn't involved in that case, but I can say that going back to my point, AGs want to punch that consumer protection ticket, whether or not the FTC is there.

I've got a question for you guys. Looking to November, how do you see the CARS Rule being impacted by the potential election?

**Brooke Conkle:**

Yes, that's really interesting. Unlike an answer of "it depends." I think the answer is "yes." By that, I mean that, essentially, the CARS Rule may come, the CARS Rule may go. The principles that are embedded in the CARS Rule are here to stay. The add-ons, the deceptive pricing, the way that pricing is disclosed, the way that add-ons are disclosed. Those initiatives are not going to change whether or not they're codified in the CARS Rule or not. And Chris, to your point, or I should say, Chris Carlson, to your point, whether those initiatives are being prosecuted by federal regulators or by state regulators, those initiatives are still ones that are going to be on the agenda moving forward.

**Chris Capurso:**

Yea, and I like the "yes" answer. I mean, my mind immediately went to, I was talking about the Bronx Honda case, because it's the one that I remember. But that was during the Trump administration, and that was kind of the same laundry list of things, the discriminatory markups, things like that. So, I agree, I don't think these types of things will change. What I would be curious about is just rulemaking in general. We're seeing it kind of on the CFPB side, where it seems like there's a lot of push to get some stuff out and get things out, so that the APA may not apply. Just trying to get things out before they could be overturned, or if there is a change of administration before this current group in charge of those agencies is shown the door. So, it's interesting. There are certain issues that are always going to be there, kind of like the military service member type issues, these types of issues. But at the same time, kind of the regulatory

rule making stuff, it's just based on what happened the last time there was a change of administration across parties, from Democrat to Republican. The kind of rulemaking and the regulatory machinery kind of slowed down a little bit.

**Chris Carlson:**

For someone that lives in the state AG space, why does the CARS Rule matter for state AGs? I ask because, in December of last year, the FTC came to the National Association of Attorneys General, and had an entire hour dedicated on explaining the CARS Rule. Why do they care what the state AGs think or try to enforce that? Or, why do they care about educating the state AGs?

**Chris Capurso:**

My initial thought would be, as Brooke said, the CARS Rule is just articulating things that the FTC already considers violates its authority, and the FTC similarly has a UDAP authority. So, maybe, like you said, using the word educating, letting AGs know, "Hey, these types of practices while, okay, this is a federal rule. If this federal rule is just based on basic UDAP authority, you guys have that too."

**Brooke Conkle:**

I would agree with that wholeheartedly. And, the one addition I would make is, oftentimes, the state AGs have in some respects, a closer ear to the ground on what is actually happening to consumers, with consumers. So, raising these issues from the FTC, they're essentially kind of deputizing the state AGs to go after these issues that, frankly, they may be closer to than the FTC is.

**Chris Carlson:**

That's really insightful.

**Chris Capurso:**

So, Chris to kind of turn your question right back out round on you. Obviously, November election, we were just talking about it. What kind of impact could that have on state AG activity? Is it the type of thing where you start to see the blue states "act more?" Do all the states start to act more? If there is a change, of course, what kind of things could change in November?

**Chris Carlson:**

In terms of the FTC, the FTC has roundly been viewed over the past many decades as being a relatively bipartisanly insulated commission, comparatively. On the other hand, what I do see is, and this happened during the Trump administration. When the federal government was perceived as being asleep at the wheel, whether that be at the CFPB or the FDA, you saw all state consumer protection units stepped up to the plate. You saw that in other contexts outside of the auto finance, but you saw this in opioids. You've seen this in vaping. You've seen this in many areas where it is viewed that consumer protection issues can't be delayed upon.

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**Brooke Conkle:**

Chris, you remind me of something that our mentor, our collective mentor, Ashley Taylor always says, "Politics abhors a vacuum." When one group steps back, another group steps forward. I think that's kind of what we anticipate. Should there be an administration change? Lastly, Chris, what should auto finance companies be on the lookout for in the AG investigation space moving forward?

**Chris Carlson:**

The biggest thing I always counsel auto finance companies, for any company, is just to be mindful of consumer complaints. Consumer complaints are always the foundation for investigations and enforcement actions, especially if you are at a state level. Especially like the auto dealer here, when it had a state presence, it was important to recognize that Arizona stepped up to the plate. On the flip side, I also think it's very important to recognize that the auto industry is always under significant scrutiny. When I was in the West Virginia Attorney General's Office, auto always received the highest number of complaints. It's going to be something that's scrutinized, every transaction is scrutinized, and from a higher perspective, and from the financing, it's very important to being mindful of complaints that come and ebb up to you.

**Chris Capurso:**

Well, it's been awesome having the Richmond triumvirate here. Before I sign off with the typical sign off, I wanted to give Chris a chance to plug anything that's happening on the RISE side of things at Troutman Pepper.

**Chris Carlson:**

Yes. I don't have the list that Brooke brings to the table, but I can hype the [Regulatory Oversight](#) blog and [The State AG Monitor](#). *State AG Monitor* includes only state AG issues that have gone on each week, and the *Regulatory Oversight* blog comes out once a month.

**Chris Capurso:**

Great. With that, we'll wrap it up for today's podcast. So, thank you to our audience for tuning in. Don't forget to check out our blogs, like the ones Chris just mentioned as well, where you can subscribe to the entire blog or just the specific content you find most helpful. For CFS, that's the [ConsumerFinancialServicesLawMonitor.com](#) and the [TroutmanPepperFinancialServices.com](#) blogs. While you're at it, why don't you head on over to [troutman.com](#) and sign up for our Consumer Financial Services mailing list so that you can stay abreast of current issues with our insightful alerts and advisories and receive invitations to our industry insider webinars.

Of course, please keep checking your podcast app for the next great episode of [Moving the Metal](#). We are going to go on a very brief hiatus and come back in October for spooky season. So, you want to hear everything we have to say potentially about Halloween. Who knows? But until next time.

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