***Moving the Metal: The Auto Finance Podcast* – FTC CFPB Enforcement Report**
Hosts: Brooke Conkle and Chris Capurso
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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 are going to talk about the FTC's recent report to the CFPB regarding enforcement activities in the prior year. But before we jump in, let me remind you to please visit and subscribe to our blogs. TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. We also have a be a bevy of podcasts that may be of interest to you. *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. And fnally, *Payment Pros*, a great podcast focused exclusively on the payments industry. All of these insightful shows are available on your favorite podcast platform, so check them out.

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Brooke Conkle:

Today, we will be discussing the FTC's recent report to the CFPB regarding enforcement activities in the prior year. So, Chris, what is this report?

Chris Capurso:

Yea, Brooke, this report is really a letter from the FTC to the CFPB responding to the CFPB's request for information that the CFPB can use in preparing its annual report to Congress, specifically, about the FTC's activities with respect to its regulations over the past year. It covers several different laws, but primarily we're talking about theTruth in Lending Act,

or TILA, and it's implementing regulation, Regulation Z, the Consumer Leasing Act or the CLA. Nobody's called it CLA yet, and it's implementing regulation, Regulation M, and the Electronic Funds Transfer Act, or EFTA, if you're feeling that, and it's implementing regulation, Regulation E.

This kind of goes into the differences in authority between the FTC and the CFPB. The letter specifically talks about Dodd-Frank giving the FTC the authority to enforce CFPB rules applicable to entities within the FTC's jurisdiction, which includes most providers of financial services that aren't banks, thrifts, or federal credit unions. So, the letter is really a hodgepodge. I almost look at it as a greatest hit of the last year that the FTC wants to cover in the consumer finance space. Which is just perfect for the end of summer, you know, everybody's getting ready to go back to school. It's like whenever you have like a TV show back in the day that was like the clip show, like that's what this is. It's the FTC's clip show just trying to get the biggest highlights out of the way at the end of the summer before everybody goes back to school.

Brooke Conkle:

Chris, that's exactly right. I think if we kind of put out our regulatory bingo card, we would hit bingo pretty quickly based on this letter. The first area that the FTC covers are litigation related to TILA. And, specifically, the FTC noted two cases, one of which is pending, one of which was sort of kind of in the wrap-up phase. But the first was against a dealer from Louisiana who the FTC alleged violated both the FTC Act and TILA. The FTC went so far as to ban the dealership from the auto industry. And, specifically, the FTC cited the dealer for falsely suggesting that it was affiliated with a government COVID-19 stimulus program.

Additionally, it also alleged that the dealer indicated to consumers that they had won valuable prizes, such as $2,500 or $5,000 to lure consumers into the dealership when they actually had not won anything at all. Then finally, the TILA sort of hook here was the FTC alleged that the dealers sent out mailers quoting monthly payments that did not provide or hid in small print, key financing terms that consumers need to determine the true costs of the advertising financing.

I should caveat here that this decision is on appeal currently to the Fifth Circuit. But as Chris mentioned, just packed into this little summary, we have a lot of the regulators' greatest hits here. Affiliation with a government COVID-19 stimulus program, prizes, and then finally hiding monthly payments and key financing terms in small print or not disclosing them at all.

The second litigation that the FTC highlighted was one from the state of Illinois, where the FTC and the state AG's office alleged that a dealer violated the FTC Act by, and here we go with our bingo card again, sneaking illegal junk fees onto consumers' bills for unwanted add-ons, such as for payment insurance and paint protection costing consumers hundreds or thousands of dollars. And, specifically, this litigation was one that was essentially closed and the FTC was reporting on the restitution funds that had been distributed to consumers. Specifically, there had been $8.8 million returned to consumers. But even after that first round of distributions, there were additional funds that were still available, so the FTC sent more money back to consumers, totaling $857,000 to folks who had cashed their first restitution check, but also essentially paid more than $1,500 in add-on fees.

Chris, as you mentioned, here we go again with our regulator bingo card and we've got illegal junk fees and add-ons. As we're going to talk about later, and as we have talked about before on our podcast, these are all sort of the greatest hits that are featured in the FTC's CARS Rule and we're going to talk about that a little bit later, too.

Yes, right on cue, the second area that the FTC reported on was specifically the CARS Rule and noted for the CFPB that one of the major sort of rulemaking, research, and policy developments that related to TILA and the CLA, CLA, as Chris has so eloquently called it, the CARS Rule. We've talked about the Cars Rule before, but really, it targets this idea of alleged junk fees. And, according to the FTC, they have summarized the CARS Rule as pertaining to the sale, finance, or leasing of motor vehicles to fight two common types of illegal tactics, bait and switch tactics, and hidden fees.

Really, you know, it goes to the litigation we talked about just a minute ago, this idea that alleged junk fees are sort of being packed into a deal and consumers are being forced to buy add-on products that not only do they not know about, their add-on products that they may not get a benefit for. Those are really two of the main aims that the FTC has stated for the CARS Rule. It is really sort of knocking out those alleged junk fees and preventing the sale of add-on products where the consumer may not know that they’re actually buying something, or may understand that they're buying something, but not understand that that product does not have sort of a legitimate purpose or any benefit for them.

Chris Capurso:

Speaking of junk fees, which if you do have that bingo card, you must have hit it by now. We're also looking at the FTC talking about its junk fees rule, which is actually something I don't know if we've talked about too much on this podcast because it's a little bit older. Also, it I have the name CARS Rule, which on an auto finance podcast, of course you're going to talk about the CARS Rule.

But the junk fee rule, it's actually a pretty simple rule. It “prohibits a business”, and that's going to be very important a little bit when I discuss what a business is. But it prohibits a business from offering, displaying, or advertising an amount a consumer may pay without clearly and conspicuously disclosing the total price. Also, important, soon to come, and including an amount a consumer must pay in an offer display or advertisement without displaying that total price, more prominently than any other information. And it also prohibits certain misrepresentations and failures to disclose related to consent and related to refundability of the fees.

The junk fees rule touches a lot of industries. Just to name a few hotels, short-term lodging, ticket sales, rental housing, and ticket sales, I mean, I'm sure that was in the news everywhere you could possibly look. The ticket sale fee fiasco. Rental housing, financial services, auto sales, Internet service providers, and other market sectors. So, this is a rule that really feeds into the name of the Federal Trade Commission. It touches on all areas of trade. Earlier, I mentioned the term business and how that would be important. That's because in the rule, it specifically defines a business as an individual corporation, partnership, association, or any other entity that offers goods or services, including but not limited to online, in-mobile applications, and in-physical locations. So, you're thinking, that sounds like everybody.

You'd be right, except for one particular notable exclusion, and that is that motor vehicle dealers that are required to comply with the CARS Rule are exempted from the definition of business. And this has created some very strange headaches in our world because, as you know, the CARS Rule is stayed right now. So, what happens if the junk fees rule comes in and the CARS Rule is still on the shelf or doesn't exist, it creates a very weird compliance headache. Fortunately, those compliance headaches are all hypothetical right now because this is still in the notice of proposed rulemaking phase.

But it's a very interesting thing that the FTC thought about motor vehicle dealers and thought, “Well, we gave them enough with the CARS Rule. Let's keep them out of the junk fee rule.” But if the CARS Rule goes away or stays sidelined indefinitely, what is going to happen with that? It's something that, you may have to think about in the future, but as I said, we're kind of in the notice of proposed rulemaking phase right now for the junk fees rule. But you had to see it coming. With all the talk about junk fees in different actions, and the CARS Rule itself, that the only inevitable step would be to have its own rule, the junk fees rule.

But jumping around again, because as we noted, this letter really is like a compilation. I mean, it's not even like a compilation of like your favorite artist. It's a compilation of like a decade. It could have like, like if it was an eighties CD, it'd be like eighties smooth jazz to like hair metal. Because this thing jumps around all over the place.

So, Brooke, what is the next track in our greatest hits album that is the FTC's report to the CFPB?

Brooke Conkle:

It is the artist formerly known as the CARS Rule, which we are getting CARS Rule Redux 2.0. Let's hit the CARS Rule again.

Chris, as you mentioned, one of the sort of pieces of information that the FTC provided to the CFPB is essentially touting its own consumer information initiatives and specifically consumer education. Again, here we go again with the CARS Rule. But what's interesting in the way that the FTC has sort of presented its educational initiatives is that it has kind of packed within that the FTC's stance on what the CARS Rule does. And, specifically, the agency is saying that we do have this rule. It's going to provide protections for consumers, but also, it's going to provide protections for dealers. According to the FTC, many dealers are already engaged in the longstanding truth and transparency principles of the rule as their business as usual.

So, really, that's kind of affirming what we have talked about is that the FTC believes that the CARS Rule is just a codification of long-standing UDAP principles that are already the law. And that frankly, has been one of the arguments that the FTC has used before the Fifth Circuit. As we talked about, the CARS Rule is being challenged to the Fifth Circuit. The FTC's position to that challenge really has been kind of focused on bedrock FTC principles and essentially arguing this CARS Rule is nothing new. This is what dealers should already be doing. It's interesting to see that perspective sort of packed in to this letter to the CFPB, where it's talking about consumer education, but within that really reaffirming how the FTC sees the CARS Rule and how it really sees it as, just a restatement of what is already the law.

Chris Capurso:

Yes. Coming from that track about the CARS Rule, we go into a little bit more about cars. Honestly, this is one of the more interesting things I think in the letter, is the FTC discusses that it provided some additional information to consumers on other auto topics. One of those articles, specifically addressed auto trade-ins and negative equity. And if you listen to one of our prior podcasts, you'll know that we discussed the CFPB released a report on its auto-gathering effort, and the first report was about negative equity.

So, it's very interesting. At that time, we were like, “This is kind of out of left field.” This isn't what we expected, I guess, to be the first ground-breaking report out of this huge data collection effort. Then, here we have the FTC sending a letter to the CFPB saying, “Hey, we're talking about negative equity too.”

I think both agencies have this on the mind, especially with the environment we're in, where car prices had been higher a couple years ago, and now we're looking at people potentially trading in those cars, where the car prices have now come back down. Looks like both the FTC and the CFPB are looking at this, and they also provided articles about the fact that auto refinancing scams could come about because of this.

On our last podcast, we talked about refinancing and how that could be something that really skyrockets because if the rates go down, then people are going to be looking for lower payments, lower rates, things like that. So, the FTC warns that, at the same time, I mean, as with any industry, at the same time, something becomes more popular. There's always going to be some fraudster or somebody out there trying to take advantage of that boon. So, the FTC is writing articles about that and also offering cautionary tips that the promises that a scammer might make to try to trick a consumer related to negative equity and trying to get rid of that negative equity on their trade-ins.

Brooke Conkle:

Yea, and Chris, to follow that up, there were two areas that are covered in the FTC letter that weren't necessarily related to auto finance issues specifically, but they're still worth mentioning because they're still on regulators' radar. The first is discrimination. The example that the FTC cited is related to auto finance and specifically the FTC detailed a report that it issued to Congress on the effects of discrimination against American Indian and Alaskan native populations. One of the cases that the FTC cited in that report was one that was related to a dealership located near the border of the Navajo Nation. And, specifically, the FTC alleged that that dealer engaged in targeting consumers with deceptive ads and unfair financing practices in violation of the FTC Act.

Then separately, the FTC also noted that there are potential discrimination issues with regard to older Americans. The FTC noted that while adults who are over 60 are less likely to report losing money than adults who are kind of in the, I guess, what bands are we now? We're Gen Z and Millennials, I think. They're kind of in the safe crowd when it comes to fraud. But for those who are in Gen X and older, if you're losing money, you're losing a lot more money than the younger folks are.

So that is an area that isn't necessarily tethered to auto finance in the FTC's report, but still has information that is important to regulators. So, while there is no kind of auto finance hook in this section, it's still important to note for auto finance companies that this is an area that is of specific concern for regulators.

Chris Capurso:

Yes. The second one is service member protections. This is one of those areas we always counsel people, and it's pretty self-explanatory. But regardless of what way the political winds blow, regardless of who's in office, who has their commissioners on the FTC, who is the director of the CFPB, service member protections are always going to be top of mind for a federal agency looking at consumer financial services. It's always going to be that way.

The FTC noted some of its initiatives on this front, including coordinating on assisting military consumers and providing trading to service members and veterans representatives in conjunction with consumer financial services issues, and including, and we talked about a prior alphabet soup, like TILA, EFTA, CLA, as we like to call it. But we also have the alphabet soup related to military lending, which would be the Military Lending Act or the MLA. The letter doesn't specifically mention this, but the Servicemember's Civil Relief Act, the SCRA, which also has state analogs, and also the Department of Defense's rule implementing the Military Lending Act.

All of those things, the FTC has been coordinating and establishing initiatives to look at. In fact, the MLA requires the DOD to coordinate with several federal agencies, including the FTC, in prescribing regulations, and they are supposed to coordinate with these federal agencies no less than once every two years. So, the FTC notes that it has participated in an interagency group that coordinates with the DOD on the issues pertaining to the MLA and the DOD's military lending rule. They specifically noted that that included issues related to TILA, such as on current automobile financing and leasing issues, and the CARS Rule. We bring the CARS Rule back again right at the end.

So, it is very obvious that the FTC, one, very proud of the CARS Rule. Two, really wants to cover junk fees in their letter. And three, are looking at some very specific areas that aren't necessarily tied to an industry such as discrimination and service member protections.

With that, that's going to wrap up today's podcast. So, thank you to everyone for tuning in. Don't forget to check out our blogs where you can subscribe to the entire blog or just the specific content you find most helpful. Those will be the ConsumerFinancialServicesLawMonitor.com and the TroutmanPepperFinancialServices.com blogs. While you're at it, why don't you head on over to TroutmanPepper.com and sign up for the 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 mark your calendars for a great new episode of *Moving the Metal*, which will release in two weeks. Until next time.