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***The Consumer Finance Podcast: Auto Finance – CFPB Circular Release*****Hosts: Brooke Conkle and Chris Capurso****Guest: Caleb Rosenberg****Date Aired: 6/18/24****Brooke Conkle:**

Hello, and welcome to a special edition of the Troutman Pepper *Consumer Finance Podcast*, where we discuss all things driving litigation and enforcement actions in the world of auto finance. I'm Brooke Conkle, I specialize in litigation, and I'm joined by Chris Capurso, who specializes in all-things compliance. Today, we're going to discuss a recent circular from the Consumer Financial Protection Bureau. But before we jump into that topic, let me remind you to please visit and subscribe to our blogs, we have two that may be of interest to you, [TroutmanPepperFinancialServices.com](https://TroutmanPepperFinancialServices.com) and [ConsumerFinancialServicesLawMonitor.com](https://ConsumerFinancialServicesLawMonitor.com).

Also, let me remind you about some of 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. We also have [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, finally, [Payments Pros](#), focused exclusively on the payments industry. All of these insightful shows are available on your favorite podcast platform, check them out.

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**Chris Capurso:**

Thanks, Brooke. Yea, this is history in this special edition, our first non-Chris Willis guest. The guest is Caleb Rosenberg, who has been a colleague and friend of mine for now, going on a decade, even predating our time at Troutman. Caleb, could you tell us a little bit about your practice and what you do here at Troutman?

**Caleb Rosenberg:**

Well, after that introduction, not shockingly, I do a lot of things with you. So, I work on the compliance side, kind of the alphabet soup of federal laws, a lot of the state overlap with that, getting in the weeds. Usually, for FinTech clients, bank partners, banks, working with bank partners in all kinds of consumer and small business products, and helping you with auto.

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**Chris Capurso:**

Right out. I guess the first question is going to go to you as the special guest. So, this circular that Brooke mentioned, what is it about and should it be of interest to auto finance companies?

**Caleb Rosenberg:**

It should. It is about including unlawful and unenforceable contract terms in contracts. And, my gut reaction when I first read it was, "Well, why would someone include unenforceable terms in the contract?" Frequently, this comes up where there are boilerplate terms that haven't been rereviewed. There's a lot going on in what most people consider to be the fine print of consumer contracts and things get included that are not always enforceable in court. And frequently, at least with clients that I've worked with, they say, "Okay. Well, what does that matter to me? Worst thing that happens is, we don't have that right in court, or we're not able to enforce it. The CFPB has come out and said, "No, that's not the worst thing that will happen to you. The worst thing will happen to you is that, we will come after you for that being deceptive, for you trying to include a term that is unenforceable, suggesting to a consumer that it is enforceable."

An obvious example would be, you tell the consumer that you are going to be able to charge a very large late fee, you know that you're not able to do that. The consumer thinks that they have to pay it when they don't. That consumer, even if they've never been charged a late fee is more likely to make payments to you on time because of the threat of the fee. So, that's just one example, but the CFPB has gone further and said, any unlawful and unenforceable terms and contracts are deceptive.

**Brooke Conkle:**

Now Chris, we know that the CFPB always has a long game strategy. This circular, while it might seem kind of very quietly released, I'm confident that the bureau has been sort of anticipating these issues for some time. So, have we seen hints that the ideas expressed in this circular have been percolating at the CFPB and has been on their radar for some time?

**Chris Capurso:**

Yea, they're predictable! Even within the last year or so, I think back to, I believe it was last April with the abusiveness policy statement that I'm sure a lot of people listening remember and going through it. There were some sentences in there talking about abusive terms and contracts, specifically, that talked about form contracts to which many in the industry argued, law requires certain form contracts, talking about TILA and Reg Z, all those lovely boxes that you see at the top of a retail installment contract, those are our form contracts. But the CFPB noted that use of certain form contracts could potentially be abusive. And then, we get to just in the last six months or so, there's this idea of registering non-bank terms and conditions. Again, going after terms and conditions, contract terms, things like that, under the deceptive prong. It's pretty clear the CFPB is really homing in on words that consumers agree to in their contracts and trying to find some angle to regulate these practices.

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**Brooke Conkle:**

As you mentioned, the circular really goes and kind of targets broadly different areas of financial services, but specifically calls out auto finance and auto finance companies. The circular directly references a 2020 consent order. And as we read the circular kind of internally, there are two kind of takeaway points that struck us with regard to auto finance companies, and the consent order that the CFPB references.

First, the consent order is not directly on point to what the bureau is highlighting in the circular. The conduct at issue there was in loan extension agreements, and really, what the conduct the bureau is concerned about in the circular itself really appears to be about origination documents. So, it's slightly off center from what the bureau really looks like it's highlighting in the circular. So that, it underscores the point that, if the bureau had something directly on point, you better believe they would cite it in this circular. But its still, auto finance is important enough to them to cite something that may be slightly off point, really. So that could be kind of good news for the auto finance context.

Second, and a little bit of less good news here is that the bureau is citing conduct that goes beyond origination. As we talked about, the circular itself really seems to be grounded in the world of a purchase contract, or a retail installment sales contract. But that's not what the bureau is citing too here, specifically for auto finance. It's citing an extension agreement, so a contract that would come after a retail installment sales contract. It's going to the life of the relationship between a consumer and an auto finance company. So, that gives us a pretty good idea that the bureau is not limiting the scope of the circular to just initiation or origination documents. It's going through the life of the relationship with the consumer, and really monitoring all contracts that can come up, that can be part of the life of that relationship. That's pretty significant.

Now Caleb, the circular highlights a couple of key federal statutes, including EFTA, TILA, and the FCRA. For these statutes, what is the bureau on the lookout for in consumer contracts?

**Caleb Rosenberg:**

I think it goes directly to the point that you were just talking about, which is, that they're looking beyond the contract itself and to the life of the entire relationship with the consumer. On the TILA side, even though the specific things that they cite to relate to mortgages, a number of the actions related to modification agreements of mortgages and waivers of rights in those modification agreements. So, companies were saying that in order to enter into this modification agreement, they needed to waive all prior causes of action, and offsets other things they might be owed from the lender. The CFPB found that was a UDAP, and is saying that any action like that is a UDAP.

Similarly, the EFTA covers payments, and there's a rule under EFTA that you are not allowed to waive any rule conferred by EFTA. Of course, that could be done in the initial contracts that could have led to originations, but it could also happen with individual payments or with payment authorization that happens during the life of a contract. So, I think that this is something that people should think about broadly, both in their contract drafting and in their servicing relationship with the consumers.

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**Brooke Conkle:**

Now Chris, if you're listening, and you're part of an auto finance company, how do you think this circular impacts auto finance companies, specifically with regard to compliance?

**Chris Capurso:**

Yea, I think it's a reminder of a bunch of things, even with, it only being seven pages, you think of a grand proclamation being something, from the CFPB, there's only seven pages. But, I mean, one of the big things is, yes, the CFPB doesn't have oversight over the dealers per se, that auto finance companies deal with. Although, we've talked about on this very podcast about the data collection effort, all these things, where the CFPB is trying to find their way in, potentially be another one. Because, obviously, auto finance companies by its, I mean, in the retail installment contract sense, they buy the paper from the dealers. So, this is another case where auto finance companies really need to be up to snuff on the paper that they're buying, whether that's providing it themselves or auditing it.

There's also a very interesting little reference in the circular to the Holder role and how the CFPB can enforce it. Brooke might be talking about that in the litigation side. As a nice little teaser, in a footnote that the CFPB decided to throw in and make sure that everybody knows that they also can enforce that. In the credit context, specifically with retail installment sales contracts, or in the case of direct loans. Caleb talked about it earlier. A lot of the times we see savings language in contracts, especially multi-state contracts for ease, so the auto finance companies don't have to have a grand editing function. I mean, obviously, the internal functions are going to be keeping up with state law. But to make sure that the contracts are uniform from state to state, that there's not too much variation, so that consumers are all seeing the same things. There could be some question on some savings language, whether "Oh, is this deceptive?" Because it potentially gives the consumer an impression that they don't have a right that they otherwise do have. It's interesting language in that consent order Brooke mentioned earlier of, the CFPB use language "net impression," or at one point, they use net misimpression too, which is interesting. But it makes finance companies have to really judge a gray area, what is a net impression? What kind of net impression would a consumer get from certain terms? So that, if you saw savings language on a certain sentence, maybe on its own, it seems totally fine. But maybe the CFPB come in and say, "Well, three clauses later, there's this one throwaway line that completely takes the net impression into a different realm. Now, we're talking about deception."

So, auto finance companies need to be careful, specifically in that kind of fee context, like attorney's fees. You see sometimes right to cure notices, and in some cases, it could be framing. I mean, this is all very new, and we don't – we're not giving legal advice on this, and we still haven't had too much time to digest this. But maybe trying to make any type of savings language a little bit more permissive than negative, because they continually talk in the circular about saying, "Unless permitted by state law, you can't do this." Whereas you could say like, "Subject to a right," something like that, just a little bit more permissive could potentially be a way forward. Obviously, we need to see what the CFPB is going to do with this.

But, there are quite a few considerations in this circular, again, considering its seven pages, considering it's kind of a throwaway in a week, where the CFPB has just been flooding the

airwaves with all sorts of things, including public registries and whatnot. This is – I don't want to say under the radar, because it's definitely piqued some interest - but it's something that auto finance companies really need to be wary of.

**Brooke Conkle:**

Chris, that's a great segue to what I was going to talk about. Just as you mentioned, this is kind of, not a throw away, but very much sort of a quiet release. What this, kind of, in a very terrifying way, frankly, reminds me of, is the very quiet release that the FTC put out a couple of years ago about the Holder rule. Essentially saying, years of understanding of the Holder rule actually was wrong. But we're not changing anything, we're just clarifying things to let you know that it's the opposite of what we've held for 40 years.

So, this very sort of quiet and non-splashy release really does not mean that this is something that auto finance companies should ignore, or should kind of sweep under the rug. It's just another file in the stack of paper. Specifically for litigation, the things that we see this circular highlighting in risk areas is, unfair and deceptive practices. How that can come forward for an auto finance company is through the Holder rule, and through state consumer protection acts. Those always have kind of a little bit more teeth, because it comes with the prospect or potential of attorneys' fees. That's what plaintiffs' lawyers are looking for, and that's what can make the UDAP claims specifically so attractive for plaintiffs' lawyers.

Now, moving on to the enforcement front, what we see as potential risk here is the idea that the CFPB has gone to auto finance companies and said, if you accept certain paper that has problems, then potentially you can't collect interest on that paper. So, as Chris said earlier, it really does put a significant burden on auto finance companies to have sort of a very thorough checklist, and a very thorough review of all of the indirect paper that comes in into the door, really kind of scouring those retail installment sales contracts for topics that the bureau thinks are really important.

**Chris Capurso:**

With that, that's going to wrap up today's version of this special edition of [The Consumer Finance Podcast](#). Thank you everyone for tuning in. Don't forget to check out our blogs where you can subscribe to our entire financial services blog or just the specific content that you find most helpful. Those websites are the [ConsumerFinancialServicesLawMonitor.com](#) and [TroutmanPepperFinancialServices.com](#). While you're at it, you can head over to [troutmanpepper.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.

One more thing, big news, we are officially spinning off this podcast. I like to look at it as more of a *Frasier* to [The Consumer Finance Podcast](#) *Cheers*, as opposed to like a *Joey* to *Friends*. Really hope everybody else sees it that way. The first edition of this new podcast will drop July 16, and it will be distributed via all the channels you're used to, and where you found this episode hopefully. But we'll have a new name, and that new name will be *Moving the Metal – The Auto Finance Podcast*, together with some outstanding intro music with car sounds, and all

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the things everybody loves. So be on the lookout for this new podcast in the next month. Until then, have a great one.

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