Vol. 23, Issue 3 September 2020

SPOT Delivery®

A Monthly Legal Update for Auto Dealers and Finance Companies *from* CounselorLibrary® *publisher of* CARLAW®

VEHICLE SALES

FTC's Auto Buyer Study and Buckle Up Report Detail Consumers' Experiences in Purchasing and Financing Vehicles

By Nora R. Udell*

On July 30, the Federal Trade Commission announced the Bureau of Consumer Protection's staff report, "Buckle Up: Navigating Auto Sales and Financing," and the BCP's joint staff report issued with the FTC's Bureau of Economics, "The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research." The report and the study highlight some of the challenges and confusion a consumer may face in buying and financing a vehicle.

This brief summary of the report and the study will help you understand how the FTC sees consumers' experiences and where it focuses its enforcement attention in vehicle sales and financing transactions. I've also provided some next steps to help ensure your dealership keeps in step with the FTC.

(see **VEHICLE SALES,** page 2)

EQUAL CREDIT OPPORTUNITY ACT

Is the Government Watching Your Dealership? How to Protect Yourself from Illegal Discrimination Claims

By L. Jean Noonan*

Last month, I wrote about a case settled by the Department of Justice against a small dealership near Baltimore ("Department of Justice Settles Discrimination Claim Against Little Dealership: Why We Should Care"). The DOJ sent pairs of testers, or "mystery shoppers," to the dealership in 2017 and 2018 to pretend to shop for used cars and compare the financing offered. The testers were a white couple and an African-American couple, and the DOJ said they had similar credit qualifications. But their qualifications, real or made up, didn't matter because the visits

(see **ECOA,** page 5)

IN THIS ISSUE:

CounselorLibrary®

SPOT Delivery®

A Monthly Legal Update for
Auto Dealers and Finance Companies

Spot Delivery is published monthly except for a combined January/February issue (11 issues per year) by CounselorLibrary.com, LLC, 7037 Ridge Road, Suite 300, Hanover, MD 21076-1426; 877.464.8326. Subscription is $349.00 per year.

Monthly issues, including all back issues, are also available online at www.counselorlibrary.com.

VEHICLE SALES from page 1

Auto Buyer Study

Using 38 detailed consumer interviews, the FTC examined consumers' vehicle purchasing and financing experiences at dealerships. The Auto Buyer Study addresses consumers' understanding of the vehicle purchase and financing process and details overall lessons the FTC has taken from the interviews. The lessons from the study highlight "several areas where consumers did not understand the process," specifically:

- Most consumers engaged in some search for the car and the dealer. However, they did not always collect the information most useful in negotiating the price of the car or the cost of financing.
- When arranging financing with the dealer, many consumers were most interested in the monthly payment, and some dealers focused discussion on that term.
- Most consumers did not attempt to negotiate or did not know that they could negotiate terms of the transaction other than the price of the car and the trade-in, and some did not negotiate at all.
- Consumers often did not understand contract "add-ons" (e.g., GAP insurance or extended warranties).
- Many consumers did not know or understand all of the details of their transactions, as revealed by comparing the consumers' interviews with their sale and financing documents.

According to the study, these areas provide a foundation for the FTC to develop consumer education and for further research into potentially modifying the vehicle purchasing and financing process.

Buckle Up Report

FTC enforcement should always be on dealerships' radars, and the Buckle Up Report highlights areas of the Auto Buyer Study that the BCP sees in its enforcement activities: (1) voluntary vehicle protection products and services, (2) advertising, (3) negotiating vehicle price and financing terms, (4) reviewing and signing documents, and (5) spot delivery.

VPPs. The FTC flagged "add-ons" as "the single greatest area of confusion observed" and cautioned that, given this lack of understanding, "it is important for dealers to think carefully about how add-ons are promoted." The FTC identified six problem areas and gave examples from the consumers' interviews:

- **Late, limited, or no discussion of VPPs.** The limited amount of time and circumstances under which most study participants had to consider VPPs may have contributed to

(see **VEHICLE SALES,** page 3)

lack of understanding and consumer confusion.

- **Confusion about whether VPPs are free.** Some consumers understood that VPPs were included in their deal at no additional charge and were surprised to learn, when going through their paperwork during the interview, that they had paid extra for VPPs.
- **Impressions that VPPs are mandatory.** The FTC noted that if GAP is required for financing, its cost must be included in the consumer's APR and finance charge disclosures. Alternatively, if GAP is not required for financing, dealers cannot represent that it is.
- **Unexpected limitations of VPPs.** One consumer bought a "Lifetime" maintenance plan, only to discover later that he received a one-year plan that covered periodic oil changes.
- **Opaque pricing of VPPs.** A few consumers said that dealers explained the cost of each VPP, but other participants said that dealers quoted prices only in terms of how much each product would increase the monthly payment. Some consumers did not know how much purchased products cost at all.
- **Bundling VPPs.** Some consumers indicated that dealers sold them VPPs as packages and that dealers did not give prices for each product. One consumer said she felt like she could not select the specific protection products she wanted but was forced to buy all products as a bundle.

Advertising. The report flagged as a concern advertising with misleading financing terms, including deceptive price and discount offers. The FTC advised that dealers "should make only accurate and non-misleading advertising claims to consumers, advertise terms that are actually available, and clearly and conspicuously disclose material qualifications or limitations on any advertised deal."

Negotiating Vehicle Price and Financing Terms; Reviewing and Signing Documents. The FTC explained that, given the length and complexity of the transactions, discussing the "out-the-door" price of the vehicle (the total price before financing, including taxes and fees) *before* discussing financing could help avoid consumers' confusion about vehicle prices. The FTC asserted that

The report and the study highlight some of the challenges and confusion a consumer may face in buying and financing a vehicle.

the length and complexity of the transactions interfered with the participants' ability to meaningfully review sale and financing documents. Despite the length of the transaction, the FTC also noted that many participants felt they did not have enough time to review and understand the transaction documents.

Spot Delivery. The FTC flagged spot delivery as an area of consumer confusion and advised that dealers should explain spot delivery to consumers before signing. Additionally, when a dealer calls a consumer back because financing falls through, the dealer should never use deceptive or unfair tactics to pressure the consumer into a new deal. Rather, the dealer should prepare, maintain, and provide to the consumer records documenting any changes to the deal and the reasons for the changes. The FTC cautioned that "[i]t is important for consumers to know that they do not have to agree to any changes or new paperwork they are being asked to sign."

Based on the Auto Buyer Study, the FTC believes the following topics "merit further study or initiatives": (1) the length and complexity of the auto transaction, (2) ancillary or "add-on" products (i.e., voluntary protection products), (3) yo-yo financing tactics (i.e., spot delivery), (4) GPS tracking capabilities, and (5) other issues raised by consumer complaints. Moving forward, the FTC expects to continue to focus on deceptive or unfair tactics in the auto industry and to develop consumer education and business guidance initiatives to ensure consumers have meaningful information when considering or entering into auto transactions.

Now what?

To start, let's stop calling voluntary protection products "add-ons." We all need to recognize that these products are optional, meaning that consumers have the option to buy them. Clarify and standardize dealership

(see **VEHICLE SALES,** page 4)

VEHICLE SALES from page 3

representations about VPPs to help avoid consumer confusion. A dealer can better show the availability and cost of VPPs by using menu selling. Check out Eric Johnson's *Spot Delivery* article from August 2020—"Menu? We Don't Need No Stinkin' Menu. Yes, You Do!"—for more information about menu selling and why it's important.

Next, advertising is not the Wild West. Dealers should consider each medium in which they advertise and review each advertisement for accuracy and legal compliance. Advertising content is governed by state and federal law. Dealers should consider having inside or outside counsel review advertising materials for statements that could be considered unfair or deceptive.

The length and complexity of the vehicle purchase and finance transaction are tougher to fix. However, clarifying and standardizing how dealers discuss VPPs with buyers may reduce the length and complexity. There should be less to discuss when consumers understand what they are buying and the costs with and without the optional products.

Many states have required disclosures for spot delivery transactions, and dealers should make sure disclosures are up to date and accurate. The number of days for deal cancellation should be reasonably limited, and dealers should make clear any changed terms in a new transaction.

Unfortunately, the report did not otherwise discuss consumer complaints or GPS tracking even though the FTC flagged those areas for additional study or initiatives. But here are some tried and true strategies. First, track and respond to any consumer complaints received. Consumer complaints can be warning shots for consumer litigation and regulator action and signs of systemic issues with products or services. Second, ensure a GPS tracking device is installed with the consent of the owner of the vehicle without charge (lest it be considered a finance charge) and used only in compliance with that consent, contract terms, and applicable law.

***Nora R. Udell** is an associate in the Maryland office of Hudson Cook, LLP. She can be reached at 410.782.2321 or by email at nudell@hudco.com.

ECOA from page 1

never progressed to the credit application stage.

The DOJ sued the dealership, alleging that the white couple testers were offered better credit terms than the African-American couple testers, such as a smaller down payment, the opportunity to pay the down payment in installments, lower biweekly payments, and the like. After several months, the case settled.

The manager said, in a phone call with me, that the testers were in his dealership for only a few minutes, asked a few questions, and left without sitting down to explore their financing options.

The manager, the husband of the owner, expressed great frustration at the DOJ's conduct. It seems like the DOJ based its complaint on only two paired tests. At least in the second pair of tests, the testers dealt with different employees—the African-American couple with a salesman and the white couple with the manager, who provided more information.

The main point of contention seemed to relate to the dealership's practice of offering no-interest down payment financing to buyers who lacked sufficient cash to pay the down payments required by the dealership's financing sources. The manager said typical down payments range from $1,500 to $2,000, depending on various factors that require a credit application for a firm down payment quote. The salesman allegedly quoted the higher number to the African-American couple, and the manager allegedly quoted the somewhat lower number as typical to the white couple.

Were these quotes conveyed as firm or as tentative numbers, depending on the credit application? We don't know. The DOJ refused to let the manager listen to the tape recording of the second test or to review a transcription of it. It is possible that the dealership consistently quoted higher down payment requirements to African-American applicants than white applicants, based on their race, and that it told white applicants, but not African-American applicants, that the dealership could offer no-interest financing for part of the down payment.

The manager denied this practice to me. He said he offered to show the DOJ files proving that most of the dealership's customers were African American and that they received terms just as favorable as white applicants, but the DOJ did not accept his offer. The manager acknowledged that his salesman and he might have given different tentative quotes to the two tester couples, based on their respective differences in sales styles, not on the testers' race. Any preliminary difference in quotes would have been resolved, he was sure, if the testers had stayed around to apply for credit, and he would have fully explained to both couples the opportunity to receive a no-interest down payment loan.

Was this difference due to intentional race discrimination, as the DOJ alleged? Or was it due to differences in styles in preliminary chitchat by different employees with different experience levels? Or was it due simply to random variations in a small number of tests? We don't know. With only two tests, which never progressed to a serious discussion of financing, anything is possible.

Lessons to Be Learned

The DOJ has done some solid work in enforcing the Equal Credit Opportunity Act. But, in my view, this case was not the DOJ's finest hour. If I am right, this is an unfortunate outcome for this little dealership. It is also a cautionary tale for every dealership.

Although some businesses hate the surreptitious nature of testing or "mystery shopping," it is a valid investigatory tool when done right. This evidence can be the most compelling proof of differences in treatment that cannot otherwise be explained away. But there is a lot of room for non-discriminatory variation in a short sales encounter that does not progress to an application. Two paired tests are hardly definitive.

This dealership had a limited opportunity to defend itself against these charges. It was not allowed to hear the recordings or view the transcripts. Fighting a case, even a flawed one, simply may not have made economic sense.

If this test had occurred in your dealership, would you have fared better? If you are honest with yourself, your answer probably would be, "This could have been me." And, another time, it might be your dealership.

Here is a weakness that exists in most dealerships. Salespeople have their own styles in persuading a shopper to become a buyer, preferably one who will buy today. With experience, they often settle into a style that seems to work well for them. They understandably resist being told how they "should" do

(see **ECOA,** page 6)

their job—a job of persuasion, honest persuasion, but still persuasion.

But variations in approaches can present a big risk to dealerships. That couple looking at cars could be government testers with a hidden tape recorder.

Your dealership needs some firm rules about talking about sensitive points, especially financing and the sale of voluntary protection products, the two hottest issues for regulators and enforcement agencies now. Let's turn first to financing.

There are several legitimate approaches to avoiding the trap that this dealer fell into.

- Deflection. If a customer asks a salesperson specific questions, you can instruct your salesperson to deflect the question. Perhaps you train salespeople to respond with an answer something like this: "That's a good question. I know we have lots of terrific financing options, but I don't want to give you wrong information. John is the best person to help you with that. Lots of those details depend on the car you select. Let's figure out which car best fits your needs and what you want to pay for it. Then John will be able to figure out financing options for you." If that had been the response at this dealership, you can bet there would have been no ECOA enforcement action.
- Limited and consistent answers. Might a customer become frustrated with deflection? Yes, and that is a legitimate concern. But if you are going to have salespeople answer any financing questions, you must do these things:
  - Decide which questions the salesperson can answer and which must be reserved for the F&I staff. Let's imagine the customer asks which models are eligible for promotional financing. That is usually a question with a straightforward answer. But what, if anything, should the salesperson say about limitations on the promotional financing offer, such as that it is available only to customers with the best credit? You do not want to mislead the customer into believing that he will receive the promotional rate if he might not. But the salesperson is unlikely to be able to give a clear and accurate answer to every customer.
  - Settle on acceptable answers to questions that may be answered. Be sure the answer is complete enough to avoid being misleading. This means not only answering the question but also giving important qualifications. An acceptable answer to the question about which models are available for promotional financing might be: "For the rest of this month, the promotional financing applies to the current year's models of X and Y. The financing applies to repayment periods of z months or less. And not everyone will qualify. Usually customers must have really good credit to qualify for that rate. John can explain all that to you. For now, do you want to look only at models X and Y, or would you be interested in seeing other models, as well?"
- Enlisting F&I help. It might be necessary to interrupt the sales process if the customer is insistent on learning an answer to a question out of scope for the salesperson. It may not always be possible to get an immediate response from the F&I staff, especially on a busy Saturday afternoon. But trying, even it if means a wait, is much safer than having the salesperson wing an answer.

Once you have settled on an approach for your dealership, or a combination of approaches, the next challenge is implementing it. The second approach, limited and consistent answers, may be the most satisfying for customers, but it is also the hardest to implement. First, you must identify the most common questions, ideally in consultation with your sales staff. Then you must decide which ones you feel the salespeople can answer accurately and consistently. Next, and don't skip this step, write out the answers you want them to give. Remember that the answer should include any important qualifications.

The final step will cause this strategy to succeed or fail—train! It is the rare dealership that can provide scripts to salespeople and expect them to give the desired answer without considerable training. After all, they don't have the opportunity to read from a script like a call center employee might. The answer must be provided within the context of the good relationship

(see **ECOA,** page 8)

FEDERAL LAW

Towing Companies Sued for Alleged SCRA Violations

By Charles F. Dodge, Jr.*

In mid-August, the Department of Justice sued Target Recovery Towing Inc. and Target Recovery & Transport Inc. in Florida federal court for violating the federal Servicemembers Civil Relief Act when, without a court order, they sold a car to satisfy a storage lien. The car belonged to an active-duty servicemember deployed overseas.

The case is only at the complaint stage, but it reflects an SCRA enforcement initiative different from others that typically make financial services news. Specifically, this case is against towing companies, not a secured creditor, and the claim arises because of a sale in the enforcement of a storage lien, not enforcement of a consensual security interest.

In this case, though, the towing companies were acting on their own behalf when they sold the car subject to their lien. It is important to note that the SCRA still offers servicemembers protections in that context.

But, the allegations in the government's complaint are familiar: the statutory lienholders (i.e., the towing companies that held a statutory lien on the car for storage fees) did not have policies or procedures in place to ensure that they did not violate the SCRA, the lienholders failed to review the no-fee military database to ensure that the owner of the car was not on active military duty when they sought to enforce the lien, and the lienholders sold the car without a court order.

In its complaint, the DOJ notes a number of factors that it alleges should have led the towing companies to at least investigate whether the owner of the car was in the military: there was a military decal on the vehicle, the owner's address was on a military base, and the towing companies sent a notice of the lien to Navy Federal Credit Union, whose website evidently makes clear that its membership is "restricted to members of the armed forces, the Department of Defense, veterans, and their families."

The DOJ also alleges that the towing companies' procedures did not include a pre-sale review of the Defense Manpower Data Center database or other efforts to see if the car's owner was on active military duty and protected by the SCRA. The DOJ also notes that the towing companies did not have a practice of obtaining court orders to comply with the SCRA in the enforcement of their storage liens.

It has become a standard expectation in financial services regulation since the enactment of the Dodd-Frank Act in 2010 and the evolution of the Consumer Financial Protection Bureau that all participants in the consumer financial services industry, including vendors, have some form of compliance management system designed to ensure compliance with consumer protection laws and avoid consumer harm. When vehicle recovery companies work with secured creditors to repossess collateral, they are participating in the financial services environment and subject to potential enforcement by the CFPB. They are also, in that context, subject to rules and restrictions imposed by their creditor business partners that most often require some form of SCRA awareness and procedures.

In this case, though, the towing companies were acting on their own behalf when they sold the car subject to their lien. It is important to note that the SCRA still offers servicemembers protections in that context. Specifically, the DOJ claimed violations of 50 U.S.C.A. § 3958, which prohibits the foreclosure or enforcement of a lien "for storage, repair, or cleaning of the property or effects of a servicemember or a lien on such property or effects for any other reason" during the servicemember's period of military service or for 90 days after, without a court order.

The DOJ filed another claim on the same day in Massachusetts federal court against a moving and storage company that allegedly sold a servicemember's possessions while he was deployed overseas, citing the same provision requiring a court order to enforce liens

(see **FEDERAL LAW,** page 8)

ECOA from page 6

the salesperson is trying to establish with the customer. That is very hard to do without considerable practice.

Making this approach all the harder is that new questions will continuously arise, requiring new decisions about whether to answer and, if so, developing good answers.

The second issue is selling VPPs. Here are the two most common mistakes dealerships make, and they are both serious. The first is not having solid policies for pricing and selling these products. The second is not consistently implementing the policies. Tune into *Spot Delivery* next month, and I'll tell you the hot issues with regulators on VPPs and how to avoid getting burned.

***L. Jean Noonan** is a partner in the Washington, D.C., office of Hudson Cook, LLP. Jean can be reached at 202.327.9700 or by email at jnoonan@hudco.com.

FEDERAL LAW from page 7

that it cited in its case against the towing companies.

The actions filed by DOJ are consistent with the civil rights initiatives described in the DOJ's congressional budget submission for fiscal year 2020, where it listed enforcement of federal laws that protect servicemembers, veterans, and their families as a priority. Enforcement actions in recent years against finance companies and banks heightened awareness of servicemember protections for players in the financial services space. These two recent actions focusing on different SCRA protections underscore the need for all lienholders, not just lienholders of consensual security interests (like finance companies), to be aware of SCRA protections for servicemembers and their families and to adopt policies and procedures designed to prevent SCRA violations.

***Charles F. Dodge, Jr.,** is a partner in the Maine office of Hudson Cook, LLP. Chuck can be reached at 207.210.6825 or by email at cdodge@hudco.com.

Loose Lips Sink Ships—and Dealerships

By Thomas B. Hudson*

Sometimes dealership sales folks are dishonest crooks. Rarely, we hope.

Other times, they have not been trained properly to play their parts in the reasonably complicated sales and financing transactions that are common at dealerships. In either case, salespeople—and F&I people too, for that matter—can create mischief when they make statements to car buyers that they shouldn't make.

Here's an example of the sort of trouble that can result from a few ill-chosen words.

Yahaira Munoz bought a used vehicle from JLO Automotive, Inc. Munoz alleged that, during the purchase transaction, the dealership's salesperson told her that GAP insurance was mandatory as part of the dealership's "low income program." If you know the requirements of the federal Truth in Lending Act and Regulation Z, you'll know that when GAP is required, the cost must be included in the finance charge and used to compute the APR in the credit transaction.

Munoz claimed that although she was not interested in buying GAP insurance, she bought it because the salesperson told her it was mandatory. The salesperson also allegedly required Munoz to provide her checking account information so the finance company could make automatic withdrawals from her bank account.

Munoz later sued JLO for violating TILA, the Electronic Fund Transfer Act, the Fair Credit Reporting Act, and the Connecticut Unfair Trade Practices Act. Munoz moved for a default judgment.

The federal trial court found that the retail installment contract Munoz signed contained language stating that GAP protection was "not required to obtain credit" and that GAP protection would not be provided unless the consumer signed for it, which Munoz did.

The court found that this language fulfilled TILA's requirement of a clear and conspicuous disclosure. The RIC also satisfied the three requirements for excluding GAP insurance from the finance charge: it disclosed that GAP insurance was not required, it disclosed the fee for the initial term of coverage, and Munoz signed the affirmative request for coverage right beneath the disclosures.

The court rejected Munoz's argument that the salesperson's oral statement that GAP insurance was required to obtain credit negated the written disclosure and thus created TILA liability. Therefore, because the GAP insurance charge satisfied the criteria to be excluded from the finance charge, and because Munoz's TILA claim was premised on the notion that the GAP charge was a finance charge, the court denied her motion for a default judgment on her TILA claim.

However, the court granted Munoz's motion for a default judgment with respect to her EFTA claim alleging that JLO required her to allow the finance company to debit her checking account automatically as a condition of financing.

Finally, the court declined to exercise supplemental jurisdiction over the CUTPA claim.

You'll need to read this opinion carefully. The dealership did not get off scot-free. It escaped liability for a federal TILA claim but not for the federal EFTA claim. Note that the federal court declined to adjudicate the state unfair trade practices act claim, which could be brought in state court or serve as the basis for a complaint to the attorney general or to dealership regulators.

That should tell you that you need to make sure that customer-facing dealership representatives know what they can and cannot say, and what they can and cannot require, when dealing with car buyers. If you aren't training your folks on these details—"coachin' 'em up," as Steve Spurrier used to say—you're looking for trouble.

Munoz v. JLO Automotive, Inc., 2020 U.S. Dist. LEXIS 136552 (D. Conn. July 31, 2020).

***Thomas B. Hudson** was a founding partner of Hudson Cook, LLP, and is now of counsel in the firm's Maryland office and the Senior Editor of *Spot Delivery.* Tom can be reached at 410.865.5411 or by email at thudson@hudco.com.

VEHICLE SALES

American Bar Association: At Last, a Good Auto Sales and Finance Resolution!

By L. Jean Noonan

For the third year in a row, members of the American Bar Association House of Delegates were ready to consider a resolution on fair auto sales and financing. Each time, it was a bad resolution, which would have urged Congress and states to require collection of applicants' race and sex for monitoring purposes, dictate dealer compensation from finance sources, and require disclosure of the cost of every voluntary protection product the dealership offers *before* a customer negotiates a vehicle purchase.

In 2018 and 2019, Hudson Cook and leaders of the ABA Business Law Section worked extensively with the resolution's proponents to educate them on the auto sales and financing process and explain why their proposal was a bad idea. We offered compromises that they rejected. Each year, just before the August meeting, we marshalled our forces to oppose the resolution. That's a tough thing to do because almost every ABA resolution passes easily. Each year, the proponents withdrew the resolution at the last minute, recognizing the strong opposition.

Why should we care about an ABA resolution? The answer is that the ABA employs some of the best lobbyists in the country. Every resolution that passes is assigned to a lobbying firm, which is instructed to do all it can to get Congress, states, and even tribal governments to pass new laws consistent with the resolution. Dealerships and their state and national trade associations would spend a fortune opposing these ABA lobbying efforts.

In May, in the middle of the nation's preoccupation with COVID-19 and the treatment of Black men by some police officers, the proponents quietly submitted their resolution again. Although we have spent untold hours with them discussing their resolution, we received not even a courtesy email that it was coming. We were preparing again to assemble our opposition, but we recognized that any resolution portrayed as advancing civil rights would be harder to oppose successfully this summer.

So, we thought we needed a completely fresh approach. After all, both sides have the same goals: we both care that illegal discrimination does not taint a consumer's auto buying and financing experience, and we both want consumers to understand the features and cost of the voluntary protection products the dealership is offering and that these products are, in fact, voluntary.

A major problem with the proposed resolution was that it would have heaped loads of costs on a dealership while doing next to nothing to ensure the transaction was free from illegal discrimination. The massive data collection burden for monitoring was not intended to *prevent* discrimination; at best, the proponents acknowledged that the data might make it easier *to prove a case* against a dealership or finance source.

Our laws and regulations already contain far too many examples of rules that were perhaps well intended but poorly thought out. As my mother used to say, "It sounds good if you say it fast." But it is very hard to get people to slow down and think critically about something that sounds good if you don't know much about it.

We asked ourselves, "What could dealers do that would assure customers, regulators, and lawmakers that their pricing of auto financing was free of discrimination?" We all know what the bad, unworkable "solutions" are. Just look at the terms of the settlements imposed by the Consumer Financial Protection Bureau on auto creditors.

Then, eureka! We had our answer. Several years ago, the National Automobile Dealers Association launched its voluntary Fair Credit Compliance Policy & Program. Two other trade associations, the National Association of Minority Automobile Dealers and the American International Automobile Dealers Association, signed on as co-sponsors.

This program was based on the Department of Justice's settlement terms in two cases resolving credit discrimination claims against dealerships. The DOJ's actions were a sound approach to preventing discrimination. They simply and elegantly ensured that each customer would be treated the same by a dealer in

(see **VEHICLE SALES,** page 11)

setting dealer participation, unless the customer qualified for a lower rate based on legitimate non-discriminatory factors, like matching a competitor's offer. The dealership could not increase the rate above its standard markup of each financing source's buy rate. It could only lower the rate based on legal business reasons.

This approach avoided the pitfalls of overregulation, such as mandating dealer compensation only by flat fees or complicated markup limits. It encouraged competition by rewarding consumers who shopped for and found a better financing rate. It did not prevent dealers from participating in promotional pricing programs offered occasionally by car manufacturers.

The Fair Credit Compliance Program built on these principles and, in places, made them even a bit tougher. The CFPB eventually acknowledged the wisdom of this approach and included it as a compliance option in some of its Equal Credit Opportunity Act settlements with auto creditors. In May, the Federal Trade Commission settled its first ECOA discrimination case against a dealer. Once again, the government endorsed the principles of the Fair Credit Compliance Program in its consent decree with the dealer.

With these facts, we re-wrote the proponents' ABA resolution. Gone was the mandate to expand fair lending laws. Gone was government regulation of dealership compensation by finance sources. Gone was the oppressive data collection requirement.

Instead, the resolution read simply that the ABA urges governments to:

> adopt laws and policies that promote the adoption of an enhanced nondiscrimination compliance system for dealer compensation for arranging and/or originating a vehicle finance contract by offering a safe harbor against pricing discrimination claims for dealers that faithfully implement the NADA/NAMAD/AIADA Fair Credit Compliance Policy and Program.

A dealership's use of the Fair Credit Compliance Program remains voluntary, but dealerships that adopt and implement it would be safe from claims of pricing discrimination. That fact gives comfort not only to the dealership and its customers but also to the finance sources that buy the dealership's contracts.

A dealership's use of the Fair Credit Compliance Program remains voluntary, but dealerships that adopt and implement it would be safe from claims of pricing discrimination.

We also put the kibosh on the proposed resolution's requirements that dealerships use window stickers and other means to quote prices of voluntary protection products before the negotiation of the vehicle's purchase. How can a consumer know whether she wants various VPPs until she has selected the car, knows how much financing she qualifies for, and knows the financing terms?

For instance, a GAP policy might be more important on a new car with rapid depreciation and a low down payment than on a used car with a larger down payment. But buying that used car might warrant also buying an extended service contract, especially if the manufacturer's warranty has ended. Buyers with big savings accounts may not worry about paying for events these VPPs cover, but a consumer who lacks such savings may value the protection and peace of mind VPPs provide.

The resolution adopted by the ABA avoids these timing issues and poorly thought out disclosure mandates. Instead, it recommends laws that say VPPs must, in fact, be voluntary—hardly a radical idea. It requires "clear and conspicuous" disclosure of the costs by "reasonable" means, such as a pricing sheet, menu, or website. Finally, the disclosure must occur before the consumer buys the vehicle, not before she begins shopping. We beat back a late proposal that the law require telling the consumer the dealer's wholesale cost of the VPP. (I countered that it might be useful for me to know a contractor's wholesale cost of supplies and labor, but no one thinks it is an unfair practice not to tell me!)

I wish the ABA lobbyists well as they advocate for this resolution. It would give the dealership that adopts the Fair Credit Compliance Program deserved protection from baseless ECOA pricing discrimination claims. That would be a big win.

(see **VEHICLE SALES,** page 14)

New Features in the CFPB Consumer Complaint Database

By Eric D. Mulligan*

On July 17, the Consumer Financial Protection Bureau added new features to its Consumer Complaint Database. The new “trends” features allow a user to view complaint data over time. While the database always allowed a user to filter complaints by date range, the new features make it easier for a user to see changes in overall complaint volume and complaints by type. If you want to see where you are and where you’ve been in terms of compliance, these new features may help.

For example, say that you feel like you’ve been getting a lot of complaints about credit reporting lately and want an easy way to see whether your feeling is right. You can enter your company’s name into the database, select the “Trends” tab, and see how many complaints your company has received by month. Then select “Product” under “Aggregate By” to see the top five products by complaint volume for the date range you’ve chosen.

If credit reporting is one of the top five products by complaint volume for that date range, then you can see whether you’re really getting more complaints about it lately. You’ll also see whether something pops up that you didn’t expect. Maybe you’ll notice that complaints about debt collection have spiked over the past two months.

You also can see what’s happening outside your company. You can choose to see aggregate complaint data for all companies, then sort by product. Maybe that increase in complaints about credit reporting is happening to everyone in your industry, not just your company. You can see data for your competitors and find out whether they’re also getting more complaints about credit reporting. You also can see data by “sub-products” (for example, vehicle loans and vehicle leases as separate categories) and “issues” (for example, complaints about obtaining credit versus complaints about payoff), although you can’t see changes over time for categories that specific.

… the new features make it easier for a user to see changes in overall complaint volume and complaints by type. If you want to see where you are and where you’ve been in terms of compliance, these new features may help.

Of course, the database can’t tell you everything. For one thing, it can report only what consumers have reported to the CFPB. It won’t tell you about what consumers have told the Better Business Bureau or any “gripe site.”

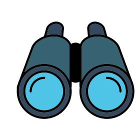
For another thing, the CFPB still doesn’t verify every allegation in every complaint, so the database may include complaints with inaccurate or incomplete information. Also, the database won’t tell you how a company handles its complaints or whether consumers are happy with a company’s responses. For these reasons, the database is no substitute for a solid compliance management system that, among other things, tracks consumer complaints and company responses to complaints.

However, the database can help you determine how the number and types of complaints are changing over time, both in your company and elsewhere. As a result, you can know whether what you’re seeing is something specific to your company or part of a larger pattern.

You can see the database at https://www.consumerfinance.gov/data-research/consumer-complaints/.

***Eric D. Mulligan** is an associate in the Maryland office of Hudson Cook, LLP. He can be reached at 410.865.5402 or by email at emulligan@hudco.com.

The FTC is requesting comments on proposed changes to FCRA rules applicable to dealers. For more information on the rules the FTC seeks to change, see the **CFPB Watch** on page 14.



STATE ENFORCEMENT

This Summer, AGs Turned Up the Heat

By Shelley B. Fowler*

We normally think of the summer as a quiet time of year, where not much happens workwise between Memorial Day and Labor Day. Well, this summer certainly hasn't fit that mold, at least when it comes to state attorneys general setting their sights on dealer misdeeds. At least three AGs sued dealerships and related individuals in the dog days of July and August. Let's see what happened.

On July 13, Florida Attorney General Ashley Moody announced that her Office of Statewide Prosecution, in coordination with the Florida Highway Patrol, sued Auto Sports of South Florida and seven individuals for their involvement in a complex scheme to fraudulently take possession of vehicles and apply for duplicate titles by using fictitious documents and methods.

According to AG's press release, the individuals submitted documents, including fraudulent powers of attorney, to the Florida Department of Highway Safety and Motor Vehicles, making it appear as though the financing for the fraudulently obtained vehicles was paid in full. The investigation revealed that the fraudulent documents allowed members of the group to obtain duplicate titles to the cars. Because the duplicate titles appeared legitimate, the individuals, including the owner of Auto Sports, were able to sell the cars to others for a large profit.

The individuals are charged with 51 counts of offenses, including racketeering, grand theft, identity theft, money laundering, and insurance fraud. If convicted, the defendants face up to 30 years in prison for each of the first-degree felonies charged.

A little more than two weeks later, on July 30, Ohio Attorney General Dave Yost announced that his office sued a defunct used car dealership, Rt. 82 Auto Gallery LLC, and its owners for failing to deliver vehicle titles to customers. The lawsuit accuses the owners of violating Ohio's Consumer Sales Practices Act and the state's Certificate of Motor Vehicle Title Act.

The AG's press release noted that his office received 33 complaints against the dealership in the past two years, most of which alleged a failure to provide titles. The AG's Consumer Protection Section provided more than $70,000 in payments to impacted customers from the Title Defect Recision Fund, a program that helps used car buyers resolve title problems. The AG's lawsuit seeks reimbursement from the owners, as well as civil penalties and an order preventing them from holding dealer or salesperson licenses in Ohio.

Most recently, on August 12, Illinois Attorney General Kwame Raoul announced that his office sued Skokie Motor Sales, Inc., operating as Sherman Dodge, for allegedly violating motor vehicle advertising regulations relating to sales events, trade-in values, discount substantiation, and advertised prices.

In 2014, the AG's office opened an investigation into Sherman Dodge after receiving complaints from consumers who were unable to purchase advertised vehicles. Consumers alleged that, upon visiting Sherman Dodge to buy a vehicle seen in advertisements, sales representatives would say that the advertised vehicle was already sold and would try to sell them a different vehicle instead. However, the consumers alleged that they continued to see the same vehicle in advertisements for weeks later.

Following the investigation, Sherman Dodge entered into an Assurance of Voluntary Compliance with the AG's office in 2016. Under the AVC, Sherman Dodge agreed to not sell a vehicle for more than the advertised price, advertise a vehicle that it has already sold or leased, guarantee a specific value for a trade-in, advertise a sale without reducing the selling price of vehicles listed in an advertisement by at least 5%, or include limited rebates in an advertised price.

The AG's lawsuit alleges that Sherman Dodge violated the AVC by continuing to engage in the activities prohibited by the AVC. The AG alleges that Sherman Dodge further violated the Illinois Consumer Fraud and Deceptive Business Practices Act by deceptively using fake checks and coupons in its advertisements, failing to disclose a consumer's potential responsibility for negative equity on a trade-in, failing to pay off a lien on a trade-in promptly, and advertising financing opportunities to those

(see **STATE ENFORCEMENT,** page 14)

VEHICLE SALES from page 11

The battle is not necessarily over, however. First, it is possible that consumer advocates may try to resurrect some of the bad ideas in the original proposal if states or Congress take up these issues. Second, there are some ABA lawyers who continue to think "transparency" requires a dealership to disclose its profit on everything it sells.

But this does not take away from our success with this ABA resolution. The past opposition of the Business Law Section and others within the ABA was known to all delegates. Just before the vote, a speaker from the Business Law Section recounted the past deep divide of members on this resolution. She said that "a couple of stubborn women" in the Business Law Section would not give up on finding a compromise. The resolution passed by the biggest margin of the day, 336 to 16. I was never happier to be a stubborn woman.

STATE ENFORCEMENT from page 13

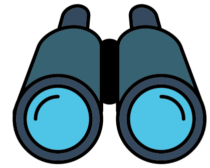
facing bankruptcy. In the lawsuit, the AG is seeking to prohibit Sherman Dodge from engaging in acts or practices that violate the law, rescind all contracts entered into between Sherman Dodge and consumers by use of unlawful methods, and require Sherman Dodge to pay full restitution to consumers. The AG also is seeking a civil penalty of $50,000 per deceptive act or practice, with an additional $50,000 for each act or practice committed with the intent to defraud and an additional $10,000 for each act committed against a person 65 years of age or older.

Given all this action against dealers in the heat of the summer, I can't imagine what's going to transpire when the weather cools down and everyone gets back to business.

*__Shelley B. Fowler__ is a Managing Editor at CounselorLibrary.com, LLC. She can be reached at 410.865.5406 or by email at rfowler@hudco.com.

CONSUMER FINANCIAL PROTECTION BUREAU

CFPB Watch



By Michael A. Benoit*

This article is designed to catch you up on the most recent Washington, D.C., developments in the auto sales, financing, and leasing world. This month, the action involved the Federal Trade Commission, the Department of Justice, President Trump, and the Consumer Financial Protection Bureau.

FTC Seeks Comment on FCRA Rule Changes. On August 24, the FTC issued separate notices of proposed rulemaking seeking comment on proposed changes to and the effectiveness of five rules implementing the Fair Credit Reporting Act. The FTC is proposing to amend the rules to correspond to changes made to the FCRA by the Dodd-Frank Act. The DFA transferred rulemaking authority for parts of the FCRA to the CFPB, narrowing the FTC's FCRA rulemaking authority for these rules. However, the FTC retained rulemaking authority for other FCRA rules to the extent they apply to dealers.

The NPRMs clarify that five rules retained by the FTC apply only to motor vehicle dealers. The NPRMs propose changes to the following rules: Address Discrepancy Rule, which outlines the obligations of users of consumer reports when they receive a notice of address discrepancy from a nationwide consumer reporting agency; Affiliate Marketing Rule, which gives consumers the right to restrict a person from using certain information obtained from an affiliate to make solicitations to the consumer; Furnisher Rule, which requires entities furnishing information to CRAs to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers provided to a CRA; Pre-Screen Opt-Out Notice Rule, which outlines requirements for those who use consumer report information to make unsolicited credit or insurance offers to consumers; and Risk-Based Pricing Rule, which requires those who use information from a consumer report to offer less favorable terms to consumers to provide them with a notice about the use of such data.

(see **CFPB,** page 15)

CFPB from page 14

As part of its periodic review of its rules and guides, the FTC is seeking comment on the effectiveness of the five rules, including: whether there is a continuing need for specific provisions of each rule; the benefits each rule has provided to consumers; what modifications, if any, should be made to each rule to benefit consumers and businesses; and what modifications, if any, should be made to each rule to account for changes in relevant technology or economic conditions. Comments on the NPRMs are due within 75 days after they are published in the *Federal Register*.

DOJ Sues Towing Companies for Auctioning Servicemember's Car Absent Court Order. On August 18, the DOJ sued two towing companies for failing to obtain a court order before auctioning off a servicemember's vehicle, in violation of the Servicemembers Civil Relief Act. The SCRA requires that a court review and approve a towing company's enforcement of a storage lien on a servicemember's vehicle during, or within 90 days after, a period of military service. The court may delay enforcement of the storage lien or adjust the amount of the servicemember's obligation to the towing company. The complaint alleges that several facts should have put the towing companies on notice that the owner of the vehicle was a servicemember. The complaint seeks injunctive relief, monetary damages, and civil penalties. For more information on this suit, see Chuck Dodge's article on page 7.

Vehicle Lease Protections for Servicemembers Expanded. On August 14, President Trump signed S. 3637, which amends the Servicemembers Civil Relief Act to expand vehicle lease protections for servicemembers under stop movement orders in response to the COVID-19 pandemic. The bill allows a servicemember who executed a vehicle lease upon receipt of military orders for a permanent change of station or deployment to terminate the lease if the servicemember thereafter receives a stop movement order in response to an emergency that prevents the servicemember or his or her dependents from using the vehicle.

FTC Releases Reports on Consumer Car Buying and Financing Experiences. On July 30, the FTC released two reports highlighting the results of its study consisting of in-depth interviews with 38 consumers about their car buying and financing experiences with dealers. The first report, by the staff of the Bureau of Consumer Protection, summarizes certain results of the study that are related to the sales and financing issues encountered by the FTC through its enforcement proceedings. The first report focuses on advertising, negotiating a price, negotiating financing terms, ancillary products and services, reviewing and signing documents, and renegotiation of financing terms. The second report, by the staff of the Bureau of Consumer Protection and the Bureau of Economics, explains the study's methodology, analyzes the study's results, and discusses related research on the car buying and financing process. For more on these reports, see Nora Udell's article on page 1.

CFPB Seeks Comments on ECOA Issues. On July 28, the CFPB issued a request for information seeking comments and information to identify opportunities to prevent credit discrimination, encourage responsible innovation, promote fair, equitable, and nondiscriminatory access to credit, address potential regulatory uncertainty, and develop viable solutions to regulatory compliance challenges under the Equal Credit Opportunity Act and Regulation B. The RFI is in lieu of a symposium the CFPB had planned to host on ECOA issues this fall. Comments are due by December 1, 2020.

So, there's this month's report. See you next month, but, in the meantime, stay safe!

***Michael A. Benoit** is a partner in the Washington, D.C., office of Hudson Cook, LLP. He can be reached at 202.327.9705 or by email at mbenoit@hudco.com.