

Consumer Groups Urge Federal Court to Require Greater Restrictions on the Sale of Pre-Owned Vehicles Subject to Open Safety Recalls

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Several consumer groups have filed a lawsuit in federal court seeking to overturn the FTC's recent settlements with three auto dealer groups involving the sale of certified pre-owned vehicles subject to open recalls. The orders prohibit the dealers from claiming that their used vehicles are safe, have been repaired for safety issues, or have been subject to a rigorous inspections unless they have either repaired the vehicles or their safety claims are paired with a clear disclaimer that the vehicles may be subject to unrepaired safety recalls. The consumer groups allege that these orders do not go far enough because the sale of "certified" pre-owned vehicles with open recalls is inherently deceptive, regardless of what any disclosures say. These groups have also publicly urged the FTC to ban the sale of *any* pre-owned vehicles subject to an open recall as inherently unfair.

For many years, it has been illegal to sell new cars that are subject to open safety recalls. In 2016, Congress banned the rental of cars subject to open recalls but declined to extend the ban to the sale of pre-owned vehicles. While the consumer groups would like the FTC to ban the sale of such vehicles altogether, believing that disclosures are ineffective in complex transactions like buying a car, the FTC appears to be reluctant to go further than Congress.

Despite public pressure from the consumer groups and members of Congress who spoke out against the issuance of the consent orders, the FTC has not backed down from its position that proper disclosures may suffice to allow the sale of a pre-owned vehicles subject to open recalls. In legal papers filed on March 17 in the consumer groups' lawsuit, *Consumers for Auto Reliability and Safety et al. v. FTC*, the FTC argued that the lawsuit should be dismissed because non-parties may not challenge consent orders. Because the agency has wide latitude in choosing how to exercise its enforcement powers, the consumer groups are unlikely to succeed in their efforts to persuade the courts to overturn the orders. Moreover, in another sign the FTC does not plan to alter its approach, on March 31 the Commission finalized three additional orders stemming from the same investigation that produced the orders at issue here.

Outside groups face long odds in challenging the FTC's refusal to take certain enforcement steps. The groups here, who are not parties to any of the settlements, are

essentially seeking to force the FTC to bring another case, litigate it, secure relief under the broader theory advocated by the consumer groups, and win any appeal. The FTC's discretion to do this is ordinarily not subject to judicial review because there would be no meaningful standard by which a court could judge the agency's priorities in this context.

For now, the standards in the consent orders remain the law of the land. And given that the FTC has never released any formal guidance concerning the sale of pre-owned vehicles subject to open recalls, the standards set forth in the consent orders are also the only guide the industry has to follow.

If a dealer makes safety-related advertising claims about its pre-owned vehicles, it must make a general disclosure that its vehicles may be subject to open recalls and tell the consumer how to obtain an individual vehicle's recall status. For example, claims that cars have undergone an "exhaustive 160-point checkpoint Quality Assurance Inspection," a "rigorous and extensive quality inspection," a "172-Point Vehicle Inspection and Reconditioning Process," or similar language would trigger the disclosure requirement. Given the high profile of this issue, it is important for dealers to have a strong system in place to check inventory for recalls and provide appropriate disclosures where necessary.

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