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Recycled Class Action Theories

Dealers in Oregon are facing a class-action lawsuit that describes dealer participation as a kickback scheme.

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Those of you with good memories might recall several lawsuits a couple of decades ago in which plaintiffs' lawyers claimed that the dealer retention part of the finance charge in a retail installment contract was an illegal kickback or violated some other law or regulation.

Those cases were resolved largely in favor of the defending dealers, and for years, we didn't see much activity involving that attack strategy. Well, perhaps, "they're baaaaaaack."

Violations and Kickbacks

Consider this recent opinion from an Oregon court.

Car buyers brought a class-action lawsuit against several related dealerships, among others, for violating the Truth in Lending Act (TILA), Oregon's Unlawful Trade Practices Act (UTPA), and Oregon's financial elder abuse statute, alleging that the defendants failed to comply with the disclosure requirements of TILA and the UTPA.

Specifically, the plaintiffs alleged that the defendants obtained payments or "kickbacks" from third parties by negotiating higher interest rates for vehicle financing than the interest rates quoted by the financing entities and that the defendants failed to disclose these alleged payments and kickbacks.

The plaintiffs also alleged that the defendants failed to disclose that they received payments from third parties for arranging the sale of "extended service warranty contracts." The defendants moved to dismiss.

The federal trial court first denied the defendants' motion to dismiss certain TILA and UTPA claims as untimely. Next, with respect to the UTPA claims, the defendants argued that the plaintiffs could not show that they suffered ascertainable loss as a result of the defendants' alleged misrepresentations or concealments or that the loss was caused by the alleged unlawful trade practice. The plaintiffs alleged that their ascertainable loss equaled the amount that the defendants received as "kickbacks" or retained as profit with respect to the vehicle financing and service contracts.

What's My Obligation?

The court concluded that the plaintiffs' allegations did not support causation under the UTPA; they failed to explain how the defendants' conduct caused them to suffer losses in an amount equal to the payments or kickbacks the defendants allegedly received. The plaintiffs did not allege how the vehicle transactions would have been different if the defendants had disclosed the alleged payments or kickbacks - for example, that they would have declined to purchase the vehicles or the service contracts or would have obtained more favorable financing.

The court provided the plaintiffs an opportunity to amend their complaint to clarify their losses and how those losses were caused by the defendants' conduct. Because the court found that the TILA claim was timely and that the plaintiffs could, depending on the proposed amendments to their claims, sufficiently allege a UTPA claim, the court denied the motion to dismiss the elder abuse claim.

Essentially, these plaintiffs were arguing that the dealership was obligated to disclose to the buyers its cost of financing and ancillary products and tell the buyer that it was keeping the difference between its cost and the amount the consumer paid. Those arguments haven't gotten much traction before, and this judge wasn't terribly impressed with the way the plaintiffs' lawyer pleaded his case, although he did give the lawyer another bite at the apple by permitting him to amend his claims.

Note that this case is at the pretrial stage when the parties are filing preliminary motions. These plaintiffs still must prove their case.

Does this case signal a return of these tactics? Stay tuned!

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