HUDSON COOK 25th ANNIVERSARY

Car Pricing under the Legal Microscope

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For several years, we have expressed concern that the Consumer Financial Protection Bureau, attorneys general, and/or plaintiffs' lawyers would paste a bull's-eye on the high vehicle prices typically charged by buy-here, pay-here dealers and by dealers selling their retail contracts at deep discounts (or paying acquisition fees), claiming that part of the high purchase price is really a finance charge. If these amounts are finance charges, they are required by federal law to be included in the finance charge and the APR. Recently, we have been alarmed by a series of developments dealing with challenges to car pricing.

My partner, Rick Hackett, raised the alarm in an article addressing the CFPB's *Rome* enforcement action in the October 2014 issue of *Spot Delivery*: "Will Buy-Here, Pay-Here Fall like Rome?" Then my colleague, Latif Zamin, addressed the issue in an article, "Consent Order Applies Extensive Restrictions to North Carolina Dealers," in the March 2015 issue of *Spot Delivery* that discussed an enforcement action by the U.S. Justice Department and the North Carolina attorney general. Then my partners, Allen H. Denson and Joel C. Winston, penned an article about the *Herbies* enforcement action titled "CFPB Takes Aim at Buy-Here, Pay-Here" for *Spot Delivery's* January-February 2016 issue.

Now we have a federal trial court decision that anyone interested in this topic needs to read. Here's what happened in that case.

Amanda Harold went to TMC Enterprises, LLC d/b/a JD Byrider to buy a car. Because of her credit history, sales personnel at JD Byrider allegedly told her she would need a co-signer and that only a few cars were available for her to purchase. The salespeople also allegedly told her that, along with each car purchase, they provide a program to help purchasers improve their credit.

Harold bought a used car for $14,995 with 103,724 miles on it and a history of front-end damage. The MSRP for the vehicle when it was new in 2007 was $14,295, and the NADA and *Kelley Blue Book* retail prices for the vehicle ranged from $5,000 to $6,000.

Harold agreed to an interest rate of approximately 24% in the retail installment sale contract. JD Byrider assigned the RISC to TMC Finance, LLC. After Harold experienced problems with the car and JD Byrider made several failed attempts to repair the car, Harold sued JD Byrider and TMC Finance for violating the Truth in Lending Act, the Virginia Consumer Protection Act, and the Credit Repair Organizations Act and for fraud. The defendants moved to dismiss the lawsuit.

First, Harold alleged that the defendants violated TILA by failing to disclose all financing charges. Specifically, she alleged that the sales price of the car was inflated to hide additional financing fees. The

defendants argued that the disclosure of the interest rate and the finance charge in the RISC was sufficient.

The federal trial court concluded that Harold adequately alleged a claim that the defendants inflated the car's sales price because it was financed, not bought with cash. The court noted that the "excessive sales price in relation to the NADA and Kelley Blue Book [sic] value creates an inference that JD Byrider would not truly charge the same price to a cash customer, and thus failed to disclose the true extent of the financing charges." The court refused to dismiss the TILA claim against both defendants.

Next, the court addressed the motion to dismiss the VCPA claim against TMC Finance on the grounds that TMC Finance was not a "supplier" under the Act. The court concluded that TMC Finance was not a "supplier" but found that, under the FTC's "Holder Rule" (more accurately, the Preservation of Consumer Claims and Defenses Trade Regulation Rule), TMC Finance, as a holder of the RISC, was subject to all claims and defenses that Harold could assert against the seller, JD Byrider, and therefore was subject to her VCPA claims. Accordingly, the court refused to dismiss the VCPA claims against TMC Finance.

The court then concluded that Harold sufficiently alleged facts supporting her fraud and constructive fraud claims and that, under the FTC's Holder Rule, TMC Finance was liable for any fraud claims brought against JD Byrider.

Finally, the court found sufficient allegations to support a CROA claim. The defendants argued that Harold did not sufficiently allege that they were credit repair organizations. The court disagreed, relying on Harold's allegation that the sales personnel at JD Byrider offered a plan or program to help vehicle purchasers build credit. The court also found that Harold sufficiently alleged that she paid valuable consideration for credit repair services by alleging that the consideration was included in the high sales price of the car. Again, the court noted that Harold sufficiently pled CROA claims against both JD Byrider and TMC Finance because TMC Finance, under the Holder Rule, was liable for any CROA claim brought against JD Byrider.

So, we have two CFPB enforcement actions, a Justice Department and North Carolina enforcement action, and a U.S. District Court case that all spell danger on the pricing issue.

There have been two arbitration decisions on pricing challenges that were wins for dealers, with the dealers defending against the actions with claims that their pricing was similar to the pricing of other BHPH dealers. I admire those two arbitration wins, but I do not believe that this argument is a winner before the CFPB or in court. When faced with a lawsuit, I would argue with a straight face that the moon is made of green cheese if I thought a judge or arbitrator would buy what I was selling. But just because you are willing to use a theory like this in defense, even if it is successful, doesn't make it a prudent basis for running your business.

We haven't seen the last of these pricing challenges, and they will pose a serious danger to dealers (and, by extension, to automotive finance companies) who price their cars at levels beyond what similar cars bring in cash transactions or in traditional indirect credit sale transactions.

Time to think through your business model with your lawyer?

Harold v. TMC Enterprises, LLC, 2016 U.S. Dist. LEXIS 142928 (W.D. Va. October 17, 2016).

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