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Navigating the Minefields When Offering a Credit Customer the "Lowest Rate"

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Every day, financing providers offer financing to customers. Sometimes they encourage a customer to apply for credit with the dealer by saying that they can offer the customer the best financing deal. Such a claim got a Ford dealership sued by a customer, who claimed misrepresentations and race discrimination under Ohio law.

Spoiler Alert: The dealership won the case. But with even small changes in the facts, it is not clear the outcome would have been so positive. Let's see what happened.

John Scott, an African-American man, bought a used Volvo from Sarchione Ford. Sarchione's finance manager, David Liebro, told Scott that he would help him obtain financing at the lowest rate available. Liebro submitted Scott's credit application to five finance sources. Each creditor provided Sarchione with a buy rate and a range for a customer rate, which is an additional percentage each finance company allows on top of the buy rate. Sarchione's policy is to always add the maximum customer rate each finance company allows, subject to certain exceptions, to ensure that everyone is treated alike.

Citizens Bank offered the lowest interest rate—a buy rate of 4.13% and a customer rate of 1.75%, for a total of 5.88%. Scott accepted the rate without being given a breakdown of the rate and signed the financing documents.

After buying the car, Scott learned from Citizens that it offered rates "as low as 4%." When Scott inquired, Liebro responded that Scott was given the lowest rate and gave Scott a list of the rates offered by each of the five creditors, although the list did not include the buy rates or the customer rates.

When Scott was faced with an expensive repair not covered by the limited warranty, he sued Sarchione for violations of the Ohio Consumer Sales Practices Act, breach of warranty, misrepresentation, and race discrimination. The trial court granted summary judgment for Sarchione, and the Court of Appeals of Ohio affirmed. The appellate court's decision was well reasoned and represented a clear victory for the dealership.

But if the facts had been a bit different, would the dealership have been at greater risk? See what you think.

Scott's OCSPA claim was related to the rate that the dealership obtained for him. Scott alleged that the dealership did not, in fact, offer him the best available rate, and he could have received a lower rate had he obtained the financing himself.

The finance manager's assertion that he would get Scott the best available rate could have two different meanings: (1) get the best possible rate available to the dealership, and (2) get the best possible rate available anywhere. The appellate court did not say what meaning it took from the finance manager's statement, but the court discussed the facts under both interpretations.

The appellate court held that Scott received the best rate available from the dealership, rejecting his claim that the dealer could have offered him credit at the lowest buy rate, without the additional dealer participation or "markup." Here is the first way the facts helped Sarchione. The finance manager testified that the dealership treated all customers alike by adding the maximum allowed participation or markup to every buy rate, with two exceptions that did not apply to Scott's situation. The finance manager is permitted to reduce the participation rate if the customer claims a lower rate is available from a local credit union or other lender or if the customer tells the finance manager that he or she cannot afford the payment.

Another helpful fact was that Sarchione's offer to Scott was the lowest retail rate it received from the five finance sources, based on the dealership's rate-setting policy. A dealership may sometimes be tempted to offer the customer the deal that is best for the *dealer*—the one with the highest participation. In general, that conduct may be allowed. But if the dealership promises the best and lowest rate, it had better be sure it offers the best rate for the *customer*.

The third helpful fact was that Scott offered no corroborating evidence that he could have received a lower rate elsewhere. He did not apply for refinancing or even get another rate quote specific to his deal. The only evidence was Scott's affidavit, which the appellate court called self-serving. But what if he *had* refinanced at a lower rate at a bank or credit union? The opinion leaves open the possibility that the court would have found a dealer misrepresentation.

Scott's discrimination claim alleged that, because the dealership did not use its discretion to lower his rate as it does for customers who meet one of the two exceptions, Sarchione discriminated against him. Scott pointed out that the dealership did not keep records of when it reduces a customer's rate, and this failure allowed for discriminatory conduct to occur. Scott claimed he was a highly qualified buyer and, further, was never told about the lower buy rates.

The argument did not impress the appellate court, which wrote, "Simply because Scott assumes that discrimination occurred does not make it so." The court said the evidence showed that Sarchione's policy was to treat customers consistently unless one of two exceptions existed, and Scott fell under neither exception. Scott did not present a competing offer from another finance source and tell the finance manager "that he would finance the car elsewhere. Rather, he accepted the loan that was offered."

The appellate court observed that Scott presented no evidence of a similarly situated person being treated differently from him. There was no evidence offered that Sarchione considered race or any other prohibited factor in setting interest rates.

Scott had a weak race discrimination claim, but his OCSPA claim has two important lessons for dealerships:

> 1. If you tell consumers you will get them the "best" or "lowest" rate, be sure you do.
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> If the rate the finance manager offered Scott had not been the lowest overall rate, consistent with its rate exception policy, I suspect the court would have found a misrepresentation. Stated differently, if you ever select the rate with a higher participation over a lower rate to the consumer, never claim to be able to provide the best financing rate.
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> Is giving the customer the lowest rate available *from the dealer* good enough? This case does not say, but it can be read to mean that the best rate is not limited to rates available to the dealer. A wise dealership promising the lowest rate will take care to limit this claim to rates the dealership can offer. It should avoid implying that its rates will also beat those of local credit unions and direct loans from local banks unless it has the market studies to show this is true.
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> 2. If you have a rate exception policy, keep good records of your rate exceptions.

This court said the lowest rate could include the dealer's participation, but the court seemed to rely on the dealership's testimony that it had a rate participation policy and a consistent practice that included the maximum allowed markup, barring limited exceptions. Scott's protest that the dealer did not keep records did not change the outcome in favor of the dealership. But if Scott had demanded discovery on the consistency of Sarchione's policy, and Sarchione had been unable to provide it, Scott may have created a question of material fact that would have prevented the trial court from granting summary judgment in Sarchione's favor.

In taking these cautionary lessons from this case, let's not overlook some very helpful language from the Ohio appellate court's decision. The appellate court found that Sarchione had no duty to disclose the terms of its agreements with the finance companies, the buy rates, or the difference between the buy rate and the rate charged to the customer. In fact, the appellate court found that Sarchione had no duty to disclose anything other than the interest rate available to Scott for the finance application submitted.

Some consumer advocates have long argued that dealers should disclose the buy rates and markups. This argument is grounded in the mistaken belief that the buy rate is the rate for which the consumer "qualifies." It does not recognize that the buy rate is a wholesale rate that reflects the savings to the finance source of not having to market directly to consumers, maintain a staff to take applications, and bear the cost of collecting the verifications and other paperwork.

Federal Trade Commissioner Rohit Chopra, who has been nominated to be the next director of the Consumer Financial Protection Bureau, has described a markup as "an undisclosed kickback that dealers earn for convincing prospective car buyers to agree to a higher interest rate than they actually qualify for with a lender." In the same FTC matter, Acting FTC Chair Rebecca Kelly Slaughter wrote, "The automobile-financing market in the United States is profoundly broken. ... In my view, far-reaching structural reform to the automobile-financing and -sales markets is long overdue and urgently needed: First and foremost, the Commission can start by initiating a rulemaking, under the Dodd-Frank Act, to regulate dealer markup."

As the new leaders of the CFPB and the FTC are confirmed and assume their roles, it is clear that we will have a lot of education to do about the consumer benefits of dealer-offered financing.

Scott v. Sarchione Ford, 2021 Ohio App. LEXIS 222 (Ohio App. January 28, 2021).

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