The CARLAWYER©

By Eric L. Johnson

Here's our monthly article on selected legal developments we think might interest the auto sales, finance, and leasing world. This month, the developments involve the Federal Trade Commission and Consumer Financial Protection Bureau. As usual, our article features the "Case(s) of the Month" and our "Compliance Tip." Note that this column does not offer legal advice. Always check with your lawyer to learn how what we report might apply to you or if you have questions.

Federal Developments

On February 9, the **Federal Trade Commission provided its annual letter to the Consumer Financial Protection Bureau summarizing the Commission's enforcement actions, research and policy initiatives, and education efforts in 2022 related to the Equal Credit Opportunity Act**.

On February 14, the **Consumer Financial Protection Bureau released a report examining debt collection tradelines on consumer credit reports from 2018 to 2022**.

On February 23, the **Consumer Financial Protection Bureau announced in a blog post that it issued "market-monitoring" orders to nine large auto financing companies requiring that they submit certain data about their auto financing portfolios**. The Bureau's sample letter sent with each order states: "Information provided in response to the Order is intended to be used for monitoring the risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services, although the Bureau reserves the right to use and share internally the information for any purpose permitted by law."

On February 23, the **Consumer Financial Protection Bureau announced that it issued a consent order against title lending company TMX Finance LLC, otherwise known as TitleMax**. The consent order alleged that, between October 2016 and September 2021, the company made at least 2,670 auto title loans to covered borrowers that exceeded the Military Lending Act's 36% rate cap. The Bureau also alleged that the loans included mandatory arbitration clauses and notice provisions prohibited by the MLA. According to the Bureau, the company also withheld information about military families' rights under the MLA and changed borrowers' personally identifiable information so they would not be identified as servicemembers or covered dependents in the MLA database maintained by the Department of Defense. In addition, the Bureau alleged that the company violated the Consumer Financial Protection Act by unfairly charging borrowers non-file insurance fees when the product provided no coverage or benefit. Finally, the Bureau alleged that the company violated the Truth in Lending Act and the CFPA by failing to properly disclose non-file-insurance fees as part of the finance charge and APR on certain loans. In its press release, the Bureau labeled the company a "repeat offender" because the company had been subject to a 2016 consent order, although the Bureau did not allege that the company violated this prior order. The company did not admit or deny these allegations, but it agreed to the entry of a 5-year consent decree that includes a $10 million penalty, a $5.05 million redress plan, and requirements to implement and maintain robust controls to ensure future compliance.

Case(s) of the Month

Dealership Liable for Violating Maryland Consumer Protection Act and Breaching Implied Warranty of Merchantability by Mispresenting that Vehicle Had Been Reconditioned: An individual bought a used minivan from a dealership. Incorporated into the purchase price of the minivan was a "reconditioning fee." Before the purchase, the buyer noticed animal hair and an odor inside the minivan and notified the dealership. The dealership represented before the purchase that it could completely remove the odor in the minivan. After the sale, the dealership could not remove the odor. The buyer then took the minivan to an independent detail shop, which found a mouse infestation in the minivan but could not remove the odor. The buyer then hired a biohazard cleaning company to remove the odor, but it was unsuccessful as well. The buyer later traded in the minivan for a used vehicle at another dealership. The buyer sued the dealership for violating the Maryland Consumer Protection Act and for breach of the implied warranty of merchantability, among other claims. The trial court found in favor of the buyer and awarded her damages and attorneys' fees and costs. The **Appellate Court of Maryland** affirmed. First, the appellate court concluded that the trial court did not err in finding a

violation of the MCPA. The dealership argued that there could be no MCPA violation because its promise to eliminate the odor from the minivan was not a misrepresentation but merely a promise to do something in the future. The appellate court disagreed, stating that "[t]he misrepresentation that the trial court found was not about [the dealership's] promise to remove the minivan's odor in the future. Rather, [the dealership's] misrepresentation was that the minivan had been 'reconditioned,' a representation [the dealership] made when it 'incorporated' a $1,295.00 'reconditioning fee' into the sales price. Even if 'reconditioning' meant only a 'thorough cleaning,' [the buyer] saw animal hair in the vehicle at the dealership, an observation that led the trial court to conclude that the minivan had *not* been 'thoroughly cleaned' prior to sale."

The appellate court rejected the dealership's argument that the buyer did not rely on the misrepresentation because she bought the minivan knowing of the odor. The evidence showed that "while [the buyer] knew about the odor before purchasing the minivan, it was [the dealership's] misrepresentation that it could 'completely remove' the odor that 'substantially induced' [the buyer] to make the purchase." Next, the appellate court concluded that the trial court did not err in finding a breach of the minivan's implied warranty of merchantability. The appellate court found that the dealership was not entitled to a second chance to remediate the minivan's odor. According to the appellate court, when the buyer accepted the minivan, it was a nonconforming good for which she expected a cure within a reasonable amount of time. The trial court concluded that the dealership's one opportunity to cure was reasonable based on the totality of the circumstances, and the appellate court agreed. *See* ***Rich Morton's Glen Burnie Lincoln Mercury v. Williams-Moore***, 2023 Md. App. LEXIS 36 (Md. App. January 12, 2023).

This Month's *CARLAWYER©* Compliance Tip

Our Case of the Month is an interesting one; not from the Seinfeld like odor that won't go away, but from the aspect of ensuring that if you're charging the consumer a fee for a service you provide that you confirm you're able to provide that service. By including a reconditioning fee into the sales price, the dealership made a representation that the minivan had been "reconditioned." Even if the "reconditioning" meant only a "thorough cleaning," the buyer in this case reportedly saw animal hair in the vehicle at the dealership, an observation that led the trial court to conclude that the minivan had *not* been 'thoroughly cleaned' prior to sale." It's time to take a long hard look at the fees and charges you assess consumers at the time of sale to ensure that the services you're charging are actually provided to the consumer (and provide value).

So, there's this month's roundup! Stay legal, and we'll see you next month.

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Eric (ejohnson@hudco.com) is a Partner in the law firm of Hudson Cook, LLP, Editor in Chief of CounselorLibrary.com's ***Spot Delivery®***, a monthly legal newsletter for auto dealers and a contributing author to the ***F&I Legal Desk Book***. For information, visit www.counselorlibrary.com. ©CounselorLibrary.com 2023, all rights reserved. Single publication rights only to the Association. HC# 4888-3800-0211.