The CARLAWYER©

By Eric 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, Consumer Financial Protection Bureau, and the Federal Communications Commission. 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 September 1, the **Federal Trade Commission announced a proposed $3 million settlement agreement with Credit Karma, LLC, resolving allegations that the company made false, misleading, or unsubstantiated claims to consumers about whether they were approved for credit offers, in violation of Section 5 of the FTC Act**. According to the complaint, the company's website and mobile application market credit monitoring and other tools, such as financial calculators, for approximating the effect of certain credit choices on a consumer's score. To access most of these tools, a consumer must sign up for a Credit Karma account and become a member. When signing up for an account, a consumer must provide a variety of personal information, including name, date of birth, and last four digits of a social security number, and also agree to the company's privacy policy and terms of service, which state that the company may collect additional information about them from other sources. The FTC's complaint alleged that the company has amassed over 2,500 data points, including credit and income information, per member. From February 2018 through April 2021, through its website, mobile app, and email marketing campaigns, the company allegedly represented in advertisements and recommendations to members that they had been "pre-approved" for third-party financial products, such as credit cards. However, according to the allegations, almost a third of the members who received a pre-approved offer and applied for credit were denied. The FTC alleged that the company did not conspicuously disclose the possibility of denial and made false claims that consumers had "90% odds" of approval. The FTC alleged that these "pre-approved" claims conveyed false certainty to consumers. Moreover, the FTC alleged that the company purposefully rejected alternative ways to describe the credit offers after it conducted testing to compare versions of its marketing materials and learned that consumers were more likely to click on offers saying "pre-approved" than those saying they had "excellent" odds of being approved. Finally, the FTC alleged that, in response to the company's false claims, consumers wasted significant time applying for credit, and, when consumers applied for these offers, third-party financial companies made hard inquiries on their credit reports, which lowered consumers' credit scores and harmed their ability to secure other financial products in the future.

On September 14, the **Federal Trade Commission and the Consumer Financial Protection Bureau announced that they filed a joint amicus brief in the U.S. Court of Appeals for the Third Circuit in the case of *Ingram v. Waypoint Resource Group, LLC***. In the brief, the agencies argue that the Third Circuit should overturn a lower court's decision that could create an exception to the Fair Credit Reporting Act allowing furnishers of credit information to decline to investigate a consumer's dispute in certain circumstances. The lower court concluded that, when a consumer submits a dispute to a credit reporting agency and that dispute is then referred to the furnisher, the furnisher is only obligated to investigate "bona fide" disputes and, therefore, may decline to investigate any dispute it deems frivolous. The agencies' brief argues that, under the FCRA, a furnisher is required to investigate any dispute forwarded to it by a credit reporting agency and cannot avoid that obligation by deeming the dispute to be not "bona fide."

On September 15, the **Federal Trade Commission released a report - *Bringing Dark Patterns to Light* - that examines how companies use digital "dark patterns," i.e., design practices that manipulate or heavily influence consumers to make certain choices**. The report focuses on certain common dark pattern tactics, including: disguising advertisements to look like independent content; comparison-shopping sites that claim to be neutral but actually rank companies based on compensation; countdown timers designed to make consumers believe they only have a limited time to purchase a product or service when the offer is not actually time-limited; making it difficult for consumers to cancel subscriptions or charges; hiding or obscuring material information from consumers, such as burying key terms of, or fees for, a product or service; and intentionally steering consumers toward privacy setting options and data sharing options that provide a company with consumers' most personal information.

On September 19, the **Consumer Financial Protection Bureau issued a blog post that examines the impact of rising new and used vehicle prices on the amounts financed by consumers for vehicles, financing term lengths, monthly financing payments, and delinquency rates**.

On September 27, **the Federal Communications Commission issued a notice of proposed rulemaking that proposes to apply caller ID authentication standards to text messaging and require mobile wireless providers to block illegal text messages before they get to consumers**. Specifically, the FCC proposes to require mobile wireless providers to block texts, at the network level, that purport to be from invalid, unallocated, or unused numbers and numbers on a Do-Not-Originate list. The agency also seeks comment on the extent to which spoofing is a problem with regard to text messaging and whether there are measures the FCC can take to encourage providers to identify and block texts that appear to come from spoofed numbers. Comments on the proposed rule are due 30 days after it is published in the *Federal Register*, which is expected shortly.

Case(s) of the Month

Notice Sent to Creditor Opting Out of Arbitration Provision in Vehicle Finance Contract Was Effective, Despite Being Signed by Car Buyers' Attorney and Not Buyers Themselves, as Required by Opt-Out Language: After individuals bought a used car, the dealership assigned the retail installment contract, which contained an arbitration clause but allowed the car buyers to opt out of the arbitration clause. The arbitration clause stated, in relevant part: "Your right to reject: If You don't want this Arbitration Clause to apply, You may reject it by mailing Us ... a written rejection notice that describes the Contract and tells us You are rejecting this Arbitration Clause. A rejection notice is only effective if it is signed by all buyers, co-buyers and cosigners and the envelope that the rejection notice is sent in has a post mark of 30 days or less after the date of this Contract." Within the 30-day opt-out period, the car buyers' attorney sent a letter to the assignee rejecting the arbitration clause. The car buyers then sued the assignee, alleging claims related their purchase of the vehicle. The assignee moved to dismiss and to compel arbitration, arguing that the car buyers' opt-out notice was ineffective because the contract stated that it "is only effective if it is signed by all buyers, co-buyers and cosigners," and the car buyers did not sign the opt-out notice personally but had their attorney sign it.

The **U.S. District Court for the Eastern District of Michigan** denied the assignee's motion to dismiss and compel arbitration. The court concluded that the car buyers, through their attorney, unambiguously rejected the arbitration clause. The court stated that "counsel's signature, authorized by [the car buyers] and presented on their behalf, has the same legal effect as their personal signatures. This conclusion is based on the relationship between an attorney and client, which is one of agency. ... [A] contract need not specify that it may be signed by an authorized representative for such a signature to be valid; such signatures are generally valid and binding by operation of law. In addition to the general principles of agency law, Michigan law expressly permits an authorized representative to sign a retail installment contract on behalf of the buyer." *See* ***Davis v. Credit Acceptance Corporation***, 2022 U.S. Dist. LEXIS 152575 (E.D. Mich. August 24, 2022).

This Month's *CARLAWYER*© Compliance Tip

Our Case of the Month spotlights another arbitration provision issue – how to handle the rejection of an arbitration clause, if one is provided in your arbitration agreement. The District Court's decision was ultimately pro-dealer, but it shows how important it is to determine whether your buyer, or in this case, their attorney rejected the arbitration clause. Not every arbitration agreement provides the buyer with the right to reject the arbitration clause. What does your arbitration agreement say? You are using one aren't you? Does it give your buyer the right to reject the clause? How do you handle rejections? Some great questions for you to ask your attorney next you speak with them.

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

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