Maryland Automobile Dealers Association

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The FTC's Shot Across the Bow

On March 26, 2015, the Federal Trade Commission had a major press conference to announce six new motor vehicle sales cases. The FTC took the occasion for a press splash about a campaign it dubbed "Operation Ruse Control".

The FTC claimed to be working with 32 law enforcement "partners", in a "nationwide and cross-border crackdown to protect consumers when purchasing or leasing a car, encompassing 252 law enforcement actions." The majority of the actions appear to be regular enforcement actions across the country by various state enforcement agencies without direction from the FTC.

The six new FTC cases by the FTC are a continuation of the FTC's upswing in in activities involving auto sales.

- One case involved an auto loan modification company that the FTC claimed charged consumers upfront fees to negotiate auto loan modifications while providing no assistance.

- Two cases involved a program in which the payments of customers were restructured based on claims of saving consumers money. The FTC charged there were no savings because the fees charged exceeded savings. Both the restructuring company and New Jersey dealers using the program were charged with violations. The companies agreed to settle with the restructuring company paying funds and forgiving debt in an amount close to $2.5 million, and the dealerships agreeing to pay $184,000.

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Service Advisors Pay Redux

We have written frequently about the exemption from premium overtime pay for service advisors. As a refresher, dealers contend that a service advisor should be exempt from premium overtime pay (time and a half) under the "salesmen, partsmen and mechanics" special exemption for auto dealers from the Fair Labor Standards Act. That view has been challenged frequently, but the challenges have not fared well over the years. Federal Courts of Appeals for the Fourth Circuit (Maryland, North Carolina, Virginia, and West Virginia) and the Fifth Circuit (Louisiana, Mississippi, and Texas), as well as some federal trial courts have disagreed, holding that the service advisors are exempt from premium overtime pay under the auto dealers' exemption from the FLSA.

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- Three cases involved advertising in which the dealerships marketed vehicles at prices the FTC claimed were not available to all buyers. The three dealerships entered consent orders similar to other FTC orders about advertising prices reflecting rebates and incentives. According to the FTC, the companies can either advertise prices available to all or they can clearly and conspicuously disclose the qualifications to achieve the prices.

While one can never claim that the FTC was modest in its splashy announcement, one must not underestimate the power and reach of the agency. Here are some important lessons auto dealers should take from "Operation Ruse Control".

- FTC Aggressiveness. When the Dodd Frank financial reform legislation was enacted, Congress increased the authority of the FTC and provided it a substantially increased budget to deal with automotive sales matters. While the FTC has always been an agency of which dealers should be cognizant, the increased authority and budget, with a Congressional direction to concentrate on auto sales matters, makes the FTC's pronouncements something to which auto dealers must give attention in their advertising and sales practices. The FTC has aggressively pursued its goals on auto sales matters.

- FTC Control. The dollar figures and terms of FTC consent orders entered in the auto dealer area have been impressive. And the FTC, as is its custom, has made a major splash each time consent orders have been entered to use them as object lessons to other dealers. One should not underestimate the impact of an FTC consent order on a car dealer's business. An FTC consent order gives the FTC direct control over a dealer's business practices for ten years, the usual duration of a consent order. An auto dealer subject to a consent order must live strictly under its terms, usually with regular required reports to the FTC and sometimes with appointment of an outside monitor to oversee the dealer's compliance. A dealer that violates an order does so at great risk, as two dealers who earlier signed consent orders over advertising practices saw recently. The FTC threatened those dealers with an action seeking civil penalties of up to $16,000 per day for alleged violations of their consent orders. They subsequently settled the claims. An FTC complaint and subsequent consent order can restrict the ability of a dealer to do business and can impose expensive compliance obligations.

- Advertising. The majority of the auto sales cases filed by the post-Dodd Frank FTC have involved advertising. There have been twenty consent orders. There have been two civil penalty actions against dealers whom the FTC charged violated their consent orders. What should dealers be careful about?

  - Truth in Lending Act. Most of the consent orders have involved allegations of Truth in Lending violations. These are easy violations for the FTC to spot. Dealer personnel involved in advertising and the dealership's outside advertising agency should understand trigger terms and the follow on disclosures if there is a trigger.

  - Bait and Switch. The focus of the three latest consent orders and of many of the previous consent orders is so called "bait and switch". The FTC focuses on pricing or sales terms it believes are not available to all potential buyers.

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CHARAPP & WEISS, LLP
8180 Greensboro Drive, Suite1000
McLean, VA 22102
Tel: 703.564.0220
Fax: 703.564.0221
www.cwattorneys.com

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Advertised vehicles prices and terms should be available to all buyers. If offers are not available to all, for example new car prices based on manufacturer rebates and incentives that have limitations, a dealer must make sure that the qualifications to achieve the savings are clearly and conspicuously disclosed.

- Negative Equity. Early in its post-Dodd Frank consent orders, the FTC charged violations by dealers who used some variant of the claim they would pay off a trade "no matter how much you owe." The FTC signaled that it would look closely at claims that failed to disclose that negative equity would be rolled into the new finance balance, and this is a continuing FTC hot button.

- The Internet. The FTC is not looking only at newspaper advertising. It knows that dealers concentrate marketing efforts on the internet, and they review dealer websites. Internet advertising has the same rules that apply to other media, and those creating web content for the dealership should know the rules.

- Additional Products. The two cases involving the payment restructuring company and the New Jersey dealers involved what the FTC calls “add-ons”. These consent orders follow up on previous FTC warnings that the additional products and services sold by dealers must provide value to consumers and their terms must be adequately disclosed. The FTC charged that the restructuring company and the dealers failed to adequately disclose the impact the fees would have on ultimate savings and those fees eliminated value for consumers. The lessons to take from this for dealers?

  - Disclosures in the sale of F&I and aftersale products and services must be candid and straightforward. Customers must understand what they are buying and what they are paying.

  - The products must provide value to consumers. What does this mean? Offering products and services for which the costs and fees exceed the savings for consumers can a problem. So can products and services whose prices are wildly inflated.

Dealers should not let the FTC’s showmanship distract from the very important lessons. The FTC is on a mission on auto sales matters. It has been given the direction, authority, and budget to be aggressive. A dealer should design its advertising and sales practices with great concern that the FTC is watching.

The Importance of Your Information Safeguards Program

Do you think that adoption of an Information Safeguards Program in your dealership is just a box to check to satisfy the FTC? Do you see it as an intrusion by the FTC to benefit only your customers? Do you see it as just another unfunded federal mandate? Think about the following situation.

You fire a disgruntled employee. Suddenly you get customer calls that they are being contacted by the ex-employee who says they were cheated and overcharged. You are outraged. It is not true. You must stop that employee.

You must take legal action to stop the ex-employee from contacting customers. Not only are the contacts a disruption, they require you to negotiate with previously satisfied customers to calm their concerns. The employee should not have your customer information. The possibility of a theft of customer information may require you to take steps under state laws to protect the customer from further identity theft.

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Not surprisingly, these courts have disagreed with the Department of Labor. The DOL itself has whipped back and forth on the issue. In 2011 it suggested that service advisors should be eligible for premium overtime pay because they are not salesmen under the auto dealers exemption, even though it agreed in prior years they should be exempt. The reason the issue has returned is a recent decision by the federal Court of Appeals for the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington). The Court, influential for its size but known to be activist, ruled that it must give deference to the DOL's 2011 interpretation that service advisors do not fall within the FLSA's auto dealers' exemption. Dealers are once again faced with some uncertainty concerning service advisors' overtime. So what should a dealer do?

If you are a dealer in the federal Fourth or Fifth Circuit, it is still the law applicable to your dealership that service advisors are exempt under the auto dealers' exemption. Unless the United States Supreme Court agrees to review this issue and rules differently, or the Fourth or Fifth Circuit Court of Appeals reviews a case and reverse its ruling, an auto dealer can rely on those precedents. However, what about a dealer in those circuits that is not comfortable taking the chance it might be the dealer whose case is chosen by some plaintiffs' attorneys to be the example to seek review? Or what if you are a dealer not in the federal circuits involved? Is there anything that can be done to give more certainty?

There is another provision of the FLSA, known as the 7(i) exemption, for employees paid commissions by retail establishments that can provide an exemption for service advisors. This exemption does not appear to be under challenge.

Three conditions must be met for an employee to fit under the 7(i) exemption. These are:

1. the employee must be employed by a retail or service establishment (an auto dealer qualifies); and

2. the employee's regular rate of pay must exceed one and one-half times the minimum wage for every hour worked in a workweek in which overtime hours are worked (which can be done by a pay plan); and

3. more than half the employee's total earnings in a representative period must consist of commissions (which, again, can be provided in a pay plan).

If you pay your service advisors according to the 7(i) exemption, the Department of Labor has noted that unless all three conditions are met, employees must earn premium pay for all hours worked over 40 in a workweek.

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You may well spend tens of thousands of dollars solving customer concerns and taking legal actions to protect your business. Is there a better solution? Yes, by protecting your valuable customer information.

Get serious about maintaining your Information Safeguards Program for protecting your business. The best protection against retaliatory customer contacts by a disgruntled ex-employee is make sure the employee does not have your information. This starts by ensuring that employees only have access to specific information they need to serve a customer. They should not be able to download customer files from your computer. They should not have access to hard copy files from which information can be copied. They should not be given copies of dealer documents on deals in which they were involved containing customer information they can keep and take with them when they leave.

Protection from retaliation by disgruntled ex-employees starts with careful and continuing attention to the company's Information Safeguards Program to be sure it is regularly reviewed, upgraded, and enforced.