The CARLAWYER©

Federal Enforcement *By: Eric Johnson*

FTC Obtains $450,000 Settlement with Dealership's Owner/Manager

The Federal Trade Commission recently reached a $450,000 settlement with Richard Berry, the owner and manager of a group of bankrupt auto dealerships in Arizona and New Mexico, resolving charges that he and the dealerships deceived consumers and falsified information on motor vehicle financing credit applications.

In addition to the $450,000 payment, the proposed settlement prohibits Berry from misrepresenting information in documents associated with a consumer's purchase, financing, or leasing of a motor vehicle and misrepresenting the costs or any other material fact related to vehicle financing. The proposed order also requires Berry to provide consumers sufficient time to review and obtain a copy of the relevant vehicle financing documents and prohibits him from violating the Truth in Lending Act and the Consumer Leasing Act. The settlement also includes a stipulated dismissal of claims against Linda Tate, the owner and president of the dealership group.

This settlement brings the FTC's three-year-long case against four dealerships, their owner/manager, and their owner/president to a final conclusion. This case represents an extremely sad tale of what can happen to a dealership, its employees, and the individuals who own and/or manage the dealership when it's alleged that the dealership and its personnel are deceiving and harming consumers. As a result of these claims and actions taken by the FTC (and let us not forget the bad actors involved), the four dealerships are now out of business, the many employees who worked at the dealerships had to find new jobs, the owner/manager and his wife have filed for bankruptcy, and the $450,000 settlement is not stayed by the filing of the bankruptcy case and will be paid by the dealership's insurance carrier. Worst of all, consumers harmed by the dealerships may have had higher defaults, may have lost their cars, and will not be made whole by the alleged bad actors.

So how did the dealerships and their owner/manager get to this point? Let's take a closer look at the history of the FTC's case.

On a referral from the Navajo Nation Human Rights Commission, the FTC began to investigate four auto dealerships with locations in cities near the border of the Navajo Nation in Arizona and New Mexico that specifically marketed to Navajo consumers and had a customer service center on the Navajo Nation Reservation in Window Rock, Arizona. The FTC filed a complaint in August 2018 against the dealerships. The dealerships named in the complaint were Tate's Auto Center of Winslow, Tate's Automotive, Tate Ford-Lincoln-Mercury, and Tate's Auto Center of Gallup ("Tate's Auto"). In addition to the dealerships, the complaint also named the dealerships' owner/corporate general manager as a defendant and the dealerships' owner/president as a "relief defendant"—a person who receives funds that can be traced directly to the dealerships' allegedly unlawful acts or practices. Note that the FTC sued the owner/manager both individually and as an officer of Tate's Auto. The FTC claimed that he formulated, directed, controlled, had the authority to control, or participated in Tate's Auto's allegedly illegal conduct. The FTC also charged that the owner/president received hundreds of thousands of dollars from the other defendants, including funds directly connected to the alleged unlawful conduct.

The FTC claimed that when consumers came into the dealerships to buy a car and needed financing, Tate's Auto falsely inflated their income and down payment information on credit applications. The FTC claimed that by falsifying the applicants' incomes and the amount of out-of-pocket cash paid, the dealerships (and their employees) made consumers appear more creditworthy and submitted false financing applications without consumers' knowledge. The FTC claimed that this practice exposed consumers to the risk of liability for submitting false information to finance companies and associated costs. Finally, the FTC claimed that Tate's Auto's practices were followed by an increase in the rate of default for individual customers of the dealerships and restrictions on access to credit for other consumers in the Navajo Nation area.

The FTC alleged that Tate's Auto representatives prevented consumers from reviewing the income and cash down payment information on the forms, such as by rushing consumers through the process of reviewing and signing the credit applications; having consumers complete the forms over the telephone or in public locations like grocery store parking lots or restaurants; and/or failing to give consumers the income and down payment portions of their credit applications before they signed them. The FTC also claimed that Tate's Auto allegedly altered financing documents after consumers signed them, without their knowledge. The FTC also stated that at least two "major" finance companies conducted fraud reviews of Tate's Auto and found that numerous financing agreements were based on applications with inflated incomes. According to the FTC's complaint, one finance company found that almost 45% of applications at one dealership listed inflated incomes.

The FTC alleged that, during the sales process, Tate's Auto representatives asked consumers to provide personal information, such as their names, addresses, and monthly incomes, so that Tate's Auto could complete a financing application and told those consumers they would submit the information to finance companies. The representatives typically obtained the information by asking consumers to provide it orally during in-person or telephone conversations or by asking consumers to enter handwritten information on a form that Tate's Auto provided. However, instead of using consumers' actual information, the FTC alleged that, in many cases, Tate's Auto inflated the numbers, making it appear that consumers had higher monthly incomes or made higher down payments than they did. One example in the complaint noted that a consumer told Tate's Auto she had a fixed monthly income of around $1,200, but her income was allegedly inflated to $5,200. Other consumers claimed that Tate's Auto inflated their incomes, often doubling (or more) their actual incomes.

The FTC alleged that Tate's Auto's representations to finance companies about consumers' income and down payment information, which has been taking place since at least 2014, was false and misleading and constituted unfair and deceptive acts or practices, in violation of the FTC Act.

The complaint further alleged that Tate's Auto engaged in deceptive advertising. For example, Tate's Auto allegedly advertised discounts and incentives to consumers without adequately disclosing material limitations or restrictions that would prevent many consumers from qualifying for them. The complaint contains some images and good examples of how not to advertise.

Finally, continuing its trend of challenging dealer's ads as being violative of federal disclosure laws, the FTC alleged that Tate's Auto's YouTube and social media ads violated federal law by failing to disclose required terms.

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The complaint charged Tate's Auto with violating the FTC Act, the Truth in Lending Act/Regulation Z, and the Consumer Leasing Act/Regulation M. The FTC sought an injunction barring the defendants from such practices in the future, consumer relief, and an order that the relief defendant disgorge all funds and assets she received from the defendants' deceptive practices.

Two of the "major" finance companies doing business with the dealerships also took action in February and March 2019. Both sued the dealerships, with one also suing the owner/manager and the owner/president. In total, the dealerships' floorplan lenders sought nearly $30 million from the defendants.

In March 2019, the four dealerships filed for bankruptcy, seeking to reorganize their debts in a combined Chapter 11 proceeding. The bankruptcy court later converted the cases to Chapter 7, and the bankruptcy trustee began the process of winding down the dealerships' business and liquidating their assets.

In September 2020, the FTC reached a settlement with the four dealerships. As part of the settlement, the FTC obtained a monetary judgment of more than $7 million against the dealerships, and the dealerships were required to cease all operations. That brings us to the recent settlement with Berry, the owner/manager of Tate's Auto. There are some very important lessons to be learned from the case and the recent settlement.

First, you should know that the FTC has a new and energetic chair and a 3-2 Democrat majority. For some time, two of the commissioners have been calling for increased enforcement against car dealers for the type of "pernicious conduct targeting a community" that was alleged in the FTC's complaint against the dealerships. The FTC is poised to strike (again) against other dealerships for bad behavior.

Second, if you're a franchise dealer engaged in non-compliant activities such as those alleged by the FTC against Tate's Auto, then you need to understand that the FTC can and will find out about your behavior. The FTC was likely tipped off to the dealerships' activities by the Navajo Nation, or it could have received consumer complaints. Either way, the FTC will learn of bad actors and take action to stop them. Third, note that the FTC went after not only the dealerships but also their owner/manager. That's a trend I think we'll see continue with the new FTC chair and leadership. The FTC will seek to hold individuals accountable for the actions of the company.

Finally, are these types of practices going on at your dealership? How tight is your compliance with federal and state law and your monitoring and auditing of that compliance? If the dealerships in this case had better compliance and a process to monitor and audit that compliance, they may not have been investigated by the FTC and sued by their lenders. Time to talk to your friendly lawyer!

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