Concurring and Dissenting Statement of Commissioner Christine S. Wilson
FTC v. Passport Automotive Group, Inc., et al.
File No. 2023199

October 18, 2022

Today the Commission announces a complaint and a settlement resolving allegations of violations of Section 5 of the FTC Act and the Equal Credit Opportunity Act (ECOA) in connection with the advertising, marketing, and sale of vehicles to consumers. Although this matter is being announced today, the Commission vote authorizing the filing of this complaint and settlement closed on Friday, October 14, 2022, on then-Commissioner Noah Joshua Phillips' last day at the Commission. The proposed complaint names Passport Automotive Group, Inc. (Passport), seven dealerships, and two individual defendants: Everett Hellmuth III, individually and as an owner, and Jay Klein, individually and as an officer. The complaint includes four counts.

- Count I alleges that the defendants misrepresented that they would sell vehicles at specific prices in violation of Section 5.

- Count II alleges that the defendants mispresented that consumers are required to pay certain fees for inspecting, reconditioning, preparing, or certifying vehicles in violation of Section 5.

- Count III alleges that defendants imposed higher costs on Black and Latino consumers than on similarly situated non-Latino White consumers and that these actions constitute an unfair practice in violation of Section 5.

- Count IV alleges that in connection with motor vehicle credit transactions, on the basis of race, color, or national origin, Defendants imposed higher costs on Black and Latino applicants than on similarly situated non-Latino White applicants in violation of ECOA.

I support Counts I, II, and IV with respect to the corporate defendants. I do not support Count III with respect to any of the defendants, and I do not support holding the individual defendants liable on any counts.

I commend the lawyers and economists who worked on this matter for their thorough investigation and successful resolution of the case. Discrimination against consumers on the basis of protected characteristics is illegal, and I support vigorous enforcement where our evidence demonstrates violative practices. The evidence the staff developed in this case gives me reason to believe that, as alleged in the complaint, Passport's fees exhibited statistically significant disparities based on race, color, or national origin that cannot be explained by non-discriminatory reasons. The evidence also supports the alleged misrepresentations about the prices of the vehicles and fees for reconditioning, inspection, preparation, and certification.

Although I am comfortable imposing liability on the corporate defendants for these alleged violations, my analysis diverges from my colleagues in the majority with respect to the individuals. To seek injunctive relief with respect to an individual, the Commission must show that the individual "participated directly in the deceptive practices *or* had authority to control those practices."[1] The settlement here also holds the individuals jointly and severally liable for the monetary judgement. To establish liability for monetary relief, the Commission must show that the defendant "had actual knowledge of the deceptive conduct, was recklessly indifferent to its deceptiveness, or had an awareness of a high probability of deceptiveness and intentionally avoided learning the truth."[2] The individual defendants here hold positions in the companies that appear to give them authority to control the practices. The complaint alleges further that these individuals had actual knowledge of both the misrepresentations alleged in Counts I and II, and the discriminatory pricing alleged as an unfair practice (Count III) and an ECOA violation (Count IV).

Specifically, the complaint alleges that the executives received emails and text messages about inappropriate fees. (Complaint Para. 38). Although some of these communications indicate that the individuals may have been alerted to incidents involving inappropriate fees, they also demonstrate that the individuals responded by delving into those incidents rather than ignoring them. (Complaint Para. 41-42). The complaint also cites two letters from a finance company – one in June 2019 and one in June 2020 – notifying Passport dealerships of statistically significant differences in the markup rate charged to Black borrowers for brief periods of time at two separate dealerships (Complaint Para. 30) and a notification to Mr. Hellmuth in 2021 from a financing company about markup disparities, again for a brief period of time (Complaint Para. 46). I note the brevity of the relevant time periods not because discrimination is acceptable in small doses, but instead because small sample sizes may produce skewed results not representative of larger sample sizes.

As noted above, the standard for imposing injunctive relief on individuals, in particular, affords the Commission wide latitude. That said, the Commission traditionally has exercised its prosecutorial discretion and considered a variety of factors when deciding whether to name a CEO or principal, including consideration of whether individual liability is necessary to obtain effective relief, and the level of the individual's knowledge and participation in the alleged illegal conduct.

The complaint here alleges misconduct from 2019 to 2022, citing as evidence a handful of communications and three notifications about possible discriminatory practices against Black and Latino customers at different dealerships. Importantly, however, the complaint also explains that Passport had multi-layered policies in place to monitor and document rate deviations. Specifically, the complaint states:

> Under the policy, any deviations from the standard markup must be recorded on a certification form. Each form must be signed by the employee who arranged the credit transaction, and a program coordinator or another employee who did not participate in the credit transaction must review the form and sign it as well. The policy also requires random monitoring of dealership credit offers and periodic audits of credit sales to ensure the policy is being effectively implemented. (Complaint Para. 27).

[1] *FTC v. Ross*, 743 F.3d 886, 892-93 (4th Cir. 2014) (adopting the test for individual liability used by other federal appellate courts, including the First, Seventh, Ninth, Tenth, and Eleventh Circuits).
[2] *Id.*

Although the complaint alleges that "in many instances" certification forms were not completed and extensive monitoring may not have occurred (Complaint Para. 28), there is no allegation that the policies were uniformly or systematically ignored. Further, no evidence is cited indicating that the individual respondents did not support or encourage compliance with these fair lending policies. Moreover, the Passport program appears to have been developed in accordance with industry best practices. Specifically, the program includes the elements set forth in the NADA Fair Credit Compliance Policy & Program, a program developed to minimize fair credit risk in response to guidance from the Consumer Financial Protection Bureau.[3]

The Commission should exercise care when deciding whether to hold executives of legitimate companies personally liable for law violations. The principals of this company appear to have attempted to put in place a robust compliance system that, as I understand it, may not have been widely adopted in the industry at that time. While compliance appears to have been insufficient to avoid discriminatory practices, at least by some dealerships at some points in time with respect to specific segments of customers, I am concerned that naming individuals here may disincentivize other executives from adopting comprehensive compliance programs for fear of falling short and incurring liability.

The majority statement notes that these individuals were subject to a prior FTC enforcement action alleging misrepresentations. But the prior action did not involve ECOA violations, and I am mindful of the policy of the federal courts on character evidence. While that policy does not constrain us as we conduct settlement negotiations, the principle in 404(a)(1) of the Federal Rules of Evidence is a sound one that serves as a constructive guardrail. Specifically, Rule 404(a)(1) provides that ("[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[4] The Notes of the Advisory Committee regarding this Rule explain that "[c]haracter evidence . . . tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man [and] to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."[5]

I contrast this case with the Commission's Bronx Honda matter, where the complaint alleged that the defendants specifically directed employees to charge higher rates and inflated fees in credit transactions to Black and Latino consumers.[6] Although I do not believe the Commission needs that level of evidence to establish individual liability in every case, we should require more than alleged here.

Importantly, to prove violations of ECOA, it is typically necessary to engage experts to conduct a complex and nuanced statistical analysis that draws on data from myriad sources, and that

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[3] NADA Fair Credit Complaint Policy & Program (2015), available at: https://www.nada.org/media/4558/download?inline.
[4] *See* Fed. R. Evidence 404(a)(1).
[5] Notes of the Advisory Committee on Proposed Rules, Fed. R. Evidence, 404(a)(1), available at: https://www.law.cornell.edu/rules/fre/rule_404.
[6] *FTC v. Bronx*, 1:20-cv-03945-PAE (S.D.N.Y. May 2020), https://www.ftc.gov/system/files/documents/cases/bronx_honda_complaint_0.pdf.

builds in a variety of assumptions. Interpreting those findings requires expertise and judgment. And even then, findings of discrimination may be rebutted in litigation. In other words, ascertaining the presence of discrimination may require extensive analysis and data not available to the executives of a company. The decisions of these executives to employ a compliance manager and to adopt a compliance program that incorporates industry best practices also weigh heavily in my assessment of whether individual liability is appropriate.

Accordingly, I dissent from the inclusion of the individual defendants in the complaint and settlement in this matter.

With respect to Count III, the unfairness count, I share Commissioner Phillips' concerns with pleading the discriminatory fees as an unfair practice for many of the reasons explained in his statement. The avenue to challenge these fees is the ECOA count, which I support.

Accordingly, I dissent from Count III with respect to both individual and corporate defendants.