

NEWS RELEASES

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Husch Blackwell's Amicus Brief Aids in Fifth Circuit Win for Auto Finance Industry

In a decision that spares the auto finance industry from substantial additional burden and requirements on top of already substantial existing regulations, the U.S. Court of Appeals for the Fifth Circuit vacated the Federal Trade Commission's Combating Auto Retail Scams (CARS) Rule, ruling that the FTC failed to issue an advance notice of proposed rulemaking in violation of its own regulations.

In December 2023, the FTC finalized the CARS Rule, which would prohibit certain advertising and sales tactics and hidden charges in the car buying and leasing process. The rule would impose various numerous non-specific obligations on dealers but would also impact downstream finance companies that purchase retail installment contracts from dealers. The FTC failed to consider in its rulemaking the significant regulatory, litigation, and enforcement impacts on the downstream finance companies.

In January 2024, the National Automobile Dealers Association (NADA) along with the Texas Automobile Dealers Association filed a petition in the Fifth Circuit to stop the rule from taking effect. NADA, dealer associations, and local dealerships filed thousands of comments urging the FTC to re-work its regulation, and specifically urged the FTC to slow down and test its proposal with consumers to determine how it would work in practice. Despite all this, the FTC nevertheless published the rule, forcing impacted entities to try to figure out how adjust business practices to ensure compliance.

The litigation attracted national interest with various groups supporting and opposing the CARS Rule. For example, approximately 20 state attorneys-general filed an amicus brief supporting the CARS Rule, citing it as a necessary enforcement tool for them. Husch Blackwell attorneys Marci Kawski, Lisa

Lawless, and Rebecca Bavlsik filed an amicus curiae brief on behalf of the American Financial Services Association, the primary trade association for the consumer credit industry, in support of NADA.

“This is a win for the auto finance industry,” Kowski said. “While the rule purported to apply only to dealer conduct, by virtue of another rule of the FTC, the Holder in Due Course Rule, downstream lenders that accept the retail installment contract after its origination between the dealer and consumer could have faced liability for the dealer’s alleged violations. The Holder Rule is sometimes used as a mechanism to try to hold a downstream lender liable for claims against a dealer for alleged violations of the law.”

“In essence, because of the Holder Rule, a dealer’s alleged failure to comply with the non-specific requirements of the CARS Rule would have been bountiful fodder for the Consumer Financial Protection Bureau, state regulators, and plaintiffs’ attorneys to try to assert claims of non-compliance against a downstream auto finance company.”