FTC Nails Bronx Honda and General Manager for Discrimination and Deception

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The Federal Trade Commission made a big splash in late May when it announced a whopping $1.5 million settlement with Liberty Chevrolet, d/b/a Bronx Honda, and its general manager, Carlo Fittanto. Bronx Honda and Fittanto were charged with discrimination in financing to African Americans and Hispanics, as well as a variety of deceptive business practices.

These allegations are just about as horrible as you can imagine. The FTC got a comprehensive settlement, appropriate to the charges. But, in resolving this case, the FTC made a mistake or two, and a couple of members of the five-member bipartisan Commission made statements that could take the FTC's usually sound law enforcement in the wrong direction.

Let's start by reviewing what the FTC alleged Bronx Honda and Fittanto did wrong:

- **Race discrimination in financing terms.** The complaint says that the defendants used derogatory terms to refer to minority customers. The complaint also says that the defendants instructed their sales personnel to charge higher markups and additional fees to African-American and Hispanic customers, because they have limited education, but not to attempt these practices with non-Hispanic white customers. The FTC's review of average markups by race and national origin supported this claim. The difference in average markups was not the highest we've seen alleged in some cases by the Department of Justice and the Consumer Financial Protection Bureau (19 basis points for African Americans and 24 basis points for Hispanics), but it was enough to make a difference over the life of the financing.
- **Deceptive advertising.** The FTC charged that the defendants advertised a "sale" price for specific cars but did not honor the price.
- **Unauthorized charges on certified pre-owned cars.** The FTC said that Bronx Honda offered "Certified Pre-Owned" Hondas, which are covered by the manufacturer's seven-year, 100,000-mile warranty, but Bronx Honda told customers they must pay an additional "certification" fee to receive the advertised price and warranty, a practice prohibited by the manufacturer. The dealership also assessed "prep, shop, or reconditioning" fees for some Certified Pre-Owned Hondas. The unluckiest customers got to pay both fees, totaling approximately $3,000, according to the complaint.
- **Other deceptive fees.** The complaint included a laundry list of bogus charges.

- Although New York law limits dealer documentation fees to $75, the dealership charged some customers doc fees of up to $695.
- Some customers got charged twice for sales tax and certain fees – once in the amount financed and again in the itemized additional charges.
- The complaint described an elaborate scheme to add "air money" to the sales finance contracts, in which the agreed-upon terms were changed before the consumer signed the contract, and many consumers allegedly signed the contracts without noticing the increases.

- **Truth in Lending Act advertising violations.** The FTC charged the dealership with violating TILA and Regulation Z by advertising monthly payments without including other financing terms "triggered" by the monthly payment, such as the down payment amount, repayment period, and Annual Percentage Rate. Online ads included an "interest rate" that was not properly labeled as the APR.

This is a pretty impressive list of law violations, ranging from despicable (overt discrimination) to technical (not labeling the interest rate as the APR). The overall picture is that of a dealership ready to cheat customers who might not catch the dealership's sharp practices.

But the Commission made a misstep or two, as well.

- **Botching the theory of discrimination.** As we know, there are two theories for liability under most anti-discrimination laws: disparate treatment and disparate impact. (Whether disparate impact is a permissible theory under the Equal Credit Opportunity Act is not settled in the courts, but the regulators and the Department of Justice believe it is.) Disparate treatment is exactly what it sounds like – treating a credit applicant less favorably because of race or another prohibited basis. It can be proved either with "overt" evidence ("Let's gouge minorities in financing terms because they won't catch us") or through statistical evidence (minorities pay higher average markups, and the creditor cannot come up with a plausible nondiscriminatory explanation).

  The allegations against Bronx Honda are classic disparate treatment claims. But, inexplicably, the complaint pleads that the dealership's pricing policy (e.g., "charge African Americans and Hispanics more") is "not justified by a business necessity that could not be met by a less discriminatory alternative." This is a test applicable only to a disparate impact claim. There can never be a business justification defense to disparate treatment. Legal theories matter. More about this in a moment.
- **Did similarly situated minorities in fact pay higher markup rates?** That's the FTC's claim, and, as with every settlement, we may never know what the evidence at trial would have been. The complaint correctly recited the requirement that any comparison must be between "similarly situated" consumers and that the increased markups for African Americans and Hispanics "cannot be explained by nondiscriminatory reasons." But did the FTC staff attempt to control for

legitimate, nondiscriminatory explanations? The complaint doesn't say.

I suspect the staff did nothing more than simply compare the markups by racial/ethnic group, without considering factors that could be legitimate, nondiscriminatory reasons for a difference. For instance, we often find that applicants in lower credit tiers pay higher average markups, regardless of race, and there can be legitimate reasons for this fact. The prime auto finance market is more competitive than the nonprime market. Dealership employees must often work harder and longer to get a nonprime applicant approved. Perhaps these legitimate reasons would not have explained the difference in markup averages. The allegations of racial animus suggest that the conduct may have been motivated only by race and ethnicity, but we may never know.

Now a bit about the settlement. I've already noted the huge cost of consumer restitution – $1.5 million. And the dealership and its general manager are jointly and severally liable for the entire amount; if one doesn't pay up, the other is on the hook for the full number.

Here are just a few of the noteworthy points in the order:

- $1.5 million is a lot of money for a one-location dealership. If another dealership has paid this much to settle an FTC case, I don't remember it.
- The money does not necessarily go to Bronx Honda customers. The money goes to the FTC, which can give it to customers, use it for consumer "information," or give it to Uncle Sam.
- The FTC loves to sue individuals associated with a "bad" business. Usually the Commission names owners when it wants to pounce on individuals. Here, it names only the general manager, perhaps because the owner(s) had little or no involvement with the operation of the business.
- The injunctions are sweeping and never expire. The order contains a long list of things the dealership (and Fittanto) cannot do in the future. Some are specific to the complaint allegations, but others are broader, such as never misrepresenting a purchasing, financing, or leasing term or any other material fact in the purchase of any product or service the dealership sells. The defendants are enjoined from ever violating any provision of the ECOA or Regulation B. (Good luck with those requirements, Bronx Honda.)

This was the FTC's first-ever credit discrimination case against a car dealership. And it appears the Commission is on a tear. No dealership should want to be the next one.