



To Be or Not To Be: Challenge to the FTC's CARS Rule Is Ripe for the Fifth Circuit to Decide

November 27th, 2024 | and [Julia K. Whitelock](#)

On October 9, 2024, the U.S. Court of Appeals for the Fifth Circuit heard oral arguments on the challenge by the National Automobile Dealers Association and the Texas Automobile Dealers Association (“Petitioners”) to the Federal Trade Commission’s Combating Auto Retail Scams Trade Regulation Rule. The three-judge panel was comprised of Judges Patrick E. Higginbotham and Jerry E. Smith, Reagan appointees, and Judge Stephen A. Higginson, an Obama appointee. The Petitioners asserted that the “billion-dollar rule” should be vacated while the FTC defended its rulemaking process.

If a Tree Falls in a Forest and No One Is Around to Hear It ...

The panel seemed skeptical of the Petitioners’ argument that the CARS Rule should be vacated because the FTC purportedly failed to provide an advance notice of proposed rulemaking. The Petitioners and the FTC spent almost half of their respective argument time disputing the requirements, or lack thereof, of the FTC’s rulemaking. The panel homed in on whether the absence of an advance notice caused the Petitioners prejudice or harm.

The Petitioners pointed out that one of the purposes of advance notice is to determine whether there is a need for a rule in the first place. As an example of what they could have done if given advance notice, the Petitioners pointed to question 49 in the proposed rulemaking regarding state regulations. The Petitioners explained that it essentially asks for a 50-state survey, which the Petitioners would have commissioned if they had been given enough time to respond.

The FTC minimized the importance of an advance notice, which provides only broad notice, and asserted that it put the industry on notice of a potential rulemaking over 10 years ago. The FTC also reminded the court that the burden is on the Petitioners to show prejudicial error. It argued that the Petitioners’ brief denied that they needed to show harm and failed to argue the source of any prejudice.

The Math Is Not Mathing.

At least some of the panel seemed receptive to the Petitioners’ cost and burden argument. The panel did not appear to have determined at the time of oral argument whether it had authority to review the CARS Rule’s cost-benefit analysis. The outcome will likely depend on how the panel majority (assuming the panel is divided) characterizes the arguments.

The Petitioners argued that an agency’s rational consideration of costs and benefits is fundamental

to a judicial arbitrary and capricious review. The Petitioners gained traction with at least one of the judges by driving home the practical implications of the CARS Rule's disclosure requirements in light of the recordkeeping mandates and the "offering price." The Petitioners questioned how a dealer will make a record to prove to the FTC later that it made the required disclosure when, for example, the dealer receives customer inquiries while out on a test drive. A dealer may field multiple questions about monthly payment, but with each question, the dealer will need to do a full underwriting to satisfy the CARS Rule's requirements. The defined "offering price" is a ceiling, not a floor. However, a dealer providing the "offering price" of a vehicle could mislead customers to believe that this is one-price shopping as opposed to the upper limits of a negotiation. The Petitioners highlighted the deficiency in the amici economists' brief—they had no engagement with the practicalities of dealer implementation of the CARS Rule.

The FTC countered that the court cannot review the Commission's cost-benefit analysis under Section 22 of the FTC Act, with the sole exception of setting aside a rule where the Commission has completely failed to do a cost-benefit analysis whatsoever. It postured that the Petitioners' cost-benefit argument is foreclosed from judicial review because the Petitioners' brief cited only to the portions of the rulemaking that were pursuant to Section 22. The FTC also asserted that if the court were to review the FTC's cost-benefit analysis, it would also review for harmlessness. One judge appeared skeptical that the FTC's analysis of the cost of compliance was rational. The judge pointed out that it has taken 10 to 20 years of litigation to settle on legal interpretations of the Truth in Lending Act; therefore, the FTC and the Petitioners should expect the regulatory compliance costs to be extremely expensive.

The Crystal Ball Is Still Hazy.

The panel expressed some skepticism that the Petitioners had suffered any prejudice or harm as a result of the FTC not employing an advance notice, regardless of whether it was required to or not. This reaction is disappointing because the Petitioners put a lot of eggs in that basket. The majority of the panel seemed more receptive to the Petitioners' argument that the rulemaking was arbitrary and capricious because the FTC did not rationally consider the burden of compliance, and the purported benefits were unsupported and unreliable.

The Petitioners are requesting that the CARS Rule be vacated by the Fifth Circuit. However, during rebuttal, one of the judges asked the Petitioners about their alternative remedy—remand without vacatur. Remand would require the FTC to consider additional evidence regarding the CARS Rule's implementation costs and alleged benefits while the court retains jurisdiction to review any revisions or new rule that the FTC promulgates after reconsideration. The Petitioners agreed that if the court isn't willing to find that the CARS Rule is arbitrary and capricious, it could remand because there are gaps in the record that would inform whether the CARS Rule should "stay or go." It's possible, though hard to predict, that the judge's question sheds light on where the panel may land as a "middle ground."

Even if the Fifth Circuit vacates or remands the CARS Rule, it is unlikely that the FTC will cease bringing enforcement actions against dealerships and other parties based on the same unfair and deceptive acts and practices that underlie the CARS Rule. Shortly after the Petitioners initiated this challenge, the FTC voluntarily stayed the effective date of the CARS Rule. It did not stay any pending enforcement actions of dealers. Rather, the FTC's enforcement actions since issuing the CARS Rule make clear that it believes that Section 5 of the FTC Act already grants it authority to take enforcement action against dealers and others for purported "bait-and-switch tactics" and

“hidden junk fees.” As stated during oral argument, the reason the FTC determined that the CARS Rule was needed was to provide the FTC with an avenue to obtain civil penalties and consumer redress, which it cannot pursue under current enforcement authority.

Should the Fifth Circuit deny the petition for review of the CARS Rule, the Petitioners are well positioned with counsel to seek an appeal to the U.S. Supreme Court. The Fifth Circuit granted the FTC’s unopposed motion to expedite the proceeding, which required expedited briefing. While this action doesn’t force the panel to shorten the time it takes to issue a decision, it is likely that the court will issue its decision within a few months.