UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Commissioner
Noah Joshua Phillips

Dissenting Statement of Commissioner Noah Joshua Phillips

Regarding Federal Trade Commission vs. Passport Automotive Group, Inc. et al.
FTC File No. 2023199

October 14, 2022

For over 80 years, the Federal Trade Commission Act's Section 5 unfairness authority has allowed the Commission to protect consumers from harmful practices ranging from unilateral changes to contracts without consumers' express informed consent[1] to poor data security that exposed consumers' most sensitive personal information.[2] The language of the unfairness standard has given the FTC the flexibility to combat new threats to consumers that accompany the development of new industries and technology. Still, there are limits to the Commission's unfairness authority. Because this complaint includes an unfairness count that aims to transform Section 5 into an undefined antidiscrimination statute, I respectfully dissent.

Defendants in this case (hereinafter, "Passport") own and operate auto dealerships. As alleged in the complaint, Passport regularly advertised specific prices for their vehicles; but when consumers would attempt to purchase a vehicle at the advertised price, Passport would charge them additional hundreds or thousands of dollars in fees. Passport claimed that these fees, such as reconditioning, inspection, preparation, and certification fees were required. They were not. Counts I and II of the complaint allege that Passport's misrepresentations about the specific price at which they would sell a vehicle and that certain fees were required were deceptive in violation of Section 5.

In addition, as described in the complaint, Passport had a policy of charging consumers for whom it arranged financing a markup of 200 basis points or 2%. Employees were permitted to reduce or eliminate that markup for specific reasons, namely if the consumer had a competing credit offer or if the consumer had a cap on the monthly payment they could afford. Employees were supposed to document the reasons for any deviations from the standard markup on a certification form, those forms were to be reviewed by other employees not involved in the sale, and the policy was to be regularly monitored for compliance. Passport did not follow these protocols, and the complaint alleges that the discretionary markup policy resulted in Black and Latino consumers being charged, on average, higher markups than non-Latino White consumers.

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[1] *In the matter of Orkin Exterminating Co. Inc.*, 117 F.T.C. 747 (1994), https://www.ftc.gov/legal-library/browse/cases-proceedings/orkin-exterminating-company-inc.

[2] *FTC v. Equifax*, Case No. 1:19-cv-03297-TWT (N.D. Ga. 2019), https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3203-equifax-inc.

From August 2017 to August 2020, Black consumers were charged, on average, $291 and Latino consumers were charged, on average, $235 more in interest than similarly situated non-Latino White consumers.

The complaint also alleges that Passport's practice of adding extra inspection, reconditioning, vehicle preparation, and certification fees resulted in Black and Latino consumers being charged these fees more frequently, and in higher amounts, than non-Latino White consumers.

The Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against an applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, or because of receipt of public assistance.[3] Per the complaint, Passport's discretionary markup policy imposed higher costs on Black and Latino consumers in violation of ECOA.[4]

The complaint also alleges that the higher costs Passport imposed on Black and Latino consumers caused substantial injury to those consumers, were not reasonably avoidable by them, and were not outweighed by any benefits to consumers and competition, and therefore Passport's conduct was unfair. This is the first case in which the Commission has alleged that the disparate impact of business conduct is unfair in violation of Section 5.

I have no quarrel with Counts I and II, nor Count IV's allegation that Passport's discretionary markup policy violated ECOA.[5] I would have voted in favor of a complaint limited to those complaint counts.[6]

I cannot support Count III and its novel interpretation of unfairness.

As a threshold matter, Count III is entirely gratuitous. *First*, it condemns conduct that is already covered by Count IV. *Second*, Count III is not necessary for the injunctive relief being sought, and does not allow the Commission to obtain monetary redress for harmed consumers or a civil penalty. Count III accomplishes nothing in this case. The sole reason for its inclusion is to announce to the world that the FTC has expanded its unfairness jurisdiction to include

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[3] 15 USC 1691 *et seq*.

[4] While the Supreme Court has never heard a case directly on the question of whether disparate impact is cognizable under ECOA, others have. See, e.g., *Fair Hous. Ctr. Of Cent. Indiana, Inc. v. Rainbow Realty Grp., Inc.*, Case No. 1:17-cv-1782, 2020 WL 1493021 (S.D. Ind. Mar. 27, 2020); *Ramirez v. GreenPoint Mortg. Funding, Inc.*, 633 F.Supp. 2d 922 (N.D. Cal. 2008). And I am aware of no court that has held that liability may not be imposed for disparate impact claims under ECOA.

[5] I agree with the concerns Commissioner Wilson raises in her separate statement regarding the application of individual liability in this case.

[6] I supported similar counts in our cases against Bronx Honda and Napleton. *See FTC v. Liberty Chevrolet, Inc. ("Bronx Honda")*, No. 1:20-cv-03945-PAE (S.D.N.Y. 2020), https://www ftc.gov/legal-library/browse/cases-proceedings/162-3238-bronx-honda; *FTC and the People of the State of Illinois v. North American Auto Services, Inc. et al. ("Napleton"),* No. 1:22-cv-01690 (N.D. Ill. 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2023195-napleton-auto.

antidiscrimination. But because that announcement raises myriad questions about the liability rule, it serves no useful function for businesses eager to stay on the right side of the law.

The FTC Act is not an antidiscrimination statute. When Congress wishes to make discrimination illegal, it says so. The Civil Rights Act of 1964 makes it unlawful to "discriminate."[7] The Equal Pay Act of 1963 bars "discrimination."[8] The Americans with Disabilities Act says it is illegal to "discriminate."[9] Congress knows how to tell the public (and law enforcers) when it is addressing discrimination. There is simply nothing to suggest that, in the 1938 Wheeler-Lea amendments to the FTC Act, Congress did so.[10] Nor is there anything to suggest that, in 1994 – after Congress had adopted numerous antidiscrimination laws – its clarification of "unfairness" did.[11]

Section 5 looks nothing like the antidiscrimination laws Congress passed; and as applied to address discrimination, it would sweep more broadly than any. For one critical thing, Section 5 does not tell us on what basis discrimination is impermissible, which classes the law protects. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of such individual's race, color, religion, sex, or national origin."[12] Title IX prohibits discrimination "on the basis of sex."[13] The Age Discrimination in Employment Act prohibits employment discrimination against individuals aged 40 and over.[14] Those are just three examples of how Congress can and has identified pernicious discrimination and banned it. Section 5 provides no such guidance, and so under the theory articulated in Count III there are no limits. The Commission's theory of Section 5 could make disparity on the basis of qualification or customer loyalty illegal.

Second, unlike other antidiscrimination statutes, Section 5 does not identify any contexts to which it applies.[15] The statutes on the books define clearly the areas in which discrimination is illegal, such as housing, employment, and credit.[16] They reflect a congressional judgment that

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[7] Title VII of the Civil Rights Act of 1964, Pub. L. 88-325.

[8] The Equal Pay Act of 1963, Pub. L. 88-38.

[9] The Americans with Disabilities Act, 42 USC 12101.

[10] Wheeler-Lea Amendment, Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. 45(a)(1)).

[11] 15 U.S.C. 45(n).

[12] Title VII of the Civil Rights Act of 1964, Pub. L. 88-325.

[13] Title IX of the Education Amendments Act of 1972, 20 U.S.C. §1681-1688.

[14] 29 U.S.C. § 621 *et seq.*

[15] The Commission's Section 5 jurisdiction is limited to acts or practices in or affecting commerce. The Commission also does not have jurisdiction over, among others, nonprofits, banks, and common carriers. 15 U.S.C. 45(a).

[16] The Fair Housing Act, 42 USC 3601 *et seq.*, prohibits discrimination by direct providers of housing, such as landlords, and other entities, such as banks and homeowners insurance companies whose discriminatory practices make housing unavailable because of an individual's race, color, sex, national origin, familial status, or disability. The Americans with Disabilities Act, 42 USC 12101, prohibits discrimination against people with disabilities in employment, transportation, public accommodations, communications, and access to state and local governments' programs and services. Equal Credit Opportunity Act ("ECOA"), 15 USC 1691 *et seq*., covers the extension of

such discrimination exists, that it is pernicious, and that it must stop. As a nation, we are better off because of the exercise of that judgment. But Section 5 has no such definition; and, under the theory of Count III, it will be up for the Commission to decide.

A third matter. Antidiscrimination law has developed two theories of proving discrimination: disparate treatment and disparate impact. Disparate treatment occurs when some individuals are treated differently than similarly situated individuals based on a protected characteristic (e.g., women are not eligible for a job). Disparate impact occurs when a neutral policy has the effect of disproportionately excluding members of a protected class (e.g., a height requirement for getting a job has the effect of fewer women being hired). Disparate impact is not cognizable under every antidiscrimination statute. The Supreme Court is clear that "antidiscrimination laws must be construed to encompass disparate impact claims when their text refers the consequences of actions and not just the mindset of actors, and where that interpretation is consistent with statutory purpose."[17]

In this case, the Commission is declaring not only that Section 5 is an antidiscrimination statute, but also that liability can be predicated upon the disparate impact of conduct. This interpretation of Section 5 fails the Court's test and would give the Commission authority to go far beyond the antidiscrimination laws on the books.

Section 5 does not mention discrimination. It does not identify protected classes, the bases on which discrimination is impermissible. Section 5 does not identify any context where Congress has determined discrimination exists and must be rooted out. And it gives enforcers and courts no guidance whether liability may be predicated on the disparate impact (on, again, any basis) of a business practice alone. One obvious takeaway from all of this is that Section 5 is not an antidiscrimination statute. No beak, no feathers, no walk, no quack – Section 5 is a terrific consumer protection tool, but it is no duck.

But if it were, Section 5 would be an odd duck indeed. To establish liability under the Fair Housing Act using a disparate impact theory, for example, a plaintiff must show that a facially neutral policy has resulted in a disparate impact, at which point the burden shifts to the defendant to provide a legitimate need for the policy. The burden then shifts back to the plaintiff to show that a less discriminatory alternative was available and serves the defendant's legitimate need.[18] A defendant will not be liable for a disparate impact if there was a valid justification and no less discriminatory alternative. That is not how Section 5 works. Unfairness requires that the costs of a business practice outweigh its benefits. That leaves open the possibility that the Commission could determine that a business practice that was legitimate and for which there was no less restrictive alternative was nonetheless illegal discrimination under Section 5 because, in our view, the benefits of the conduct didn't justify the discrimination. Put differently, the theory of

credit and bars discrimination "with respect to any aspect of a credit transaction" on the basis of race, color, religion, national origin, sex, marital status, age, or because of receipt of public assistance.

[17] *Texas Dep't of Hous. & Comty. Affs. v. Inclusive Communities Project, Inc.*, 576 US 519, 534 (2015).

[18] Id. (adopting this three-step burden-shifting test for disparate-impact under the Fair Housing Act).

Count III would allow the Commission to condemn conduct covered by antidiscrimination laws but permitted by them.

If the FTC Act is an antidiscrimination statute encompassing disparate impact liability untethered to protected classes or context, then the Commission has the power to declare a great many legal things illegal. For example, a dating service that allows users to specify a preference for potential partners with a particular gender, religion, race, or national origin, resulting in fewer matches for some classes of users.[19] Or a music streaming service that uses an algorithm that recommends more male artists than female artists to its users.[20] It sounds silly to suggest that the FTC would make a federal case over Spotify recommending Ed Sheeran more often than Taylor Swift, but such a suit would be possible under the majority's view of unfairness. Businesses trying to follow the law will have to wait and see what the Commission chooses to condemn.

On a more practical note, this pleading also fails as a matter of Section 5. Disparate impact liability examines the impact of business conduct. A defendant does something, and that thing has a disparate impact. In this case, we apply the Section 5 unfairness test as if the disparate impact were the conduct itself. So, we look only to the disparate impact for the substantial injury and then again, and only, to the impact in weighing the costs and benefits of the conduct. That analysis mistakes the impact for the conduct, effectively conflating two separate parts of the Section 5 analysis.

Some have argued that Section 5 unfairness can be a "gap filler" for where antidiscrimination law does not apply.[21] They maintain that discrimination falls cleanly within the scope of unfairness, and point to the fact that the Commission can consider public policy in evaluating whether conduct is unfair to bolster their argument. This misinterprets the history of Section 5. In 1938, Congress amended the FTC Act to give the Commission the ability to protect consumers from "unfair or deceptive acts or practices."[22] "Unfair" is an elastic term, and it went undefined for decades. During the 1960s and 70s, the Commission used the flexibility in the language with increasing breadth until its ambitions met with resistance from Congress and the public.[23] Congress shut down the agency.[24] In 1980, the Commission issued its Unfairness Policy

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[19] Christian Gollayan, *Dating apps promote racial discrimination: study*, N.Y. POST (Oct. 3, 2018), https://nypost.com/2018/10/03/dating-apps-promote-racial-discrimination-study/.

[20] Andres Ferraro, Xavier Serra, & Christine Bauer, *Break the Loop: Gender Imbalance in Music Recommenders*, CHIIR '21: Proceedings of the 2021 Conference on Human Information Interaction and Retrieval, 249-254 (Mar. 14, 2021), https://dl.acm.org/doi/10.1145/3406522.3446033.

[21] Stephen Hayes and Kali Schellenberg, *Discrimination is "Unfair" Interpreting UDA(A)P to Prohibit Discrimination*, Student Borrower Protection Center (Apr. 2021), https://protectborrowers.org/discrimination-is-unfair-interpreting-udaap-to-prohibit-discrimination/.

[22] Wheeler-Lea Amendment, Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. 45(a)(1)).

[23] *See, e.g.,* J. Howard Beales III, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MKTG. 192 (2003); Ernest Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, 4 REGULATION 33 (1980).

[24] *See,* Merrill Brown, FTC Temporarily Closed in Budget Dispute, WASH. POST (May 1, 1980), https://www.washingtonpost.com/archive/business/1980/05/01/ftc-temporarily-closed-in-budget-dispute/5c63ef5d-4e28-471d-8f9c-014d4d28d360/.

Statement to impose some limits on what it believed it could condemn.[25] Congress codified the unfairness test in 1994. Section 5(n) of the FTC Act states that an act or practice is unfair if it "causes or is likely to cause substantial injury to consumers or competition which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition."[26] It also specifically prohibits public policy considerations from serving as the primary basis for an unfairness determination.[27] Nowhere in this long, rich history does the concept of antidiscrimination arise.

The theory that Section 5 can "fill gaps" in antidiscrimination law runs directly counter to public policy, as established by Congress. The gaps in question are in fact lines drawn by the legislature. Discrimination is impermissible on this basis (but not that). Discrimination is illegal in this context (but not that). Liability is limited to disparate treatment (but not impact). By glossing over the distinctions that anchor antidiscrimination law, Section 5 colors outside lines Congress carefully drew. In the name of "public policy", it adopts a policy different from the one policymakers specifically promulgated.

I understand the impulse to declare problematic and even repugnant behavior unfair. As Americans, we all want a society devoid of invidious discrimination. In their joint statement in the *Napleton* case, Chair Khan and Commissioner Slaughter expressed their desire to declare disparate impact unfair and encouraged the Commission "to use our existing enforcement tools to protect consumers to the fullest."[28] Section 5 is versatile, but it is not a Swiss Army knife. It is not a tool to tackle any problem or societal ill. If we try to wield it as such, we are not likely to come out on top. That will be a step back, not forward, for our common goals.

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[25] Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science, and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), Reprinted in International Harvester Co., 104 F.T.C. 949 (1984) ("Unfairness Policy Statement"), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

[26] 15 U.S.C. 45(n).

[27] Id.

[28] Joint Statement of Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter In the matter of Napleton Automotive Group (Mar. 31, 2022), https://www.ftc.gov/news-events/news/speeches/joint-statement-chair-lina-m-khan-commissioner-rebecca-kelly-slaughter-matter-napleton-automotive.