

IN THE MATTER OF
PEACOCK BUICK, INC., ET AL.

Docket 8976. Order, Mar. 2, 1976

Denial of respondents' motion for reconsideration of opinion and final order forbidding the misrepresentation of the necessity of credit insurance and requiring disclosure that such insurance is not required.

Appearances

For the Commission: *Jerry W. Boykin, Michael E.K. Mpras, Michael Dershowitz and Frank H. Addonizio.*

For the respondents: *Stein, Mitchell & Mezines*, Washington, D.C.

ORDER DENYING PETITION FOR RECONSIDERATION

The Commission issued its opinion and final order in this matter on December 19, 1975 [86 F.T.C. 1532], and respondents were served with both on January 16, 1976. By motion dated February 2, 1976, respondents have petitioned for reconsideration of Paragraphs I(6) and I(7) of the order, pursuant to Section 3.55 of the Commission's Rules of Practice. Complaint counsel oppose the motion as inappropriate for reconsideration and defective on its merits.

This case involved practices in the sale of new and used cars. The Commission held that respondents had committed several violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), among which was that respondents, through sales agents, misrepresented to certain customers that it would be necessary for those customers to purchase credit life insurance in order to secure automobile financing from area lending institutions. In fact the lending institutions in question did not require such insurance as a precondition for extension of a loan. Order Paragraphs I(6) and I(7) were designed to remedy the violation by forbidding respondents from misrepresenting the necessity of credit insurance [Par. I(6)] and by requiring respondents to disclose affirmatively, orally and in writing, that such insurance is not required [Par. I(7)].

In their motion for reconsideration, respondents argue that the practice which the Commission's order condemns is immunized from Commission review by the McCarran-Ferguson Act (15 U.S.C. §1011, *et seq.*). This issue was briefed cursorily by respondents in the main proceeding, and dismissed by the Commission in summary fashion. Respondents in their motion for reconsideration cite certain Federal court cases reported subsequent to the time of oral argument and decision, which in their view warrant a different disposition. We agree

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with complaint counsel that the cases cited by respondents do no more than articulate points that might as readily have been raised earlier in the proceeding. Nonetheless, we have reviewed these cases and considered the substance of respondents' motion which, for reasons indicated below, must be denied.

The McCarran-Ferguson Act provides in part that

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance, *Provided*, That after June 30, 1948 * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. (15 U.S.C. §1012.)

A threshold question is whether an automobile dealer's practice of telling customers that they must buy credit insurance in order to obtain financing constitutes the "business of insurance" as used within the statute. As the Supreme Court has recognized, the legislative history of the McCarran-Ferguson Act provides little guidance as to the meaning of the "business of insurance." The Act was passed in response to the Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), which raised the possibility of massive Federal antitrust intrusion into what had theretofore been considered a State regulatory function, primarily involving insurance ratemaking. Congressional debate centered largely on the relationship between insurance ratemaking and antitrust laws, and upon State taxation of insurance companies. See *SEC v. National Securities, Inc.*, 393 U.S. 450, 458-59 (1968). In attempting its own definition, the Court said:

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance." (393 U.S. 459)

While the District Court cited by respondents may be correct in asserting that the insurer-insured relationship "is not the all-inclusive boundary of [the McCarran-Ferguson] Act" [*Proctor v. State Farm Mutual Automobile Insurance Company* (No. 249-722, D.D.C. Jan. 21, 1976)], we must also bear in mind the admonition that:

National Securities indicates that the MFA is to be narrowly construed in the face of valid federal regulatory interests; accommodation of federal and state regulatory interests is to be sought." [*SEC v. Republic National Life Insurance Co.*, 378 F. Supp. 430, 436 (D.C.N.Y. 1974), emphasis added.]

Any analysis of a transaction to determine whether it constitutes the “business of insurance” cannot end with the simple determination that an insurance policy is somehow involved, however tangentially. The transaction as a whole must be carefully evaluated to ascertain the nature and significance of the interests which come into play. It is perhaps no accident that the cases cited by respondent, and others on this subject, have sought to define the “business of insurance” in terms of certain activities of *insurance companies* or *insurers*, e.g., *SEC v. National Securities, Inc.*, *supra.*; *Dexter v. Equitable Life Assurance Society of the United States*, 527 F.2d 233 (2d Cir. 1975); *Addrisi v. Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). The transactions of a company whose principal purpose is to sell insurance are, after all, those most likely to involve primarily the interests which Congress intended be left to State regulation. Where, as here, we deal with a company which is not an insurance company at all, whose business touches on insurance in only a small way, the utmost care must be exercised to ensure that predominantly non-insurance aspects of the business are not immunized from Federal supervision by the mere presence of an aleatory contract.

Scrutiny of the transaction challenged here makes clear that what is essentially involved is the *arrangement of credit* by an automobile vendor. The Federal interest in ensuring that the business of financing be undertaken honestly is embodied not merely in the Federal Trade Commission Act’s proscription of “unfair or deceptive” acts or practices, but as well in the explicit requirements of the Truth in Lending Act (15 U.S.C. §1601, *et seq.*) and its implementing Regulation Z (12 C.F.R. §226).

As respondents themselves pointed out in their appeal brief before the Commission, Congress and the Federal Reserve Board have spoken explicitly with respect to the duties of a vendor offering insurance incident to the extension of credit. Regulation Z requires that a creditor who offers credit life insurance must include it when itemizing the finance charge, and for purposes of computing the annual percentage rate of the loan, unless such insurance is not required by the creditor for the extension of credit, and the consumer has made a written election to accept such insurance, following written disclosure that it is optional [12 C.F.R. §226.4(a)(5)]. In the instant case it appears that respondents obtained signed statements from consumers indicating their willingness to accept credit insurance, and those statements included a disclosure that such insurance was optional. Testimony of consumers indicated, however, and the Commission so found, that oral representations by salesmen were sometimes used to mislead borrow-

ers into believing that credit life insurance was required, thereby destroying the effect of the written disclosure.

Respondents' misrepresentations did not deal with the terms of an insurance policy, nor bear in any way upon the relationship between an insurer and its insured. The misrepresentations did, however, sorely mislead consumers as to the conditions under which they would be granted credit and the amount they would have to pay to obtain it. We think that any reading of the McCarran-Ferguson Act which would harmonize the Congressional goal of Federal non-interference with the "business of insurance" with the goal of Federal prevention of deceptive credit practices must lead to the conclusion that the precise practice involved here is not, within the statutory contemplation, the "business of insurance." If the "business of insurance" intrudes upon the business of financing, we think it does so only at the point at which the borrower or his lender may seek to deal with the *insurer* regarding particular details of the policy being purchased. To hold otherwise, we believe, would do little to effectuate the Congressional desire to leave regulation of the business of insurance to the States, but do much to thwart the clear Federal interest in preventing deception in the sale of automobiles in or affecting commerce and in credit financing generally. We do not believe, as respondents would have it, that the McCarran-Ferguson Act was intended to encroach so fundamentally on areas of Federal concern other than insurance, nor do we find in any of the cases cited by respondents warrant for concluding otherwise.¹

For the foregoing reasons we believe that the opinion of the Commission is correct in concluding that entry of order Paragraphs I(6) and I(7) is not barred by the McCarran-Ferguson Act, and accordingly,

It is ordered, That respondents' motion for reconsideration be, and it hereby is, denied.

¹ Respondents also argue that the practice involved here is subject to regulation by the Commonwealth of Virginia. The Virginia insurance code cited by respondents prohibits in general terms false representations "with respect to the business of insurance." VA Code §38.1-52(2); see also §38.1-51. Whether this constitutes the type of regulation necessary to immunize a practice from Commission scrutiny need not be resolved, inasmuch as we have concluded that for purposes of the McCarran-Ferguson Act the practice at issue here is not the business of insurance.

IN THE MATTER OF
J & J FURNITURE CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2800. Complaint, Mar. 8, 1976—Decision, Mar. 8, 1976

Consent order requiring a New York City seller and distributor of furniture and home appliances, among other things where sales presentations have been made in whole or in part in Spanish, to cease failing to furnish buyers with Spanish language translations of contracts, agreements or other documents used in connection with retail credit sales. Further, respondents are required to prominently display in-store notices of customers' right to receive all necessary documents in both Spanish and English.

Appearances

For the Commission: *Sandra L. Bird.*

For the respondents: *Wallman & Liebman*, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that J & J Furniture Corp., a corporation, and Luis R. Jerez, individually and as an officer of said corporation, have violated Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent J & J Furniture Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 179 East 116th St., New York, New York.

Respondent Luis R. Jerez is an officer of said corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporate respondent, including those hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution to the public of furniture and home appliances.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents have engaged in and are now engaged in commerce, or their practices affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Respondents purchase for