

Modifying Order

109 F.T.C.

IN THE MATTER OF

FORD MOTOR COMPANY, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 9073. Consent Order, March 29, 1979—Modifying Order, April 3, 1987*

The Federal Trade Commission has modified a 1979 consent order with Ford Motor Co. and Ford Motor Credit Co. (93 F.T.C. 402) by replacing procedures for the sale of repossessed cars and light trucks. The modified order has replaced the repossession accounting procedure with a "repossession guide" which respondents must provide its dealers to give them guidance in handling repossessions in various states. Additionally, the modified order eliminates specific limitations on deductions dealers were allowed to take when calculating surpluses and substitutes a provision permitting them to deduct costs allowed under state law.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On November 12, 1986, Ford Motor Company and Ford Motor Credit Company ("Ford") filed a request pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51, to reopen the proceeding and vacate or modify the cease and desist order entered against Ford on March 29, 1979, in Docket No. 9073, 93 F.T.C. 402.

This matter arose out of allegations that certain franchised Ford dealerships and certain dealerships owned in whole or in part by Ford were failing to account for and pay to defaulting customers surpluses generated by the sale of repossessed motor [2] vehicles.¹ A complaint was issued against Ford and Francis Ford, Inc., a franchised Ford dealer, on February 10, 1976. Subsequently, the matter was withdrawn from litigation with respect to Ford, who consented to the order at issue here.

One of the principal features of the Ford order is a repossession accounting procedure that Ford was required to make a part of the Ford Manual of Dealer Accounting Procedure, which is binding on its dealers through various sales and service agreements. The repossession accounting procedure was intended to bring about the uniform calculation of surpluses by Ford dealers. The order limits deductible

¹ The obligation of the secured creditor or his guarantor to account for and pay surpluses arises out of Article Nine of the Uniform Commercial Code (UCC), which has been adopted by 49 states and the District of Columbia. Under the UCC, a secured party, after repossession and disposition of the collateral, is required to account to the defaulting buyer for any surplus of proceeds from the sale or disposition of the collateral in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling,

expenses to specified direct out-of-pocket expenses under the repossession accounting procedure.

The complaint against Francis Ford was tried administratively and led to an order that limited the deductible expenses in accounting for repossessions to the same specified expenses that were allowable under the repossession accounting procedure featured in the order against Ford. Francis Ford appealed the Commission's decision and order to the Ninth Circuit Court of Appeals. That court vacated the order against Francis [3] Ford in *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *certd. denied sub nom. FTC v. Francis Ford, Inc.*, 459 U.S. 999 (1982), ruling that the Commission should have proceeded by rulemaking rather than adjudication.

Ford's petition asks the Commission to reopen the proceeding and either vacate or modify the order. Ford offers several arguments in support of its request. First, Ford argues that the order competitively disadvantages Ford dealers compared to dealers of motor vehicles manufactured by companies not under similar orders (referred to as foreign dealers), since the repossession accounting procedure forces Ford dealers to absorb costs that other dealers can recoup under applicable state law. Second, it is argued that the *Francis Ford* decision precludes enforcement of the Commission's repossession policy against dealers, so that the Commission should not continue to enforce it against manufacturers. Third, it is argued that the *Francis Ford* decision triggers the provisions of the "most favored company" clause since it represents a less restrictive adjudicated order that requires deletion of Parts II and VI of the order. Fourth, it is argued that the *Francis Ford* decision raises questions about the Commission's jurisdiction over the matter. Fifth, it is argued that the Commission's 1980 Unfairness Policy Statement represents a changed condition of law that requires vacation or modification of the order.

The National Automobile Dealers Association (NADA), a national trade association representing approximately 19,000 franchised new car and truck dealers, filed comments supporting [4] the Ford respondents' request in response to the Commission's request for public comment published on December 4, 1986, 51 *Fed. Reg.* 43746. NADA's comments track the Ford respondents' arguments and put forward one additional argument: that the failure to include repossession accounting provisions in the Commission's Credit Practices Trade Regulation Rule resulted in less restrictive standards that trigger provisions of the "most favored company" clause.

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen and consider modification of an existing order upon a satisfactory showing by the party subject to the order that changed conditions of law or fact require modification. The stat-

ute also provides that the Commission may reopen and modify or set aside an order "if the public interest shall so require." See 15 U.S.C. 45(b) (1982); 16 C.F.R. 2.51, 3.72 (1986). The Commission has decided to grant in part the Ford petition on the ground that, although the petition does not make a showing of changed circumstances of law or fact sufficient to warrant this action, the action is justified in the public interest.

Most of the arguments advanced by the Ford respondents were also made by General Motors (GM) in a similar request that the Commission denied on November 28, 1984, in Docket No. 9074. With respect to GM's argument that the GM order placed its dealers at a competitive disadvantage compared to foreign car dealers, the Commission noted that GM had presented no evidence that the order's provisions imposed significant financial burdens on GM [5] dealers that were not also borne by foreign dealers who comply with their obligation under state law to account for and pay surpluses.

In contrast, Ford's petition contains concrete evidence of competitive disadvantage. Ford submitted the results of a survey of 100 dealers whose repossession practices were audited under the order. The survey identifies five categories of costs that Ford dealers are required to absorb in whole or in part, but that dealers operating under state law standards generally are able to recoup. The petition then estimates the cost disadvantage this places on the universe of Ford dealers who handle repossessions. Although Ford's methodology probably overstates the actual cost disadvantage to Ford dealers because most repossession sales result in deficiencies rather than surpluses and because most deficiencies are not recovered, the Commission finds that the cost disadvantage is nevertheless real and substantial and that modifications to the order are therefore warranted in the public interest.² The Commission therefore will make appropriate modifications to the order to remove the competitive disadvantage Ford dealers suffer under the existing accounting procedure.

The remaining arguments made in Ford's petition and in the NADA comments do not justify vacating or further modifying the [6] order. Ford argues the Commission should not continue to enforce its orders against manufacturers since it cannot proceed against dealers after the decision in *Francis Ford*. That is not our reading of *Francis Ford*, but in any event the modifications to the order that are being made to remove the competitive disadvantage to Ford dealers will result in dealers and manufacturers alike being subject to the same

² In addition, as the NADA comments noted, the order may have the unintended effect of raising financing costs to a number of purchasers of Ford vehicles because of the tendency of a number of Ford dealers to minimize their compliance burden and attendant costs by assigning retail installment contracts on a non-recourse basis, which are generally more costly than recourse assignments.

requirement to account for and pay surpluses in accordance with state law.

Ford next argues that the "most favored company" clause in Part VII.B. of the order is triggered by the decision in *Francis Ford* and requires deletion of Parts II through VI of the order. The "most favored company" clause states that the Commission will modify the Ford order to match any adjudicated or consent order in three related proceedings that prescribes less restrictive standards for disposing of repossessed vehicles or determining surpluses or redemption rights. The clause on its face limits its coverage to *order-prescribed* standards. Because the *Francis Ford* decision failed to prescribe less restrictive standards, the "most favored company" clause is not triggered. Nor does the decision in the Credit Practices Rule, where the Commission declined to impose standards to account for deficiencies in repossession sales, trigger a similar "most favored treatment" clause referring to the rule, as NADA argues. [7]

Ford also suggests that the order should be vacated or modified because the Commission lacks jurisdiction after *Francis Ford* and because the order does not meet the requirements of the Commission's 1980 Unfairness Policy Statement. The *Francis Ford* decision attacked the procedure by which the Commission chose to proceed but not its jurisdiction. Thus there has been no change in the Commission's jurisdiction over dealers who fail to pay surpluses to consumers. Similarly, the Commission's Unfairness Policy Statement does not change the law and does not support vacation of the order.

It is therefore ordered, That the proceeding be reopened and that the final order issued March 29, 1979, in Docket No. 9073 be, and it hereby is modified to read as follows:

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. "*Ford respondents*" means Ford Motor Company ("Ford") and Ford Motor Credit Company ("Ford Credit"), corporations. References to either or both of the Ford respondents shall include their successors, assignees, officers, agents, representatives and employees, as well as any corporations, subsidiaries, divisions or devices through which they act in the United States. *Provided*, [8] *however*, that references to Ford shall not include Ford Credit and references to either or both of the Ford respondents shall not include dealerships.

B. "*Vehicle*" means a passenger car or a truck with a gross vehicle weight less than 26,000 pounds (11,794 kilograms).

C. "*Dealership*" or "*dealer*" means a corporation, partnership or proprietorship that is a Ford, Lincoln or Mercury vehicle dealership but excludes truck dealerships whose principal business is the sale of trucks with a gross vehicle weight more than 8,000 pounds (3,629 kilograms).

D. "*Retail sale*" means the installment credit sale of a vehicle, other than for purposes of resale (e.g., sale to dealers or wholesalers), lease or rental, to a purchaser who is not a fleet purchaser.

E. "*Repurchase financing*" means the financing of a retail sale subject to an agreement between a financing institution and a dealership (generally called a "*repurchase*," "*recourse*," or "*guaranty*" agreement) which provides that the dealership is obligated to pay off the [9] outstanding obligation to the financing institution after receiving a transfer of the repossessed vehicle.

F. "*Repurchase dealership*" or "*repurchase dealer*" means a dealership that engages more than occasionally in repurchase financing transactions.

G. "*Equity dealership*" means a dealership in which Ford has a controlling equity interest, holds 50 percent or more of the voting stock, or is entitled to elect 50 percent or more of the board of directors.

H. "*Liquidating dealership*" means an equity dealership that has ceased or is in the process of ceasing normal operation of a dealership and whose business has been or is being wound up by Ford or under Ford's supervision. It shall not mean a dealership not previously an equity dealership whose assets come into the possession or control of either of the Ford respondents by virtue of default on or compromise of a debt obligation.

I. "*Financing customer*" means a purchaser of a vehicle from a dealership by means of a retail installment contract. [10]

J. "*Disposition*" or "*dispose*" refers to a dealership's sale or lease of a repossessed vehicle previously sold by that dealership and returned to it by or for a financing institution pursuant to a repurchase agreement. Such sale or lease includes only transactions with an independent third party; i.e., it does not include a sale or lease to the financing institution, the dealership or their representatives, or to a person or firm liable under a guaranty, endorsement, or repurchase agreement covering the repossessed vehicle. Disposition or dispose shall not refer to the repurchase of a repossessed vehicle by a dealership pursuant to a repurchase agreement, or refer to a sale subsequent to a judicial sale in Louisiana.

K. "*Proceeds*" means whatever is received upon disposition of the repossessed vehicle, but exclusive of sales taxes, service contracts or separately priced warranties.

L. "Allowable expenses" means commercially reasonable expenses allowable under applicable state law. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for sale and [11] reselling of the vehicle, and not otherwise reimbursed to the dealership.

M. "Contract balance" means (1) the unpaid balance as of the date of repossession less applicable finance charge and insurance premium rebates deducted by the financing institution, plus (2) other charges authorized by contract or law and actually assessed prior to repossession.

N. "Surplus" means the excess of (1) the proceeds plus applicable insurance or warranty reimbursements received by the dealership or financing institution plus any other applicable rebates or credits not deducted by the financing institution, over (2) the contract balance, allowable expenses, and amounts paid to discharge any security interest provided for by law.

O. "Pay" or "paid," in reference to payment of a surplus, means a commercially reasonable attempt to pay.

II.

It is further ordered, That Ford shall provide to all dealers within 60 days of the effective date of this modified order, and to each new dealer within 30 days of entering into a sales and [12] service agreement, a "repossession guide." The repossession guide shall be made part of the Ford Manual of Dealer Accounting Procedures and shall state that:

1. Each surplus should be determined according to Paragraphs I.J through I.N of this order and paid to the repurchase financing customer within a reasonable period of time;
2. Expenses other than allowable expenses should not be deducted in calculating surpluses and deficiencies sought;
3. Dispositions should be commercially reasonable, which in practice means that the dealer should make the same efforts to obtain the best available price for a repossessed vehicle as would be made for a comparable used vehicle except that a dealer is not required to offer a warranty without extra charge even though such warranties are provided on other used vehicles;
4. If any rebate owing to the repurchase financing customer's account has not been received at the time the Ford accounting form is completed, such rebate should be applied for promptly; [13]
5. If any rebate is received after completion of the Ford accounting form, any surplus or deficiency should be redetermined and any re-

maining surplus paid within a reasonable time of disposition or within a reasonable time of receiving the rebate, whichever is later;

6. An accounting form should be prepared by the dealer for each disposition of a repossessed vehicle and:

a. should set forth the calculation of each surplus, and of each deficiency upon which collection is attempted;

b. should be signed by a person authorized to sign retail installment contracts on behalf of the dealership;

c. a copy of the form should be sent with the surplus payment to each repurchase financing customer to whom a surplus is paid and to each repurchase financing customer from whom a deficiency is sought; and [14]

d. should be retained by the dealer, together with all relevant underlying documentation, for at least two years from the date of disposition;

7. Dealers should not obtain waivers of surplus or redemption rights from repurchase financing customers except as allowable under applicable state law.

8. Failure to account for and pay surpluses to customers may expose the dealer to legal action.

III.

It is further ordered, That Ford shall require each Ford employee who is a director of an equity dealership to:

1. Provide the repossession guide described in Part II of this order to each such dealership; and

2. Vote for resolutions so that each such dealership handles repossessions in accordance with applicable state law. [15]

IV.

It is further ordered, That Ford Credit:

A. Shall incorporate provisions to the following effect into the "Retail Plan" Section of its "Automotive Finance Plans for Ford Motor Company Dealers," and into any subsequent edition of that document or any comparable successor document:

1. dealers are to permit redemption by the customer whose vehicle has been repossessed, at any time until there is a binding agreement for disposition;

2. dealers are to permit redemption in accordance with the post-repossession notice sent by Ford Credit to the customer.

3. dealers are to determine whether a surplus exists on a repurchase financing repossession according to the repossession guide described in Part II of this order;

4. in determining surpluses and deficiencies, dealers are not to deduct expenses other than allowable expenses; [16]

5. dealers are to account for and pay each surplus within a reasonable period of time of disposition.

B. Shall develop and distribute to all dealers who use Ford Credit's form of retail installment contract, revised Ford Credit retail installment contract forms that include a clear, concise statement in lay language that, in the event of repossession:

1. no expenses other than commercially reasonable expenses incurred as a direct result of repossessing (including, where permitted, attorney's fees and court costs), holding, preparing for sale and selling the vehicle may be deducted from the proceeds in determining a surplus or deficiency; and

2. any surplus realized on the resale or other disposition of the vehicle is to be paid to the customer.

C. Shall include the following information in clear lay language in at least one notice sent prior to repossession to every Ford Credit repurchase financing [17] customer to whom a notice of intent to repossess is sent:

1. the total amount past due at the time the notice is mailed;

2. in transactions where the customer is entitled to reinstatement of the contract, the customer will have an absolute right to such reinstatement and to regain possession of the vehicle by paying all past due installments and by paying such other amounts and fulfilling such other conditions as provided by law;

3. that the customer will have an absolute right to redeem the vehicle at any time prior to a binding agreement for its disposition, and that this right can be exercised by paying the contract balance plus all expenses incurred as a direct result of repossessing, holding and preparing the vehicle for sale;

4. the date or interval of time prior to which the vehicle will not be sold; [18]

5. that if the vehicle is not redeemed or the contract reinstated, the customer will be entitled to a refund of any surplus within a reasonable period of time;

6. that failure to account for and refund a surplus will give the customer a right to sue for the amount of the surplus and, except in California and Louisiana, for statutory penalties as provided by state law.

D. Shall establish and follow a procedure for uniformly sending a

written notice ("post-repossession notice") to Ford Credit financing customers as soon as practicable after repossession. Ford Credit shall periodically examine its branches' files, in accordance with its usual monitoring procedures, to determine whether the post-repossession notices have been and are being sent, and shall institute appropriate actions to assure that this procedure is adhered to. The post-repossession notice shall specify in clear, lay language:

1. the name, address and telephone number of the dealership to which the vehicle has been or will be returned for disposition, if applicable, and the [19] address and telephone number of the Ford Credit branch office to be contacted;
2. the date or interval of time within which the customer may reinstate the contract in states where the creditor is required to permit reinstatement of the contract;
3. the net amount necessary to redeem the vehicle, and, in transactions where the customer is entitled to reinstatement, the amount necessary to reinstate the contract, at the time the notice is sent;
4. the date or interval of time prior to which the vehicle will not be sold;
5. that the vehicle can be redeemed at any time prior to a binding agreement for its disposition;
6. that additional expenses incurred as a direct result of holding and preparing the vehicle for sale may increase the amount necessary to redeem the vehicle if redemption is delayed; [20]
7. that Ford Credit should be contacted to reinstate the contract in states where the customer is entitled to reinstatement;
8. that Ford Credit should be contacted for further information about redemption, including the procedure for redeeming the vehicle;
9. that, where the vehicle has been returned to the dealer and is not redeemed or the contract is not reinstated, any surplus must be paid to the customer within a reasonable period of time after disposition (the notice also may state that a contract between the dealer and Ford Credit provides that the dealer is to pay any surplus);
10. that failure to account for and refund a surplus will give the customer a right to sue for the amount of the surplus and, except in California and Louisiana, for statutory penalties as provided by state law;
11. that the customer may be liable for a deficiency or that state law prohibits Ford Credit and the dealer [21] from collecting any deficiency (the notice is to include the applicable language only);
12. that the customer has the right to direct the dealer to apply for a rebate of any unearned premiums payable by any insurance carrier

or agent from whom the dealer has, on behalf of the customer, obtained a credit life, accident and health or collision insurance policy.

E. Shall obtain no waivers of redemption or surplus rights from financing customers, except as allowable under applicable state law.

F. Shall, commencing three months and to be completed no later than twelve months after the effective date of this order, revise all pertinent Ford Credit forms, form letters, notices and internal written procedures to be consistent with the provisions of this order.

V.

It is further ordered, That:

A. In the event the Federal Trade Commission issues a final Trade Regulation Rule establishing standards less restrictive on automobile manufacturers, financing [22] companies or vehicle dealerships than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence of or the amount of surpluses, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then such less restrictive standards shall, on the effective date of the Rule, supersede and replace the corresponding provision(s) of this order. The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive. *Provided, however,* that the Ford respondents shall advise the Commission of their intention to rely upon any provision of a Trade Regulation Rule as having superseded any provision of this order 30 days in advance of reliance thereon. *Provided further* that this paragraph shall not be construed as exempting the Ford respondents from any Trade Regulation Rule, or as limiting in any way their legal right or standing to challenge or otherwise contest any Trade Regulation Rule. [23]

B. In the event any of the proceedings presently bearing Docket Nos. 9072, 9073, or 9074 results in a final adjudicated or consent order prescribing standards less restrictive than a corresponding provision or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence of or the amount of surpluses, or the time or manner of paying or accounting for surpluses, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then the Commission shall, within 120 days of a Ford respondent's petition

pursuant to Section 3.72 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this order or other relief as necessary and appropriate to conform this order to such less restrictive standards prescribed in the other order(s). The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive.

C. In the event a Ford respondent is of the opinion that changed conditions of law require that this order be altered or modified, the Ford respondent may, pursuant to Section 3.72(b)(2) of the Commission's Rules of [24] Practice, file a petition requesting a reopening of this proceeding for that purpose.

VI.

It is further ordered, That:

A. The Ford respondents shall maintain complete business records relative to the manner and form of their continuing compliance with this order, including but not limited to copies of notices sent to financing customers pursuant to Paragraphs IV.C and D above. The Ford respondents shall retain all such records for at least three years and shall, upon reasonable notice, make them available for inspection and photocopying by authorized representatives of the Federal Trade Commission.

B. Ford shall forthwith distribute a copy of this order to its Ford, Lincoln-Mercury and Parts and Services divisions, and to the Dealer Development activity, and Ford Credit shall forthwith distribute a copy of this order to each of its regions.

C. Each of the Ford respondents shall notify the Commission at least thirty days prior to any proposed corporate change such as dissolution, assignment or sale resulting in the emergence of a successor corporation or [25] corporations, the creation or dissolution of subsidiaries, the discontinuance of Ford's present program for investing in equity dealerships, or any other change which may affect compliance obligations arising out of this order.

IN THE MATTER OF
FOREMOST-McKESSON, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket C-2427. Consent Order, July 26, 1973—Modifying Order, April 16, 1987

The Federal Trade Commission has modified a 1973 consent order (38 FR 22468) by setting aside the second paragraph, of the consent order, prohibiting material inducements to customers to attend respondent's trade shows.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

Respondent McKesson Corporation ("McKesson")¹ filed a Petition to Reopen Proceeding and Set Aside Order ("Petition") on November 26, 1986, pursuant to Subsection 5(b) of the FTC Act, 15 U.S.C. 45(b). The Commission's order to cease and desist relates to McKesson's practices surrounding trade shows that it conducts for its retail drug store customers. McKesson is the largest wholesale distributor of drugs and druggists' sundries in the country.

McKesson requests the Commission to reopen the proceeding to set aside the two principal parts of the order on the basis of changed conditions of law and fact and the public interest. The Commission issued its order in this matter on July 26, 1973, with the consent of McKesson. 83 F.T.C. 228. The complaint and order were based upon alleged violations of Section 5 of the FTC Act. 15 U.S.C. 45. The first ordering paragraph prohibits McKesson from inducing promotional allowances and services from its suppliers in connection with trade shows when McKesson knows or has reason to know that such allowances and services are not available to its competitors on proportionally equal terms. The second part prohibits McKesson from providing material inducements to customers to attend McKesson's trade shows when the receipt is dependent on the volume of the customer's purchases.

The commission filed on January 10, 1979, a civil penalty action against respondent for violations of the order in this matter in *FTC v. Foremost-McKesson, Inc.*, No. 79 Civ. 0162 (PNL) (S.D.N.Y.). The civil penalty action focused upon national trade shows held by McKesson in 1976, 1977, and 1978 and attended by McKesson's retail customers. A Final Judgment and Permanent Injunction was entered on

¹ Respondent was formerly Foremost-McKesson, Inc. It changed its name to McKesson Corporation in 1983.