

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9074. Consent Order, June 11, 1980—Modifying Order, March 4, 1988*

The Federal Trade Commission has modified a 1980 consent order (95 F.T.C. 825) with respondents by changing the accounting procedures for the sale of repossessed cars and light trucks. The Commission has replaced the repossession accounting procedure with a "repossession guide" which respondents must provide to its dealers.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On November 5, 1987, General Motors Corporation (GM) and General Motors Acceptance Corporation (GMAC) filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and Part VIII.B of the order in this matter, to reopen the proceeding and modify the order issued against GM and GMAC on June 11, 1980, in Docket No. 9074, 95 FTC 825.

This matter arose out of allegations that certain franchised General Motors dealerships and certain dealerships owned in whole or in part by GM were failing to account for and pay to defaulting customers surpluses generated by the sale of repossessed motor vehicles.¹ A complaint was issued against GM, [4] GMAC and a franchised GM dealer on February 10, 1976. Similar complaints were issued against Chrysler Corporation (D.9072), Ford Motor Company (D.9073), their respective credit subsidiaries, and a franchised dealer of each. GM and GMAC consented to the order that is the subject of this decision. Similar consent orders were issued against Chrysler and Ford and their respective credit subsidiaries.

A principal feature of each of these orders is a repossession accounting procedure that dealers of these automobile manufacturers were to use in conjunction with the disposition of repossessed motor vehicles returned to them under a recourse or repurchase agreement. The repossession accounting procedure was intended to bring about the uniform calculation of surpluses and deficiencies resulting from the

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, and the like, and allowable legal costs and fees. See U.C.C. § 9-504.

resale of repossessed motor vehicles by Chrysler, Ford, and GM dealers. Each of these orders also contained a most favored corporation provision. In the GM order that provision is found at Part VIII.B. It reads as follows:

"In the event any of the proceedings presently bearing Docket Nos. 9072, 9073 or 9074 result in a final adjudicated or consent order prescribing standards less restrictive (including deferral to state law) 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 [5] or amount of surpluses or deficiencies, 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 General Motors respondent's request pursuant to Section 2.51 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this order to such less restrictive standards proscribed in the other order(s). The enumeration of subject matter contained in clauses (1), (2) and (3) of this paragraph is exclusive."

It is implicit in the application of uniform standards such as the repossession accounting standards that GM, Ford and Chrysler have required their dealers to follow under their respective orders, that those applying such standards will bear similar added costs. A function of uniformity is to avoid creating an artificial competitive imbalance among those affected. The purpose of Part VIII.B is to avoid creating such a competitive imbalance if a similarly situated respondent is able to demonstrate the need for less restrictive standards. On April 3, 1987, we issued our decision modifying the order against Ford and Ford Credit in Docket No. 9073. We concluded, based on the materials submitted, that it was in the public interest to defer to state law with respect to the subject matter enumerated in clauses (1) and (2) of the most favored corporation provision set out above and accordingly ordered modification to that order consistent therewith.

Since there is now a final order in a related proceeding prescribing less restrictive standards with respect to enumerated [6] subject matter and GM and GMAC having petitioned to modify their order in the same manner as that granted Ford, we conclude that the modifications requested are warranted.

It is therefore ordered, That the proceeding be reopened and that the final order issued June 11, 1980, in Docket No. 9074 be, and it hereby is modified to read as follows:

I. DEFINITIONS

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

A. "*General Motors respondents*" or "*respondents*" means General Motors Corporation ("General Motors") and General Motors Acceptance Corporation ("GMAC"), corporations. References to General Motors 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. However, references to General Motors shall not include GMAC and references to General Motors respondents shall not include dealerships. The requirements imposed on the General Motors respondent shall apply only to transactions within the United States.

B. "*Vehicle*" means an automobile or truck with a gross vehicle weight rating less than 11,000 pounds (4,990 kilograms) or a motor home. The term includes all [7] parts, accessories and appurtenances of the vehicle. A van is deemed a "truck."

C. "*Dealership*" or "*dealer*" means a corporation, partnership or proprietorship as to its operations within the United States pursuant to a Sales and Service Agreement with General Motors' Buick, Cadillac, Chevrolet, Oldsmobile, or Pontiac divisions, or the GMC Truck Division.

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

E. "*Recourse 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 outstanding obligation to the financing institution after receiving a transfer of the repossessed vehicle.

F. "*Equity dealership*" means a dealership in which General Motors holds 50 percent or more of the voting stock or is entitled to elect 50 percent or more of the board of directors.

G. "*Financing customer*" means a purchaser of a vehicle [8] from a dealership by means of a retail installment contract.

H. "*Disposition*" or "*dispose*" means 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 recourse 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 a representative of either. Disposition or dispose shall not mean the transfer of a repossessed vehicle to a dealership pursuant to a recourse agreement, or to a person or firm liable under a guaranty, endorsement, or recourse agreement covering the repossessed vehicle, nor mean a sale subsequent to a judicial sale.

I. "*Proceeds*" means whatever is received for a repossessed vehicle upon its disposition, as proceeds are described in the Initial Compliance Report. Among other things, it does not include charges for separately priced warranties and service contracts itemized in the sales contract or lease.

J. "*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 disposition [9] and disposing of the vehicle, and not otherwise reimbursed to the dealership disposing of the vehicle.

K. "*Contract balance*" means (1) the unpaid balance as of the date of repossession, less any payments made thereafter and less applicable finance charge, insurance premium and service contract rebates deducted by the financing institution, plus (2) other charges authorized by contract or law and actually assessed or incurred prior to repossession. It may reflect a deduction for insurance, service contract and warranty payments received or to be received by the financing institution.

L. "*Surplus*" means:

- + proceeds
- + applicable insurance or warranty reimbursements received by the dealership or financing institution unless these reimbursements were deducted in computing the contract balance
- + any other applicable rebates or credits not deducted in computing the contract balance
- allowable expenses
- amounts paid to discharge any [10] security interest in the vehicle provided for by law

= Surplus. A negative (minus) amount produced by this calculation is referred to as a "deficiency"

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

II. REPOSSESSION ACCOUNTING PROCEDURES

It is further ordered, That General Motors shall provide to all dealers within 60 days of service of this modified order, and to each new dealer within 30 days of entering into a Sales and Service Agreement, guidelines for determining the existence of surpluses and for accounting for surpluses and for any deficiencies sought.

A. These guidelines (the "repossession accounting guide") shall, by physical insertion or as a supplement, be made a part of the General Motors uniform accounting system referred to in the various dealer

Sales and Service Agreements between General Motors and its dealers. These agreements provide that this system (currently called the "General Motors Dealers Standard Accounting System Manual") should be followed in dealership operations. The repossession accounting guidelines shall also be incorporated into any [11] subsequent set or compendium of comparable instructions.

B. The repossession accounting guidelines shall include a standardized form ("dealer repossession accounting form") which dealers should use in determining for each vehicle the existence and amount of any surplus and of any deficiency sought, and in recording payment of each surplus, in accordance with the provisions of Paragraph C below.

C. The repossession accounting procedures shall provide that:

1. Each surplus should be determined and paid to the recourse financing customer within a reasonable period of time of disposition in accordance with a method conforming to Paragraphs I.H through I.L of this order;

2. Expenses other than allowable expenses should not be deducted in calculating surpluses and deficiencies sought;

3. Dispositions should be commercially reasonable. 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 [12] warranties are provided on other used vehicles.

4. If any rebate owed to the recourse financing customer's account has not been received at the time the dealer repossession accounting form is completed, such rebate should be applied for promptly;

5. If any rebate is received after completion of the dealer repossession accounting form, any surplus or deficiencies should be redetermined and any remaining surplus paid within a reasonable time of disposition or within a reasonable time of receiving the rebate, whichever is later;

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

- a. should set forth the calculations of each surplus and of each deficiency sought;

- b. should identify the vehicle and the financing customer and should be signed by a person authorized to sign retail installment contracts on behalf of the dealership; [13]

- c. a copy of the form should be sent with the surplus payment to each recourse financing customer to whom a surplus is paid and

should be sent to each recourse financing customer from whom a deficiency is sought; and

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

7. Dealers should not obtain waivers of surplus or redemption rights from recourse 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. EQUITY DEALERSHIPS PROCEDURES

It is further ordered, That:

A. General Motors shall require each General Motors employee who is a director of an equity dealership to:

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

2. Vote for resolutions so each such dealership [14] handles repossessions in accordance with applicable state law.

IV. GMAC RETAIL PLAN CHANGES, DEFICIENCY REPRESENTATIONS, POST-REPOSSESSION NOTICES

It is further ordered, That GMAC:

A. Shall, in connection with the extension and enforcement of retail credit obligations relating to the sale of vehicles by dealers, cease and desist from:

1. Purchasing a repossessed vehicle at or through any type of sale (title clearance) conducted by GMAC.

2. Misrepresenting, directly or indirectly, orally, in writing, or in any other manner, that the debtor may be liable to pay a deficiency where GMAC knows or should know that it is not entitled under state or federal law to collect a deficiency.

3. Collecting or attempting to collect a deficiency from a defaulting customer, or from his or her successors or assigns, where GMAC knows or should know that (a) it is not entitled under state or federal law to collect such deficiency, or (b) such deficiency is greater than the amount determined in accordance with the definitions set forth in Part I of this order. For purposes of this subparagraph, the [15] definitions of "proceeds" and "allowable expenses" will apply to GMAC's own dispositions.

4. Obtaining waivers of redemption or surplus rights from financing customers, except as allowable under state law.

B. Shall incorporate, by addendum or otherwise, provisions to the following effect into its Retail Plan as it relates to recourse financing, and into any subsequent edition or 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 GMAC to the customer;

3. dealers are to determine whether a surplus exists on a recourse financing repossession according to the repossession accounting procedures 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.

C. Shall develop revised retail installment contract forms which (except as modified as described in Paragraph D below) include a clear, concise statement in lay language that, in the event of repossession:

1. no expenses other than reasonable expenses incurred as a direct result of repossessing, holding, preparing for disposition and disposing of 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.

D. Shall distribute the revised retail installment contract forms to all dealers who use GMAC forms after the Commission issues a final rule or final adjudicated order not less restrictive than the Paragraph C statements of allowable expenses and the duty to any surpluses. If the final rule or final adjudicated order is less restrictive than the Paragraph C statements, GMAC shall complete the distribution after the Commission has modified Paragraph C to render it consistent with the final rule or final adjudicated [17] order. GMAC shall direct its branch offices that after the distribution to a dealership of the revised GMAC retail installment contract forms, they are not to purchase from the dealership GMAC forms of retail installment contracts that are not on the revised forms.

E. Shall establish and follow a procedure for uniformly sending a written notice ("post-repossession notice") to GMAC financing customers as soon as practicable after repossession.

1. GMAC 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 the procedure for sending post-repossession notices is adhered to.

2. The post-repossession notice shall have a GMAC heading and shall specify in clear, lay language:

a. the name and address of the place at which the vehicle is being stored and the address and telephone number of the GMAC branch office to be contacted; [18]

b. the date or interval of time within which the customer may redeem by reinstating the contract in states where the creditor is required to permit reinstatement of the contract;

c. the amount necessary to redeem by reinstating the contract at the time the notice is dated, if the customer is entitled to or will be permitted to redeem by reinstatement;

d. the net amount necessary to redeem by discharging the customer's obligation at the time the notice is dated, except where the customer is entitled to or will be permitted reinstatement until the vehicle is disposed of;

e. the date or interval of time prior to which the vehicle will not be disposed of;

f. that the vehicle can be redeemed at any time prior to a binding agreement for its disposition; [19]

g. that additional expenses may be incurred and may increase the amount necessary to redeem the vehicle if redemption is delayed (as further described in the Initial Compliance Report);

h. that GMAC should be contacted for further information about getting the vehicle back;

i. that any surplus resulting from a sale or lease is to be paid to the customer within a reasonable time after disposition (the notice may also state that an agreement between the dealer and GMAC provides that the dealer is to pay any surplus);

j. that failure to account for and pay a surplus may give the customer a right to sue for the amount of the surplus and for any penalties provided by law

k. that the customer will be liable for a deficiency or that the deficiency cannot be collected (the [20] notice is to include the applicable language only);

1. that the customer should call the insurance company or the dealer to make sure that any insurance or service contract has been cancelled and that the customer has a right to credit for any refunds.

F. Shall issue no new materials to dealers inconsistent with this order.

G. In any action by the Commission seeking civil penalties for a

violation of subparagraphs A.2-.4 and Paragraph E, GMAC may not be held liable if it shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. In applying this paragraph, judicial interpretations of Section 130(c) of the Truth in Lending Act, 15 U.S.C. 1640(c) (1974), shall be used.

V. EFFECT OF INCONSISTENT RULE OR ORDER

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 companies or dealerships than a corresponding provision [21] or provisions of this order relative to (1) the disposition of repossessed vehicles, (2) the determination, calculation or communication of the existence or amount of surpluses or deficiencies, 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. However, the General Motors 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.

B. In the event any of the proceedings presently bearing Docket Nos. 9072, 9073 or 9074 result in a final adjudicated or consent order prescribing standards less restrictive (including deferral to state law) 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 or amount of surpluses [22] or deficiencies, 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 General Motors respondent's request 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

such matter contained in clauses (1), (2) and (3) of this paragraph is exclusive.

VI. STANDARD REPORTING AND RECORDKEEPING

It is further ordered, That:

A. The General Motors respondents shall maintain complete business records relative to the manner and form of their continuing compliance with this order. These include, but are not limited to, copies of notices sent to financing customers pursuant to Part IV. The General Motors 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. [23]

B. Promptly following service of this order, General Motors shall distribute a copy of this order to its car divisions, GMC Truck Division, and Motors Holding Division unless previously furnished, and GMAC shall distribute a copy of this order to each of its regional managers, unless previously furnished.

C. Each of the General Motors respondents shall notify the Commission at least 30 days prior to any proposed corporate change which may negate any of the obligations of the General Motors respondents arising out of this order. Such changes include dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the discontinuance of General Motors present program for investing in equity dealerships, and the creation or dissolution of subsidiaries or any other change which may have such effect. No notice need be provided in the event of General Motors terminating, reducing or acquiring any interest in an equity dealership.

IN THE MATTER OF
ROCHESTER ANESTHESIOLOGISTS, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9199. Complaint, Sept. 30, 1985—Decision, Mar. 8, 1988

This consent order prohibits, among other things, the anesthesiologists, of Rochester, N.Y., from boycotting third-party insurance providers: by combining or taking any joint action against competing anesthesiologists; by engaging in price fixing or tampering with the reimbursement levels or terms of any third-party payor for anesthesia services; or by fixing or setting their fees.

Appearances

For the Commission: *David M. Narrow.*

For the respondents: *Kenneth A. Payment, Harter, Secrest & Emery, Rochester, N.Y. Harry P. Truehart, III, Nixon, Hargrave, Devans & Doyle, Rochester, N.Y. Robert Conklin, Hodgson, Russ, Andrews, Woods & Goodyear, Buffalo, N.Y. and James S. Grossman, Mousaw, Vigdor, Reeves, Heilbronner & Kroll, Rochester, N.Y.*

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 respondents have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, 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 as follows:

1. For purposes of this complaint, the following definitions shall apply:

(a) "*Blue Shield*" means Genesee Valley Medical Care, Inc., also known as Blue Shield of the Rochester Area.

(b) "*Third-party payor*" means any person or entity that engages in the process of reimbursing for, purchasing, or paying for health care services provided to any other person. Third-party payors include, but are not limited to, health insurance companies; prepaid hospital, medical or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider