

IN THE MATTER OF
SEARS, ROEBUCK AND CO.

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

Docket C-3786. Complaint, Feb. 20, 1998--Decision, Feb. 20, 1998

This consent order prohibits, among other things, the Illinois-based retail corporation from misrepresenting that any reaffirmation agreement it obtains will be filed with the bankruptcy court, that any reaffirmation agreement is binding, or any other material fact while attempting to collect debts subject to a pending bankruptcy proceeding. In addition, the consent order prohibits the respondent from collecting debts that have been discharged in bankruptcy proceedings. The consent order also preserves the Commission's right to file an action in federal district court to seek full redress for consumers if Sears' refunds to debtors pursuant to a separate class action lawsuit settlement total less than \$100 million.

Appearances

For the Commission: *Paul Block, John Dugan and Phoebe Morse.*

For the respondent: *Stephen H. Olesky, Hale & Dorr, Boston, MA. Theodore N. Mirvis, Wachtell, Lipton, Rosen & Katz, New York, N.Y. and Ronald L. Rose, Dykema Gossett, Bloomfield Hills, MI.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Sears, Roebuck and Co., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Sears, Roebuck and Co. is a New York corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois. Respondent is engaged in, among other things, the consumer retail business. In the course and conduct of its business, respondent has regularly extended credit for the purpose of facilitating consumers' purchase of respondent's products and services (hereinafter referred to as "consumer credit accounts").

2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

THE UNITED STATES BANKRUPTCY CODE

3. Under the United States Bankruptcy Code (11 U.S.C. 1-1330), a debtor may be granted a discharge in a Chapter 7 bankruptcy proceeding from debts that have arisen prior to the filing of the bankruptcy petition (hereinafter referred to as "pre-petition debts"), meaning that the debtor is no longer individually liable for these debts. The granting of a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . ." 11 U.S.C. 523(a)(2). The purpose of the injunction is to protect the debtor's "fresh start" by ensuring that no debt collection efforts are taken against the debtor personally for pre-petition debts.

4. The United States Bankruptcy Code provides, however, that a debtor may agree with a creditor that the creditor can enforce what would otherwise be a discharged debt. In other words, a debtor may reaffirm his or her pre-petition debts, as long as certain requirements are met. These so-called "reaffirmation agreements" are enforceable only if, among other things, the agreement is filed with the bankruptcy court. If the debtor is not represented by an attorney, the bankruptcy court must hold a hearing to determine that the reaffirmation agreement would not impose an undue hardship on the debtor and is in the best interest of the debtor, and must approve the reaffirmation agreement before it becomes enforceable. 11 U.S.C. 524(c) and (d).

5. If the requirements of 11 U.S.C. 524(c) and (d) are not met, an agreement to reaffirm a debt is not binding and a creditor violates the bankruptcy code if it attempts to collect that debt. 11 U.S.C. 524(a).

VIOLATIONS OF SECTION 5(a) OF THE FEDERAL TRADE COMMISSION ACT

6. From at least 1985 to 1997, respondent regularly induced consumers who had filed for protection under Chapter 7 of the United States Bankruptcy Code to enter into agreements reaffirming some or all of their pre-petition consumer credit account debts that would otherwise be discharged through bankruptcy proceedings.

7. In numerous instances, respondent represented, expressly or by implication, to consumers that their reaffirmation agreements would be filed with the bankruptcy courts, as required by the United States Bankruptcy Code.

8. In truth and in fact, in many cases respondent did not intend to file, and in fact did not file, the reaffirmation agreements with the bankruptcy courts. Therefore, the representation made in paragraph seven was, and is, false or misleading.

9. In numerous instances, respondent represented, expressly or by implication, to consumers that their reaffirmation agreements were legally binding on the consumers and that the consumers were legally required to pay their pre-petition debts.

10. In truth and in fact, in many cases, the reaffirmation agreements were not legally binding on the consumers and the consumers were not legally required to pay their pre-petition debts for reasons including, but not necessarily limited to, the following: (a) respondent did not file the reaffirmation agreements with the bankruptcy courts; or (b) respondent filed the reaffirmation agreements, but the agreements were then not approved by the bankruptcy courts. Therefore, the representation made in paragraph nine was, and is, false or misleading.

11. In the course and conduct of its business, respondent regularly collected from consumers debts that had been legally discharged in bankruptcy proceedings and that respondent was not permitted by law to collect. Respondent's actions have caused or were likely to cause substantial injury to consumers that is not offset by any countervailing benefits and is not reasonably avoidable by these consumers. 15 U.S.C. 5(n). Therefore, respondent's collection of debts that it was not permitted by law to collect was, and is, unfair.

12. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Azcuenaga not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a

copy of a draft of complaint which the Boston Regional Office and the Division of Credit Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent had violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Sears, Roebuck and Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 3333 Beverly Road, Hoffman Estates, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, "*respondent*" shall mean Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

2. "*Debt*" shall mean any obligation or alleged obligation of a consumer to pay money arising out of any transaction.

3. "*Reaffirmation agreement*" shall mean any agreement between a creditor and debtor in bankruptcy whereby a debt that is otherwise dischargeable with respect to the personal liability of the debtor is reaffirmed by the debtor.

4. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the collection of any debt, shall not:

A. Misrepresent, expressly or by implication, to consumers who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that reaffirmation agreements will be filed in bankruptcy court;

B. Misrepresent, expressly or by implication, to consumers who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that any reaffirmation agreement is legally binding on the consumer; or

C. Collect any debt (including any interest, fee, charge, or expense incidental to the principal obligation) that has been legally discharged in bankruptcy proceedings and that respondent is not permitted by law to collect.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, shall not make any material misrepresentation, expressly or by implication, in the collection of any debt subject to a pending bankruptcy proceeding.

III.

It is further ordered, That respondent Sears, Roebuck and Co., and its successors and assigns, for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including but not limited to all reaffirmation agreements signed by consumers and records sufficient to show that such reaffirmation agreements were filed in bankruptcy courts and were subsequently

approved by bankruptcy courts as part of the underlying bankruptcy proceedings, if required by the United States Bankruptcy Code.

IV.

It is further ordered, That respondent Sears, Roebuck and Co., and its successors and assigns, for five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, managerial employees, and bankruptcy court representatives having debt collection responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall, for five (5) years after each such statement acknowledging receipt of the order is signed and dated, maintain and upon request make available to the Federal Trade Commission for inspection and copying such statements. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within ninety (90) days after the person assumes such position or responsibilities.

V.

It is further ordered, That respondent Sears, Roebuck and Co., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

It is further ordered, That respondent, and its successors and assigns, shall provide notification of all proposed settlement terms relating to the action filed by the United States Attorney for the District of Massachusetts in *United States of America v. Sears, Roebuck and Co.*, Civil No. 97- 10839JLT, allegations made by the Attorneys General of various states and any other currently pending legal actions by government entities not cited herein, and all currently pending class action lawsuits, against respondent or any of its predecessors or affiliates, that challenge conduct similar to that challenged by the Commission in this proceeding, to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in writing, at least ten (10) days before any such proposed settlement is submitted to a court for final approval.

VII.

It is further ordered, That respondent Sears, Roebuck and Co., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on February 20, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Azcuenaga not participating.

IN THE MATTER OF

AMERICA ONLINE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 907 OF THE ELECTRONIC FUND TRANSFER ACT, REGULATION
E AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3787. Complaint, March 16, 1998--Decision, March 16, 1998

This consent order prohibits, among other things, the Virginia-based Internet service provider from: misrepresenting the terms or conditions of any online service trial offer; or representing that online service is free or otherwise representing that consumers need not pay for the online service, unless any obligation to cancel or to take other action to avoid charges is disclosed clearly and prominently in the instructional materials, and all other advertisements include a statement directing consumers to where this disclosure is available. In addition, the consent order requires the respondent to disclose the manner in which fees or charges are assessed or calculated and prohibits misrepresentations concerning the terms or conditions of any electronic fund transfer from a consumer account.

Appearances

For the Commission: *Lucy Morris, David Medine, Nina Chang and Steven Silverman.*

For the respondent: *Kevin Duke*, in-house counsel, Dulles, VA.

COMPLAINT

The Federal Trade Commission, having reason to believe that America Online, Inc. ("America Online" or "respondent") has violated the provisions of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, as well as the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. 1693-1693r, as amended, and its implementing Regulation E, 12 CFR 205, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. America Online is a Delaware corporation with its principal office or place of business at 22000 AOL Way, Dulles, Virginia.
2. America Online has developed, advertised, offered for sale, sold, and distributed to the public its online service for personal computer users. Through its online service, America Online provides consumers with a range of options including electronic mail,