

Complaint

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IN THE MATTER OF  
FORD MOTOR COMPANY, ET AL.

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

*Docket 9073. Complaint, Feb. 10, 1976 — Decision, March 29, 1979*

This consent order, among other things, requires a Dearborn, Mich. manufacturer of motor vehicles, and the Ford Motor Credit Company to incorporate into specified documents a system for determining and accounting for all surpluses realized on repossessed vehicles resold by its dealers and to institute training programs designed to familiarize employees and dealers with their obligations in handling repossessions. Following such training, Ford is required to conduct a series of field audits to verify that dealers are calculating and paying surpluses correctly, and to submit timely compliance reports to the Commission. Additionally, respondents are required to inform dealers of their obligations to pay surpluses on past and future repossessions, and advise customers of their surplus and/or redemption rights, in the manner set forth in the order.

*Appearances*

For the Commission: *Bruce Carter, Barry Barnes, Dean A. Fournier and David R. Pender.*

For the respondents: *George V. Burbach, Dearborn, Mich. for Ford Motor Credit Co., David R. Larrouy, Dearborn, Mich. for Ford Motor Co., Micheal Esler, Haessler, Stamer & Esler, Portland, Ore. for Francis Ford, Inc. and Carlton Harkrader and Thomas Brunner, Wald, Harkrader & Ross, Washington, D.C. for Ford Motor Co. and Ford Motor Credit Co.*

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

COMPLAINT

The Federal Trade Commission, having reason to believe that Ford Motor Company, Ford Motor Credit Company and Francis Ford, Inc., corporations, have violated the provisions of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint.

PARAGRAPH 1. *Respondents.* Respondent Ford Motor Company ("Ford") is a Delaware corporation with its office and principal place of business at The American Road, Dearborn, Michigan.

Respondent Ford Motor Credit Company ("Ford Motor Credit") is a Delaware corporation with its office and principal place of business

at The American Road, Dearborn, Michigan. It is a wholly-owned subsidiary of Ford Motor Company.

Respondent Francis Ford, Inc. ("Francis Ford") is an Oregon corporation with its office and principal place of business at 509 S.E. Hawthorne Boulevard, Portland, Oregon.

Allegations stated below in the present tense include the past tense.

PAR. 2. *Respondents' Business.* Ford manufactures, distributes and sells motor vehicles, including automobiles and trucks. It also owns all or part of the voting stock of various retail dealers of its vehicles, whose business operations and policies it controls. It is responsible for the acts and practices of its wholly- or partially-owned dealers.

Wholly- or partially-owned as well as independent retail Ford dealers are referred to below as "Ford dealers."

Ford Motor Credit is a finance company which provides retail financing to customers of Ford dealers for their retail installment contract purchases of new and used motor vehicles. It also provides wholesale financing for inventories held by Ford dealers.

Francis Ford is a franchised Ford dealer selling new and used motor vehicles.

PAR. 3. *Commerce.* Each of respondents participates in some or all phases of the sale, distribution and repossession of motor vehicles, and in the transmission across state lines of contracts, monies, and other business papers related to the extension and enforcement of credit obligations. Respondents each maintain a substantial course of trade in motor vehicles and motor vehicle credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. *Retail Installment Contract Sales.* Francis Ford and most other Ford dealers arrange financing through Ford Motor Credit or other lenders for retail sales of motor vehicles to their customers. Most of the sales to be financed by Ford Motor Credit are executed on a printed "retail installment contract" form provided by Ford Motor Credit, naming the customer as buyer and the dealer as seller. This "retail installment contract" form indicates that the contract is to be assigned to Ford Motor Credit for value, that the buyer is to be indebted to the dealer or its assignee, and that the dealer or its assignee is to be a secured party holding security interest in the vehicle sold. In the event the buyer defaults, Ford Motor Credit and Francis Ford and other retail Ford dealers have also undertaken the obligation, by express or implied representations in their retail installment contracts, to account to the defaulting buyer for any surplus arising from the resale of repossessed collateral. This

obligation is reaffirmed after default in notices sent to defaulting buyers by Ford Motor Credit. These representations have the tendency and capacity to lead buyers to a reasonable expectation that Ford Motor Credit will refund any surplus.

PAR. 5. *Statutory Duty to Account for Surplus.* The respective rights and duties of the defaulting buyer and secured party after repossession are defined by state commercial law, derived by almost every state from Article Nine of the Uniform Commercial Code, and the retail installment contract. State law requires the secured party, after repossessing and/or disposing of the collateral, to account to the defaulting buyer for any surplus of proceeds from the sale or disposition 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.

PAR. 6. *Post-Default Procedures Determined by Master Agreement.* In instances where Ford Motor Credit as secured party declares a default, it usually repossesses or causes repossession of the vehicle. The procedures followed by Ford Motor Credit and the dealer after repossession are determined by a master agreement embodied in the "Ford Motor Credit Company Retail Plan," between Ford Motor Credit and the dealer, as well as by the terms of the assignment of each retail installment contract to Ford Motor Credit. Additional terms are spelled out in Ford Motor Credit's legal guides and operations manuals. A majority of the agreements executed between Ford Motor Credit and Ford dealers in the United States are repurchase or similar agreements (hereinafter "repurchase" agreements).

PAR. 7. *Repurchase Transfer and Payoff.* Pursuant to the agreements described in Paragraph Six, Ford Motor Credit in most instances returns the repossessed vehicle to the repurchase dealer and receives from the dealer a payoff, consisting of the unpaid balance of the retail installment contract adjusted by applicable charges and credits. The dealer then resells the vehicle to a third party.

PAR. 8. *Joint Liability.* Under applicable state law, a dealer who receives a transfer of collateral from a secured party pursuant to a repurchase agreement has a duty to properly dispose of the collateral and to account to the defaulting buyer for any surplus. Ford Motor Credit also is obligated to ensure that a proper disposition of the collateral is made and that a proper accounting for any surplus is given to the defaulting buyer. Ford Motor Credit shares this obligation jointly with the dealer because (1) it continues to be the secured party and continues to be a fiduciary with respect

to the defaulting buyer's equity interest; (2) Ford Motor Credit, as assignor of the contractual duties of a secured party, continues to be liable for performance of those duties; (3) Ford Motor Credit has dictated, controlled and acted jointly with the repurchase dealer in executing relevant aspects of the credit transaction; and (4) Ford Motor Credit has made representations to buyers, as set forth in Paragraph Four, that these duties would be properly performed.

PAR. 9. *Failure to Account for Surpluses.* In a substantial number of instances Ford Motor Credit, Francis Ford, and other Ford repurchase dealers, have (1) failed to institute or follow correct procedures for determining the existence or amounts of surpluses realized from the sale of repossessed vehicles, (2) failed to disclose the existence of these surpluses to defaulting buyers, and (3) wrongfully retained such surpluses in violation of the defaulting buyers' statutory and contractual rights. The failure to identify and disclose surpluses has concealed their existence from these consumers and consequently few have asserted their rights under applicable state law. The failure to remit surpluses has deprived numerous consumers of substantial amounts of money rightfully theirs and has unjustly enriched Ford Motor Credit and its repurchase dealers. These practices are therefore unfair and deceptive.

PAR. 10. *Failure to Disclose Material Facts Concerning Redemption.* Ford Motor Credit and its repurchase dealers fail, in some instances, to inform defaulting buyers of facts necessary to their exercise of the right of redemption granted by state law, including but not limited to (1) the nature and duration of the right to redeem, and (2) the amount required to redeem. This failure to disclose material facts has the tendency and capacity to hinder defaulting buyers in exercising the right to redeem and is therefore an unfair and deceptive act or practice.

PAR. 11. *Owned Ford Dealers Using Non-Ford Motor Credit Financing.* A number of wholly- or partially-owned Ford dealers engage in the acts and practices ascribed to dealers in Paragraphs Nine and Ten, in instances where retail installment financing for their customers is obtained from finance institutions other than Ford Motor Credit. These acts and practices, for the reasons stated above, are unfair and deceptive.

PAR. 12. *Conclusion.* The acts and practices of respondents set forth in Paragraphs Nine, Ten, and Eleven are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

Commissioner Nye dissented.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint together with a proposed form of order; and

The respondents Ford Motor Company and Ford Motor Credit Company, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, admissions by these respondents as to the Commission's jurisdiction, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers and other provisions in accordance with the Commission's Rules; and

The Commission having thereafter, in accordance with Section 3.25(c) of its Rules, withdrawn this matter from adjudication as to Ford Motor Company and Ford Motor Credit Company; and

The Commission having considered the matter 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 pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Ford Motor Company is a Delaware corporation with its office and principal place of business located at The American Road, Dearborn, Michigan.
2. Respondent Ford Motor Credit Company is a Delaware corporation with its office and principal place of business located at The American Road, Dearborn, Michigan.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as to Ford Motor Company and Ford Motor Credit Company, and of these respondents, and the proceeding is in the public interest.

## ORDER

## 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. It shall not refer to Francis Ford, Inc. 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, 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 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.

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, services contracts or separately priced warranties.

L. "Allowable expenses" means only actual out-of-pocket expenses incurred as the result of a repossession. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for sale and reselling of the vehicle, and not otherwise reimbursed to the dealership. They are limited to the following charges (if allowable under applicable state law):

1. expenses paid to others, who are not employees of the dealership or of the financing institution that financed the vehicle, for repossessing, towing or transporting the vehicle;
2. filing fees, court costs, cost of bonds, fees paid to a sheriff or similar officer, and fees and expenses paid to an attorney who is not an employee of the dealership or the financing institution for obtaining possession of or title to the vehicle;
3. fees paid to others to obtain title to the vehicle, to obtain legally required inspection of the vehicle, or to register the vehicle;
4. expenses paid to others for storage (excluding a charge for storage at facilities operated by the dealership);
5. labor and associated parts and supplies furnished by the dealership for the repair, reconditioning or maintenance of the vehicle in preparation for resale, computed at dealer cost (as defined in the Initial Compliance Report) with appropriate adjustments for any insurance or warranty recovery;
6. amounts paid to others for labor and associated parts and supplies purchased for the repair, reconditioning or maintenance of the vehicle in preparation for resale;
7. sales commissions paid for actual participation in the sale of the particular vehicle, computed at a rate no higher than for a similar, nonrepossessed vehicle and excluding portions of commissions attributable to the selling of service contracts, separately priced warranties, financing or insurance;
8. expenses of advertisements that specifically mention the

particular vehicle, including a proportional share of any advertisement that also mentions other vehicles;

9. auctioneer expenses and fees paid; and

10. expenses for telephone calls and postage incurred in arranging for the repossession, holding, transportation, reconditioning and resale of the vehicle.

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 reasonable attempt to pay in accordance with the standards set forth in the Initial Compliance Report.

## II.

*It is further ordered,* That Ford shall provide to all dealers within 60 days of the effective date of this order, and to each new dealer within 30 days of entering into a sales and service agreement, a system for determining the existence of surpluses and for accounting for surpluses and for any deficiencies sought.

A. This system (hereinafter the "accounting system") shall be made a part of the Ford Manual of Dealer Accounting Procedure referred to in the various dealer sales and service agreements between Ford and its dealers. Such agreements provide that this Manual is to be followed in dealership operations. Ford shall not change the sales and service agreements so as to affect the status of the accounting system portion of the Manual without 60 days notice to the Commission and shall not subsequently so change the sales and service agreements so as to affect the status of the Manual if the Commission, within that time period, advises Ford that it objects to the change. The accounting system shall also be incorporated into any subsequent set or compendium of comparable instructions.

B. The accounting system shall include a standardized form ("Ford accounting form") for dealers' use in determining the existence and amount of surpluses and of any deficiencies sought,



and in recording payment of each surplus in accordance with the provisions of Paragraph II.C below.

C. The accounting system shall provide that:

1. Each surplus is to be determined according to Paragraphs I.J through I.N of this order and paid to the repurchase financing customer within 45 days of disposition;

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

3. Dispositions are to 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 is to be applied for promptly;

5. If any rebate is received after completion of the Ford accounting form, any surplus or deficiency is to be redetermined and any remaining surplus paid within 45 days of disposition or within 10 days of receiving the rebate, whichever is later;

6. The Ford accounting form is to be prepared by the dealer for each disposition of a repossessed vehicle and:

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

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

c. a copy of the form is to 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

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

7. Dealers are not to obtain waivers of surplus or redemption rights from repurchase financing customers.

D. The accounting system shall state that failure to adhere to the standards of Subparagraphs II.C.1 through II.C.7 or to account properly to customers for surpluses will expose the dealer to legal action by the Federal Trade Commission and/or consumers.

E. Ford shall give the Federal Trade Commission 30 days advance notice of any change in its manner and form of carrying out the requirements of Part II of this order.

F. The accounting system shall not apply to sales of repossessed vehicles subsequent to judicial sales in Louisiana.

G. The Federal Trade Commission has proposed a trade regulation rule that defines duties involved in disposing of a repossessed vehicle differently from the method described in Subparagraph II.C.3 above. Said subparagraph is not to be considered a ratification or acceptance by the Commission of that method of disposition.

### III.

A. *It is further ordered*, That the Ford respondents:

1. shall, within 90 days of the effective date of this order, develop and provide to every repurchase dealer detailed educational materials and training to carry out the purposes of Part II of this order and of Part VI (insofar as it relates to reinstatement and redemption rights), as further described in the Initial Compliance Report.

2. shall, commencing no later than 180 days after the effective date of this order, include detailed information on all pertinent aspects of Part II of this order and Part VI (insofar as it relates to reinstatement and redemption rights) in all appropriate seminars, correspondence courses and other training materials offered to dealers.

3. shall provide no instructions to dealers inconsistent with this order.

B. *It is further ordered*, That Ford:

1. shall, within 60 days of the effective date of this order, send to each repurchase dealer a letter which contains information to the following effect, with nothing to the contrary or in mitigation thereof:

a. state law requires that any surplus generated on the disposition of a repossessed vehicle must be returned to the defaulting customer;

b. the duty to pay surpluses has existed for many years and the company urges dealers to pay all surpluses on repossessed vehicles disposed of prior to the date of the letter, as well as those arising later;

c. except in California and Louisiana, state law provides that if a dealer does not pay a surplus owed, the defaulting customer has the right to recover a penalty equal to "an amount not less than the credit service charge plus 10 percent of the principal amount of the debt or the time price differential plus 10 percent of the cash price;"

d. if a customer to whom a surplus is owed has been reported by the dealer or its agent to a credit reporting agency as owing a

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deficiency, the dealer should promptly advise such agency of the correct facts; and

e. the Federal Trade Commission has issued complaints against three automobile dealers charging that their failure to pay past surpluses violated federal law.

2. shall include in the above mailing a copy of this order, together with the Commission's published Analysis of Consent Order.

3. shall, within 90 days of the effective date of this order, develop and provide to all Ford Dealer Development branch personnel (other than clerical employees) educational materials and training to carry out the purposes of Parts II and V of this order, as further described in the Initial Compliance Report.

4. shall provide to authorized representatives of the Federal Trade Commission upon 30 days written notice a set of mailing labels addressed to the president of each dealership, together with a list containing the same information and a certification that the labels and list are complete.

C. *It is further ordered, That Ford Credit:*

1. shall, within 60 days of the effective date of this order, send to each dealer to which Ford Credit has returned a vehicle, pursuant to a repurchase agreement, that was repossessed since May 1, 1974:

a. a letter containing the same information required by Subparagraph III.B.1 above; and

b. a list containing the following data for each Ford Credit repossession returned to the dealer between May 1, 1974 and the effective date of this order: name, address and account number of the financing customer, net payoff and date of repossession of the vehicle.

2. shall, within 90 days of the effective date of this order, develop and provide to all Ford Credit branch personnel involved in repurchase financing transactions (other than clerical employees) educational materials and training to carry out the purposes of Parts II and VI of this order, as further described in the Initial Compliance Report.

IV.

*It is further ordered, That:*

A. To determine whether dealers are correctly calculating and paying surpluses, Ford shall conduct an audit ("initial sample audit") of repurchase dealers. This audit shall:

1. consist of 100 repurchase dealers randomly selected pursuant to a sampling method as set forth in the Initial Compliance Report accepted by the Federal Trade Commission;

2. begin within sixteen months after the effective date of this order and be completed and reported to the Federal Trade Commission in accordance with Subparagraph IV.I.2 below within the next eleven months, exclusive of the month of December, as set forth in the Initial Compliance Report.

B. An audit conducted pursuant to Paragraph IV.A or IV.C shall be deemed to demonstrate dealer compliance if less than 1.5 percent of the dispositions audited are noncomplying transactions. A "non-complying transaction," as further described in the Initial Compliance Report, means a disposition that results in a surplus not correctly calculated and paid in full to the financing customer.

C. In the event the initial sample audit does not demonstrate dealer compliance Ford shall conduct further audits ("follow-up sample audits"), each to consist of 85 dealers randomly selected pursuant to the procedure and schedule described in the Initial Compliance Report, until an audit demonstrating dealer compliance has been attained or a total of four follow-up sample audits have been conducted, whichever occurs first.

D. Within thirty days after a determination by Ford or advice by the Commission's representatives that the initial sample audit or a follow-up sample audit does not demonstrate dealer compliance, Ford shall supplement the accounting system to provide that each dealer submit to Ford:

1. no later than six months after the above advice or determination, the completed Ford accounting forms described in Paragraph II.B of this order for all repurchase financing repossessions disposed of by the dealer that were returned to the dealer during the audit period covered by the prior sample audit; and

2. with each of the above submissions, a signed statement that the Ford accounting forms submitted include all repurchase financing repossessions disposed of by the dealer that were returned to the dealer during the audit period or, alternatively, that there were no such repossessions.

No submission shall be necessary after the last follow-up sample audit.

E. Ford shall review all Ford accounting forms submitted to it pursuant to Paragraph IV.D within 90 days of their receipt. This review shall be conducted by trained clerical personnel in accordance with the Initial Compliance Report, but Ford shall not be required to undertake a detailed analysis of these Ford accounting forms and shall not be deemed to have violated this paragraph if, despite good faith efforts, there are errors or omissions in that review.

