

insurance Co., 210 Pa.Super. 107, 232 A.2d 64 (1967). An examination of the bond does not show where it was executed or where it was delivered, and nothing in the record aids us in determining what may be a complex question of conflict of laws. Some of the issues presented can be more appropriately disposed of in the court below than here. See Section 1653, Title 28, U.S.C. But there are also preliminary determinations which should be made in the court below rather than here. We cannot presently deal with the merits of the controversy.

The judgment of the court below will be vacated and the case remanded with direction to proceed in conformity with this opinion.



ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC., ABC Storm Window Co., Inc., All-State Industries of Tennessee, Inc., All-State Industries, Inc., and All-State Industries of Illinois, Inc., corporations, and William B. Starr, individually and as an officer of said corporations, Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.
No. 13568.

United States Court of Appeals,
Fourth Circuit.

Argued Jan. 6, 1970.

Decided March 19, 1970.

Petition to review and set aside portions of order of Federal Trade Commission declaring justified complaint charging unfair and deceptive acts and practices and ordering desistance and cessation of imposture by companies engaged in interstate sale and installation of residential aluminum siding and related products. The Court of Appeals, Albert

V. Bryan, Circuit Judge, held that findings as to deceptive sales practices of respondents were supported in the evidence and were sufficient to sustain complaint, and that directive requiring respondents to reveal that instruments of indebtedness could be assigned to finance company against whom purchaser's claims or defenses might not be available, resting upon the nature and prevalence of respondents' deceptions, was not too broad, too general or vague.

Affirmed.

1. Trade Regulation ⇐751

Federal Trade Commission would not be disqualified from proceeding on complaint charging unfair and deceptive acts and practices by companies engaged in sale and installation of residential aluminum siding, storm windows and doors on ground that, prior to initiation of instant proceeding, its chairman had written Senate committee decrying prevalence of practices in national trade paralleling those of respondents. Federal Trade Commission Act, § 5(b), 15 U.S.C.A. § 45(b).

2. Trade Regulation ⇐751

Overriding duty of Federal Trade Commission is to investigate appearances and apprehensions of activities hurtful to the economy of the country, and it was incumbent upon the Commission to speak out on commercial behavior thought to be of overtopping importance because of its apparently deceiving character and potential expansion.

3. Trade Regulation ⇐799, 810

Findings by examiner with respect to deceptive sales practices by companies engaged in interstate sale and installation of residential aluminum siding, storm windows, doors, and appurtenant fixtures were supported by the evidence and were sufficient to sustain complaint charging unfair and deceptive acts and practices. Federal Trade Commission Act, § 5(b), 15 U.S.C.A. § 45(b).

4. Trade Regulation ⇐816

Directive requiring companies engaged in interstate sale and installation

of residential aluminum siding and related products to disclose orally prior to sale, and in writing on any instrument of indebtedness, that such instrument, at respondents' option and without notice, could be assigned to finance company against whom purchaser's claims or defenses might not be available was within jurisdiction of Federal Trade Commission was not too broad, too general or vague, and was supported by the record, resting on the nature and prevalence of respondents' deception. Federal Trade Commission Act, § 5(c), 15 U.S.C.A. § 45 (c).

Jacob A. Stein, Washington, D. C. (Joseph J. Lyman, Washington, D. C., on the brief) for petitioners.

Robert E. Duncan, Atty., Federal Trade Commission (John V. Buffington, Gen. Counsel, J. B. Truly, Assistant Gen. Counsel, and Alvin L. Berman, Atty., Federal Trade Commission on the brief) for respondent.

Before HAYNSWORTH, Chief Judge, and SOBELOFF and BRYAN, Circuit Judges.

ALBERT V. BRYAN, Circuit Judge:

The Federal Trade Commission on June 19, 1967 complained in due form of unfair and deceptive acts and practices by All-State Industries of North Carolina, its four affiliates and principal executive officer (All-State). Federal Trade Commission Act, section 5(b), 15 U.S.C. § 45(b). Upon the accused's responsive denial of the charges and after a plenary administrative hearing, the Commission declared the complaint justified and ordered desistance and cessation of the imposture. Respondents appeal, but we perceive no infirmity in the order.

[1] I. At the start, respondents moved to disqualify the Commission on the grounds that prior to the initiation of this proceeding, its Chairman had written the United States Senate Committee on Commerce decrying the preva-

lence of practices in national trade paralleling those of All-State. The respondents branded the communication a prejudgment of their cause, obliging the Commissioners to recuse themselves.

[2] The argument is superficial. The Commission was performing its overriding duty under the Act—to investigate appearances and apprehensions of activities hurtful to the economy of the country. It was incumbent upon this body to speak out, as it did, upon commercial behavior thought to be of overtopping importance because of its apparently deceiving character and potential expansion. *FTC v. Cinderella Career and Finishing Schools, Inc.*, 131 U.S.App.D.C. 331, 404 F.2d 1308, 1313-1314 (1968). Cf. *Lehigh Portland Cement Co. v. FTC*, 291 F.Supp. 628 (ED Va.1968, Lewis, J.), *aff'd per curiam*, 416 F.2d 971 (4 Cir. 1969).

[3] II. The respondent companies engage in the interstate sale and installation of residential aluminum siding, storm windows, doors, and appurtenant fixtures. From the Hearing Examiner's findings of fact, the following account unfolds of how they vend their products. These are of two grades. The "ADV" is the cheaper. It is extensively advertised, primarily through mail-outs to people whose names and addresses are culled from telephone directories. "PRO", the other grade, is of a higher quality and not so widely publicized.

Respondents' sales technique, or "pitch", is devised to create, first, a demand for the "ADV" product. Through inflated promotion it is presented as a "special offer" with "limited time" prices. But the Examiner found the "ADV" is actually priced uniformly and without time limit. He held as untrue All-State's claim that they deal directly from their factory with the output "100% guaranteed".

Inquiries or "leads" are answered by a supposed "sales manager". He attempts to pressure the prospect into signing a contract, a note and a deed, committing him to the purchase of

"ADV" articles but leaving blank the monetary obligation. As soon as the contract is executed, the salesperson brings out a sample of the "ADV" and points out deficiencies in it, "whether real or imaginary". The "PRO" is then shown in contrast, to the detriment of the "ADV". Whenever possible the "PRO" is then sold "at the highest price obtainable from the individual customer". The salesmen have incentives to substitute the "PRO"—they receive no commission on "ADV" but only on "PRO" sales.

This "bait and switch" artifice, the Examiner discovered, was fully set forth in the sales force's training manual and was employed generally. He also reported that All-State's agents utilized "gimmicks whereby the original prices quoted for respondents' products can be reduced." For example, the representative would promise a potential buyer a special discount, even below the quoted sale price, if the latter would allow the use of his home for demonstration or display purposes. Rarely, however, would a patron's home be so utilized. It was found as a bare inducement to overcome "sales resistance at a higher price" and provide "some apparently reasonable basis for the reduction in price."

These findings of the Examiner were embraced by the Commission as securely rooted in the evidence. Clearly they sustain the complaint.

[4] III. The Commission's final order contained thirteen "cease and desist" directives against continuance of the practices inveighed against by the Examiner. This suit attacks these mandates as too broad, too general and vague. Appellants' criticisms are untenable. The Commission's precepts are unequivocally phrased and necessary inhibitions upon the appellants' future pursuit of business.

The only directive warranting further discussion is No. 13. Refused by the Examiner, but added by the Commission, it requires the respondents to refrain from:

"13. Failing to disclose orally prior to the time of sale, and in writing on any conditional sales contract, promissory note or other instrument of indebtedness executed by a purchaser, and with such conspicuousness and clarity as is likely to be observed and read by such purchaser, that:

"Any such instrument, at respondents' option and without notice to the purchaser, may be discounted, negotiated or assigned to a finance company or other third party to whom the purchaser will thereafter be indebted and against whom the purchaser's claims or defenses may not be available."

This prescript is best explained in the words of the Commission's opinion: "We hold that the examiner erred in dismissing this charge of the complaint. Our holding is based upon two grounds discussed in detail below: first, that failure to disclose to prospective purchasers that notes of indebtedness executed in connection with a retail sale may be assigned to third parties to whom the purchaser's claims or defenses on the contract may not be available is inherently unfair where, as here, the seller routinely assigns such instruments to third parties; and second, that such failure to disclose is deceptive in view of facts officially noticed by the Commission."

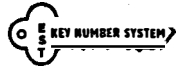
This directive is sustained. Factually, it rests on the Commission's quite sound anticipation that All-State's deceptions would engender customers' complaints generally. Warrantably, it foresaw purchasers soon seeking to recoup their losses through set-offs or counterclaims against the obligations they had delivered to All-State. Possibility of their success would, of course, be foiled or obstructed by negotiation of the obligations. Despite its severity the Commission thought the directive was a needed public precaution.

This determination was peculiarly justifiable here because of the nature and prevalence of All-State's deceptions. It was within the Commission's domain and

cannot be said to be unsupported in the record. Cf. Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c).

The order on appeal will be enforced against all of the respondents, individual as well as corporate.

Affirmed.



**Mary Ellen PEMBERTON, Plaintiff-
Appellant,**

v.

**PAN AMERICAN WORLD AIRWAYS,
INC., and United States of America,
Defendants-Appellees.**

No. 26799.

United States Court of Appeals
Fifth Circuit.

Jan. 6, 1970.

Action by wife to recover from government, which had supplied forklift for use in carrying out contract, and from holder of maintenance contract on forklift for husband's death, which resulted when forklift overturned. The United States District Court for the Middle District of Florida, George C. Young, J., dismissed complaint against government, and dismissed complaint against maintenance contractor, notwithstanding jury verdict in wife's favor against contractor. Wife appealed. The Court of Appeals, Cassibry, District Judge, held that evidence that repair work for defects in forklift was required of maintenance contractor shortly before accident was sufficient for jury. The Court further held that wife was not entitled to recover from government on theory that government made periodic inspection of maintenance jacket for forklift and should have had notice of vehicle's history of defective brakes and steering mechanism and thus was negligent in not maintaining forklift in proper working

condition, in absence of showing that periodic inspection of jacket would have revealed that vehicle could not be maintained in good condition through established procedure for repair and service between user of forklift and maintenance contractor.

Affirmed in part, reversed in part and remanded.

1. Federal Civil Procedure ⇨2608

Party is entitled to judgment notwithstanding verdict if, after considering all evidence in light and with all reasonable inferences most favorable to party opposed to motion, facts and inferences point so strongly and overwhelmingly in favor of moving party that reasonable men could not arrive at verdict contrary to it.

2. Federal Civil Procedure ⇨2608

Party is not entitled to judgment notwithstanding verdict if there is substantial evidence opposed to motion, that is, evidence of such quality and weight that reasonable and fair-minded men in exercise of impartial judgment might reach different conclusions.

3. Negligence ⇨136(18)

Evidence, in action by wife to recover from holder of maintenance contract on forklift for husband's death, which resulted when forklift overturned, that repair work for defects in forklift was required of maintenance contractor shortly before accident was sufficient for jury. 28 U.S.C.A. § 1346(b).

4. Negligence ⇨136(18)

Evidence, in action by wife to recover from holder of maintenance contract on forklift for husband's death, which resulted when forklift overturned, that accident was caused by defects in vehicle was sufficient for jury. 28 U.S.C.A. § 1346(b).

5. Automobiles ⇨187

Wife was not entitled to recover from government, which had supplied forklift for use in carrying out contract, for husband's death, which resulted when forklift overturned, on theory that government made periodic inspection of