

**STATE OF NEW HAMPSHIRE  
INSURANCE DEPARTMENT**

**In Re: Aegis Home Protection**

**Docket No. 22-046-EP**

**PROPOSED DECISION AND ORDER**

**Appearance for Petitioner:**

Joshua Hilliard, Esq.  
Enforcement Counsel NH Insurance Department (the "NHID")

**Appearance for Respondent:**

No appearance for Aegis Home Protection ("Aegis")

**Hearing Officer Appointed by Commissioner:**

Steven M. Notinger, Esq.

**I. Summary**

S.H., an owner of a home in Anytown, New Hampshire, received a "TIME SENSITIVE" home warranty notice dated April 18, 2022. See Testimony of S.H.; Exhibit 3. The notice stated that it was "the final attempt to notify" her and that she had "**NOT CONTACTED** us yet to get her home warranty up to date." Id. The notice also stated that "we reserve the right to revoke your eligibility for service coverage after 5 days." See Exhibit 3. S.H.'s immediate reaction was that she had missed some deadline until her husband pointed out that it was not the case. See Testimony of S.H. S.H. never had a home warranty at any time she owned the Anytown property. Id. Two other identical notices were sent to her

husband. See Exhibit 3. It is obvious the notices were an advertisement and not a “disconnect” notice. The NHID brought a three-count Show Cause Order against Aegis. In it, NHID alleges that Aegis violated RSA 415-C:7, I(a) “making, publishing, printing, distributing, issuing, circulating, advertising or placing before the public any statement or representation which was false or misleading.” The NHID also brought a count under RSA 400-A:16, II for failing to provide documents upon request to the NHID. Aegis is not an obligor but a marketing company<sup>1</sup> and is only subject to the request of the Commissioner to the extent the Commissioner has authority over it under RSA 415-C: 7.

## **II. Procedural and Jurisdictional Background.**

The NHID brought this enforcement action after S.H. submitted a complaint (the “Complaint”) to the Department. The NHID has the authority to pursue the Complaint pursuant to RSA 400-A:16, RSA 415-C, RSA 541-A:31 and Ins 200 et seq. Aegis did not appear at the hearing, but the NHID has the burden of proof and went forth with its presentation of the case. Ins 206.03(b)(2). Under New Hampshire law, the NHID may seek a cease-and-desist order and impose penalties should there be a basis to do so. RSA 415-C:10, II-IV. NHID does not seek restitution in this matter.

An evidentiary hearing was held on October 25, 2022, in front of Steven M. Notinger, Administrative Hearings Officer. The NHID appeared and offered the testimony of several witnesses. Aegis did not appear. Aegis was given proper

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<sup>1</sup> NHID conceded at the hearing that Aegis was not the obligor of the home warranties but a marketing company.

notice of the hearing<sup>2</sup> at two known addresses by both certified and regular mail and by email. See Exhibit 2. Aegis responded to one of NHID's requests, so the NHID has the correct address.

The following exhibits were admitted into evidence at the hearing:

Ex. No.

1. Order to Show Cause and Notice of Hearing
2. Service of notice information
3. Direct mailer advertisements
4. May 10, 2022, NHID request for information
5. May 23, 2022 Aegis Warranty Group response
6. July 29, 2022 NHID request additional information; and
7. August 16, 2022, NHID second request

During the hearing, NHID offered the testimony of the following witnesses:

1. Sarah Prescott, Enforcement Paralegal for the NHID; and
2. S.H., the homeowner (pursuant to Ins 206.01(b)(1)-(2), the homeowner testified remotely by Webex)<sup>3</sup>

### **III. Standard of Review.**

The NHID has the burden of proof on all issues in this matter by a preponderance of the evidence. Ins 206.05.

### **IV. Findings of Fact.**

S.H. an owner of a home in Anytown, New Hampshire, received a “**TIME SENSITIVE**” home warranty notice dated April 18, 2022. See Testimony of S.H.; Exhibit 3. The notice stated that it was the “final attempt to notify” her and that she had not “contacted” them to get her “Home Warranty up to date.” Id. The notice also stated: “We reserve the right to revoke your eligibility for service

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<sup>2</sup> See RSA 400-A:14, I(c).

<sup>3</sup> See Order on Motion to Allow Remote Witness, dated 10/18/22 (allowing Buyer to testify remotely).

coverage after 5 days.” See Exhibit 3. Two other notices were sent to S.H.’s husband. See Exhibit 3, Testimony of S.H. S.H.’s immediate reaction was that she had missed something until her husband pointed out that it was not the case. See Testimony of S.H. S.H. never had a home warranty at any time she owned the Anytown property, or otherwise. Id. Two other identical notices were sent to her husband. See Exhibit 3. It is obvious these notices were an advertisement and not “disconnect” notices. A copy of one of the notices is as follows:

NHRD Exhibit 3  
INS 22-046-EP

Home Warranty Division  
IMMEDIATE RESPONSE TO THIS NOTICE REQUESTED

**TIME SENSITIVE**

Notice Date: April 18, 2022  
Address: [REDACTED]  
Customer ID: 096SP01011  
Contact Phone: 1-888-207-8701  
Respond By: 05/09/2022

To: [REDACTED]  
File: [REDACTED]  
Order: [REDACTED]  
Of: [REDACTED]

Call to verify the above information  
Before the respond date expires  
Read below for more information

IMMEDIATE RESPONSE REQUESTED

ATTENTION Customer ID 096SP01011

This letter is to inform you that the property's home warranty, at [REDACTED] (Address) may be expiring or may have already expired. Our records indicate that you **HAVE NOT CONTACTED** us yet to get your Home Warranty up to date.

Please call **IMMEDIATELY** as this will be our **FINAL ATTEMPT TO NOTIFY YOU 1-888-207-41701**

Without a home warranty in place, you are at risk of being financially liable for any and all repairs. However, you still may have time left to activate a warranty on your home before it's too late. No inspection will be required and final acceptance is subject to your ability to meet eligibility requirements.

We reserve the right to revoke your eligibility for service coverage after 5 days.

PHONE: 1-888-207-8701 PLEASE RESPOND BY: 05/09/2022

NO FINANCE CHARGES APPLY TO THIS OFFER	
<b>EXTREMELY URGENT &amp; TIME SENSITIVE - IMMEDIATE RESPONSE REQUESTED</b>	
Please be advised that the amount you spend on home repairs and maintenance will continue to increase over time. That means that the average cost to fix or replace your Air Conditioner, Hot Water Heater, Furnace, Appliances, and others will only increase with the age of your home.	
Types of Coverage Available	Examples of Repair/Replacement Costs
1. Comprehensive Coverage	Air Conditioner - \$2,350 - \$7,124
2. Enhanced coverage	Hot Water Heater - \$140 - \$552
3. Protection Available Through 2024	Furnace - \$2,442 - \$5,780
	Refrigerator - \$319 - \$520

Operating Hours: Monday - Friday 7 am - 7 pm CST, Saturday 9 am - 3 pm CST  
Not all customers have previous coverage. We are offering this notice to our current mortgage holders.

012 00001002

See Exhibit 3.

When the NHID received these notices from S.H., they contacted Aegis to get more information about its contacts with New Hampshire and Aegis responded. See Exhibits 4, 5. Aegis stated that it was a marketing company that worked for at least two home warranty insurers, but that it was not the obligor itself. See Exhibits 4, 5. The NHID concedes that Aegis is not an obligor doing business in the state. See Statement of Joshua Hilliard on the record.

#### **V. The NHID's Allegations and Penalty Requests.**

The NHID raises the following allegations and requests the following penalties:

1. Three violations of RSA 415-C:7, I(a) for the three notices sent to the S.H.s—for false and misleading advertising in the state. (\$1,000 penalty each, \$10,000 each if willful).
2. Violations of RSA 400-A:16, II—for failure to respond to NHID's document requests.
3. The NHID also requested a cease-and-desist order<sup>4</sup> at the hearing under RSA 415-C:10, II prohibiting Aegis from further false advertising in this state.

#### **VI. Analysis**

The operative statute to determine whether the advertising above is unlawful is RSA 415-C:7, I(a), (b), which states in part:

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<sup>4</sup> The NHID did not request a cease-and-desist order in its Order to Show cause. See Exhibit 1. The NHID did request a cease-and-desist order at the hearing which the Hearings Officer treats as an oral motion under Ins. 205.05(a). See Request of Joshua Hilliard. The NHID's Order to Show Cause states it reserves the right to amend the Order to Show Cause. The respondent had notice of the hearing and did not appear. For all these reasons the oral motion to amend the Order to Show Cause at the hearing by oral motion is granted.

No obligor, its designee, or any other representative of an obligor, including a seller or administrator, shall in connection with the sale, or offer to sell, or any advertisement or in connection with any benefits, advantages, conditions, terms, or services available under a consumer guaranty contract:

(a) Make, publish, print, distribute, issue, circulate, advertise, or place before the public, any statement or representation that is false or misleading;

(b) Mislead by permitting or causing the omission of a material statement that under the circumstances should have been made in order to make the statements that were made not misleading.

First, it is clear from the statute that it covers activities of both the obligor and a “designee” or “other representative of an obligor.” Id. It is undisputed on this record that Aegis is a representative of an obligor. When personnel from the NHID called the number on the advertising, they reached Aegis. See Testimony of Sarah Prescott. Plus, when Aegis responded to a NHID request for information, it did not deny it sent the advertising, rather it stated it represented at least two obligors in New Hampshire as their marketing agent. See Exhibit 5. “Aegis itself does not issue, perform, or arrange to perform any services pursuant to a residential service contract. However, Aegis is committed to marketing and selling the highest quality consumer protective products.” Id. Aegis represents obligors and falls within the scope of RSA 415-C:7, I.

The New Hampshire Supreme Court has said that reviewing advertising for deception involves a constitutional analysis of whether the advertising is protected free speech. Appeal of Sutfin, 141 N.H. 732, 736-37 (1997) (Court found it problematic that dental board did not consider constitutional issues in disciplining dentist for his advertising. “It is now well settled that the first and fourteenth amendments protect professional advertising.”) Id. at 735 (citing In re

R.M.J., 455 U.S. 191, 203, 71 L. Ed. 2d 64, 102 S. Ct. 929 (1982); Bates v. State Bar of Arizona, 433 U.S. 350, 363-66, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977)).

“The State has the power to ban commercial speech that is false, deceptive, or misleading.” Id. (citing Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 142, 129 L. Ed. 2d 118, 114 S. Ct. 2084 (1994)). “When commercial speech is inherently likely to deceive, the Court has recognized that the government can take preemptive action, and need not wait for the public to suffer actual harm.” Id. (citing Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 464-66, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978)).

“A term is inherently misleading if it is ‘likely to deceive the public based upon the general public's use of the term.’” Id. at 736 (citing Snell v. Engineered Systems & Designs, Inc., 669 A.2d 13, 19 (Del. 1995)).” “In general, a statement will only be inherently misleading if the statement, standing alone, will almost unavoidably lead to fraud, undue influence, intimidation, or other duplicity.” Id. at 737 (citing In re R.M.J., 455 U.S. at 202).

In a case involving commercial advertising, the Fifth Circuit analyzed whether the word “invoice” in automobile advertising was inherently misleading. Joe Conte Toyota v. Louisiana Motor Vehicle Comm’n., 24 F.3d 754 (5th Cir. 1994). The Court started its analysis by stating that inherently misleading advertising may be banned outright, but other forms of advertising that are not misleading on their face are subject to a four-part test. Id. at 755-56. The Court cited various interpretations of the term “inherently misleading” by Supreme Court justices then concluded that “[f]rom all of this we conclude that a statement

is actually or inherently misleading when it deceives or is inherently likely to deceive.” Id. at 756.

The Fifth Circuit found ample evidence that the term “invoice” in the subject advertising was inherently misleading. Id. The Court explained:

[W]e note that the main text of the proposed advertisement used the term “factory invoice” and the disclaimer, “dealer invoice.” Appellant’s alternative disclaimer introduced still another expression, the “amount dealer paid distributor.” Thus, in the proposed advertisement, the invoices and amounts are attributed to three different sources--the dealer, the factory and the distributor. At best this is difficult for a reader to follow, at worst it is unrelievedly confusing.

The district court concluded that Appellant’s proposed advertisement “conveys no useful information to the consumer.” Joe Conte Toyota, Inc. v. Benson, No. 92-0993, 1993 U.S. Dist. LEXIS 4709, 1993 WL 114507 at \*1 (E.D.La. April 6, 1993). It also found that:

Due to holdbacks, incentives, and rebates, the invoice amount bears little relation to the dealer’s true cost. To the extent that the term “invoice” provides any information to the consumer, it is ***misleading***; its use can only be intended to confuse the invoice amount with the dealer’s actual cost. Plaintiff in effect concedes this when it offers to explain in its proposed ads that the term “invoice” does not mean what it appears to mean.

Id. at 757 (citation omitted; emphasis added.) The Court held that because the advertising was inherently misleading, id. at 757-58, restricting it did not infringe on the advertiser’s “First Amendment right to engage in commercial speech.” Id. at 757 (citation omitted).

In the instant case, exhibit 3 is inherently misleading and false. See Exhibit 3. It is advertising, yet it is sent out to look like a “shut off” or “termination notice.” Exhibit 3. The reason is to convince the consumers that if they do not act, they will lose something valuable. This reason is false. Many



places in the notice it talks of “time sensitive” and/or a “final” attempt to notify the consumer as well as reserving “the right to revoke your eligibility for service coverage after 5 days.” Id. The reality is that it is an unsolicited piece of advertising. Mrs. S.H. did not have a home warranty and never had a home warranty, yet she is being told her “home warranty” was expiring. See Testimony of S.H. Her reaction to the letter was that she thought she had missed some deadline and she had to check with her husband to confirm everything was alright. See Testimony of S.H.

This is precisely the type of advertising that is misleading or false within the meaning and intention of RSA 415-C:7, I, and must be prohibited. See Joe Conte Toyota, 24 F.3d at 757-58 (the meaning of “invoice” was confusing and misleading); Appeal of Sutfin, 141 N.H. at 737 (advertising by dentist not so intrinsically deceptive that it was inherently misleading.)

There was nothing in the record to establish how widespread a problem exists with regard to the dissemination of Exhibit 3 to the public. There is no evidence of other consumers who received this advertising from Aegis. Nevertheless, to prevent harm to other consumers, Aegis shall cease and desist from advertising, publishing, printing, distributing, issuing, circulating, or placing before the public, any statement or representation regarding consumer guaranty contracts in the State of New Hampshire that are false or fraudulent.

If this matter comes before the Insurance Department again on similar facts, it will clearly be a willful violation of RSA 415-C:7, I (a) and each violation will suffer a fine of \$10,000.00 per occurrence. See RSA 415-C:10, III.

RSA 400-A:16, II, provides:

“Any individual or entity who transacts insurance in this state or is otherwise subject to the authority of the commissioner shall, upon request of the commissioner, provide the commissioner with all documents and information relevant to any investigation under this section within 10 working days, or shall request within the 10 working-day period, for good cause shown, additional time to respond.” Under RSA 415-C:2, II, “[c]onsumer guaranty contracts are not insurance and are exempt from this state's insurance laws, except for the provisions of RSA 400-A:16 through RSA 400-A:25 or as provided by this chapter.” Under RSA 415-C:7, the commissioner has authority to regulate not only obligors that improperly advertise but their “designee or any other representative of an obligor” that sells guaranty contracts. See RSA 415-C:7, I(a). Consequently, a designee’s conduct can be regulated under RSA 415-C:7. Aegis is a designee or representative of some of the obligors selling home warranty services in New Hampshire. See Exhibit 5. Therefore, Aegis “is otherwise subject to the authority of the commissioner” pursuant to RSA 400-A:16, II, and must respond to NHID’s inquiries. Aegis did partially respond to the NHID’s inquiry but did not produce the information requested. See Exhibits 4, 5.

## **VII. Penalties.**

The Hearing Officer recommends that the Commissioner impose the following penalties on Aegis:

1. Pursuant to RSA 415-C:10, II, order Aegis to cease and desist from advertising, publishing, printing, distributing, issuing, circulating, or placing

before the public, any statement or representation regarding consumer guaranty contracts in the State of New Hampshire that are false or fraudulent.

2. Pursuant to RSA 415-C:10, III, Aegis is ordered to pay a \$3,000.00 penalty for its three violations of RSA 415-C:7, I(a), which it committed by mailing three advertisements to the S.H. family that were misleading and false.

3. Pursuant to 400-A:16, II, Aegis is ordered to pay \$2,500.00 for failing to fully respond to the NHID's requests for documents.

All other requests for penalties are denied.

**SO, ORDERED.**

11-21-22  
date

  
Steven M. Notinger, Hearing Officer

