IN THE MATTER OF

CARTE BLANCHE CORPORATION

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

Docket C-2879. Complaint, Apr. 27, 1977 --- Decision, Apr. 27, 1977

Consent order requiring a Los Angeles, Calif. credit card company to cease failing to furnish customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Roger J. Fitzpatrick, Hong S. Dea, Howard Daniels* and *John F. Lefevre.*

For the respondent: *Stephen B. Friedman,* Los Angeles, Calif.

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 Carte Blanche Corporation, a corporation, has violated the provisions of said Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent Carte Blanche Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3460 Wilshire Boulevard, Los Angeles, California.

PAR. 2. Respondent Carte Blanche Corporation extends credit to consumers and others through the issuance of a credit card, hereinafter sometimes referred to as a Carte Blanche card.

PAR. 3. Respondent Carte Blanche Corporation maintains business offices located in several states. Respondent issues Carte Blanche cards to persons throughout the United States and contracts with merchants to honor purchases made on Carte Blanche cards in retail businesses throughout the United States. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent, pursuant to an agreement with its cardholders, issues Carte Blanche cards, valid for a designated period of time, which enable the cardholders to charge purchases of merchandise or services from subscribing hotels, restaurants, gasoline stations, and other retail businesses. Respondent reimburses such businesses for honoring the Carte Blanche card. In return, the cardholders agree to repay respondent by making payments on their Carte Blanche charge accounts.

PAR. 5. On occasion a Carte Blanche cardholder's charge account balance reflects a credit on the cardholder's account which represents an amount of money owed to the cardholder by respondent, rather than an amount of money owed to respondent by the cardholder. This credit balance is the result of, among other things, overpayments by the customer or credits given for the purchase price of returned merchandise.

PAR. 6. Typical and illustrative of respondent's practices in handling the credit balances of its cardholders are the following:

Respondent provides a cardholder having a charge account credit balance with only a single periodic statement setting forth the amount of his credit balance. The periodic statement is sent to the cardholder at the end of the billing cycle during which the credit balance is created. No additional periodic statement is provided to a cardholder for any billing cycle during which the credit balance is reflected on his account, unless he transacts business on his account.

At no time is a cardholder having a credit balance informed by respondent that he is entitled to request and receive a cash refund of his credit balance.

At no time does respondent refund cash representing an outstanding credit balance to a cardholder unless the cardholder specifically requests the refund of his credit balance.

Respondent closes Carte Blanche card accounts when, for among other reasons, it is requested to do so by the cardholders or when the cardholders fail to renew their accounts upon the expiration of their established terms. Upon closing an account which reflects a credit balance, a cardholder is thereafter unable to utilize his credit balance by making offsetting purchases; respondent does not inform the cardholder that he is entitled to request and receive a cash refund representing his outstanding credit balance, nor does respondent refund without request cash representing the outstanding credit balance of such closed accounts.

Through such acts and practices, respondent in a substantial number of instances has retained in its possession substantial dollar amounts of credit balances belonging to its cardholders.

PAR. 7. By failing to notify Carte Blanche cardholders whose charge accounts reflect credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish Carte Blanche cardholders during billing cycles in which credit balances remain outstanding with a sufficient number of periodic statements disclosing the amount of their credit balances; by failing without their request to refund to its cardholders credit balances reflected on accounts on which no activity has taken place for a substantial period of time; and by closing Carte Blanche accounts which reflect outstanding credit balances without automatically refunding the credit balances, respondent has caused a substantial number of its cardholders and former cardholders to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Six above were and are unfair.

PAR. 8. The acts and practices of respondent set forth in Paragraphs Six and Seven above were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

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 Bureau of Consumer Protection 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 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, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such 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 has violated the said Act, and that 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, 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 Carte Blanche Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3460 Wilshire Boulevard, Los Angeles, California.

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

It is ordered, That respondent Carte Blanche Corporation, a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on consumer credit accounts created incident to its business of issuing credit cards, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each of its cardholders having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times during the six month period following the creation of the credit balance. *Provided, however,* that a periodic statement must be mailed or delivered during the first billing period succeeding the creation of the credit balance.

2. Failing to notify each cardholder having a credit balance created after the date of entry of this order of his right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph One and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by returning your statement in the enclosed envelope. If you do not charge against this credit or request a refund, a check will be mailed to you automatically within seven months after your credit balance was created. But a credit balance of one dollar ($1.00) or less will not be refunded unless specifically requested, and it will not be credited against future purchases after the seven month period." *Provided, however*, that if respondent refunds without request credit balances of one dollar ($1.00) or less, the last sentence of such disclosure may be deleted.

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see [enclosed instructions"] OR [reverse side"], *provided, however*, that this notice may be abbreviated.

3. Writing off or in any way deleting from a cardholder's account any credit balance of more than one dollar ($1.00) created after the date of entry of this order before respondent has made a cash refund or the cardholder has made a fully offsetting purchase, unless such credit balance is not in fact owed to the cardholder, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each cardholder having a credit balance of more than one dollar ($1.00) created after the date of entry of this order, the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which a credit balance exists and the cardholder neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the cardholder.

Provided, however, that in the event that an account having a credit balance in any amount should be closed for any reason and the cardholder has neither transacted any business on the account nor requested a refund, respondent shall refund the full amount of said credit balance no later than thirty-one (31) days from the effective date of the closing of the account. The mailing or otherwise delivering of a refund for the full amount of the customer's credit balance shall terminate respondent's responsibility to provide any periodic statements under Paragraph 1 of this order.

A. *It is further ordered,* That with respect to each credit balance owed to a Carte Blanche cardholder in the amount of more than one dollar ($1.00) which was created at any time within the three year period prior to the date of entry of this order, and which has not been refunded to the cardholder as of the date of entry of this order, respondent shall refund to each such cardholder the full amount of such credit balance, unless such credit balance is not owed to the cardholder, or the cardholder makes a fully offsetting purchase within the period for compliance herewith. Respondent shall affect complete compliance with the provisions of this paragraph no later than eight (8) months after the date of entry of this order, and the report required by Paragraph G of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the cardholder either in person or by mailing a check payable to the order of the cardholder to the last known address shown in respondent's records for said cardholder. Each periodic statement sent pursuant to the terms of this order shall be mailed to the cardholder at the last known address shown in respondent's records. In the event that any such statement or check is returned to respondent with a notification to the effect that the cardholder to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement with an address correction request to the Post Office unless respondent has already done so. If the check or statement which has been remailed is returned to respondent, and reflects an amount greater than fifteen dollars ($15.00), respondent shall obtain from a credit bureau the most current address available for the cardholder in the credit bureau's files by means of an in-file report or other credit bureau report. If a new address is obtained, respondent shall mail the check or statement to the cardholder at that address. If the cardholder is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the cardholder's account to be retained until such time the term of the account expires so that offsetting purchases can be made, and respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question; provided, however, that in the event said cardholder should subsequently request a refund of any such credit balance respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered,* That if a cardholder requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such cardholder's account, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the cardholder with a written explanation, with supporting documentation when available, of the reason(s) for refusing to refund the amount requested. The cardholder's return of a periodic statement which reflects a credit balance shall constitute a request for a refund of said credit balance.

D. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on an account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a cardholder's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered,* That respondent shall maintain a list which contains the following data: name and address of each Carte Blanche cardholder who received a refund of a credit balance without request; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. Respondent shall also maintain a separate list which contains the following data: the names and addresses of all cardholders who requested in person or by mail a refund of a credit balance but whose request was refused; the date the request was made; the date a written explanation of the refusal was sent to the cardholder; a copy of the written explanation; and the amount of the claimed credit balance.

F. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

G. *It is further ordered,* That respondent shall, within ninety (90) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

H. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

I. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

In the Matter of

FEDERATED DEPARTMENT STORES, INC.

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

Docket C-2880 Complaint, Apr. 27, 1977 --- Decision Apr. 27, 1977

Consent order requiring a Cincinnati, Ohio, retailer to cease failing to furnish customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Roger J. Fitzpatrick, Hong S. Dea, Howard Daniels* and *John F. Lefevre.*

For the respondent: *Harold P. Rosenberg,* in house counsel, Cincinnati, Ohio.

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 Federated Department Stores, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, 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 in that respect as follows:

Paragraph 1. Respondent Federated Department Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 222 West 7th St., Cincinnati, Ohio. Respondent Federated Department Stores, Inc. is responsible for the formulation, control and direction of the policies, acts and practices of its divisions, including the acts and practices hereinafter set forth. Respondent's divisions include Abraham and Straus; Bloomingdale Bros.; Milwaukee Boston Store Co.; Bullock's; Bullock's North; Burdine's' William Filene's Sons Co.; Foley's; Goldsmith's; F. & R. Lazarus & Co.; Levy's of Tucson; I. Magnin & Co.; Rike's; Sanger-Harris; and Shillito's.

Abraham & Straus division operates ten department and specialty stores under the trade name Abraham & Straus. Its principal office and place of business is located at 420 Fulton St., Brooklyn, New York.

Bloomingdale Bros. division operates twelve department and specialty stores under the trade name Bloomingdale's. Its principal office and place of business is located at Lexington Ave. and 59th St., New York, New York.

Milwaukee Boston Store Co. division operates six department and specialty stores under the trade name Boston Store. Its principal office and place of business is located at 331 W. Wisconsin Ave., Milwaukee, Wisconsin.

Bullock's division operates fifteen department and specialty stores under the trade name Bullock's. Its principal office and place of business is located at Broadway, Hill and 7th Sts., Los Angeles, California.

Bullock's North division operates three department stores under the trade name Bullock's North. Its principal office and place of business is located at 550 Stanford Shopping Center, Palo Alto, California (mailing address: P.O. Box 2007, Menlo Park, California 94025).

Burdine's division operates eleven department stores under the trade name Burdine's. Its principal office and place of business is located at 22 E. Flagler St., Miami, Florida.

William Filene's Sons Co. division operates eleven specialty stores under the trade name Filene's. Its principal office and place of business is located at 426 Washington St., Boston, Massachusetts.

Foley's division operates seven department and specialty stores under the trade name Foley's. Its principal office and place of business is located at 1110 Main St., Houston, Texas.

Goldsmith's division operates four department stores under the trade name Goldsmith's. Its principal office and place of business is located at 123 S. Main St., Memphis, Tennessee.

F. & R. Lazarus Co. division operates eleven department and specialty stores under the trade name Lazarus. Its principal office and place of business is located at S. High and W. Town Sts., Columbus, Ohio.

Levy's of Tucson division operates one department store under the trade name Levy's. Its principal office and place of business is located at El Con Shopping Center, Tucson, Arizona.

I. Magnin and Company division operates twenty-two specialty stores under the trade name I. Magnin. Its principal office and place of business is located at Union Square, San Francisco, California.

Rike's division operates five department stores under the trade name Rike's. Its principal office and place of business is located at 2nd and Main Sts., Dayton, Ohio.

Sanger-Harris division operates nine department stores under the trade name Sanger-Harris. Its principal office and place of business is located at 303 N. Akard at Pacific, Dallas, Texas.

Shillito's division operates seven department stores under the trade name Shillito's. Its principal office and place of business is located at 7th and Race Sts., Cincinnati, Ohio.

PAR. 2. Respondent Federated Department Stores, Inc., through its aforesaid divisions, operates and controls a number of retail department and specialty stores in New York, Wisconsin, California, Florida, Massachusetts, Texas, Tennessee, Ohio and Arizona.

PAR. 3. Respondent Federated Department Stores, Inc. sells and distributes merchandise in commerce by operating and controlling retail department and specialty stores in a number of states and by causing merchandise to be shipped from its warehouses and retail department and specialty stores for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other acts and practices, respondent maintains, and at all times mentioned has maintained, a substantial course of business in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent permits customers of its operating divisions who qualify for credit to charge purchases to revolving credit accounts or other charge accounts. On occasion, a customer's charge account balance consists of a credit on the customer's account which represents an amount of money owed to the customer by one of respondent's divisions, rather than an amount of money owed to one of respondent's divisions by the customer. This credit balance may be the result of, among other things, overpayments by the customer or credits given for the purchase price of returned merchandise.

PAR. 5. Typical and illustrative of respondent's practices in handling the credit balances of its customers are the following: Respondent, through its divisions, provides each customer having a charge account credit balance with a periodic statement setting forth the amount of the credit balance; the statement is mailed at the end of the billing cycle during which the credit balance is created. A second periodic statement is mailed six months after the first. No additional periodic statement is provided to a customer for any billing cycle during which the credit balance is reflected on the account, unless business is transacted on the account.

If the customer does not request a refund in cash in the amount of the credit balance or make a purchase within six months following the issuance of the first statement, respondent's divisions, through bookkeeping entries, may transfer the amount of the credit balance from the customer's charge account subject to automatic reinstatement. No cash payment to the customer is made at the time of the transfer of his credit balance from his charge account.

At no time do respondent's divisions refund cash representing an outstanding credit balance without request.

Through such acts and practices, respondent's divisions, in a substantial number of instances, have retained in their possession substantial dollar amounts of credit balances belonging to their customers.

PAR. 6. By failing to furnish to customers, during billing cycles in which credit balances of any amount remain outstanding, a sufficient number of periodic statements disclosing the amounts of their credit balances along with their right to request and receive cash payment of the amounts of their credit balances, and by failing to refund without request credit balances reflected on accounts on which no business has been transacted for a substantial period of time, respondent has caused a substantial number of its divisions' charge account customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondent, through its divisions, as set forth in Paragraphs Five and Six above, were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

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 Bureau of Consumer Protection 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 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, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such 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 has violated the said Act, and that 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, 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 Federated Department Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 222 West 7th St., Cincinnati, Ohio.

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

It is ordered, That respondent Federated Department Stores, Inc., a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer revolving credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each charge account customer having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times in the six-month period following the creation of the credit balance; *provided, however,* that a periodic statement must be mailed or delivered as of the end of the first billing period during which the credit balance is created and *provided,* further, that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

2. Failing to notify each charge account customer having a credit balance created later than sixty (60) days from the date of entry of this order of the customer's right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished

by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph (1) and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

> [The Credit Balance shown on the enclosed statement] OR [This credit balance] represents money we owe you. You may obtain a refund by presenting your statement at our store or by returning it in the enclosed envelope. If you do not charge against this credit or request a refund, a check will be mailed to you in ____ months. But a credit balance of $1 or less will not be refunded unless specifically requested, and it will not be credited against future purchases after that ____ month period." *Provided, however,*if respondent refunds without request credit balances of one dollar ($1.00) or less, the last sentence of such disclosure may be deleted, and if respondent credits amounts under $1.00 against future purchases, the phrase "and it will not be credited against future purchases after the ____ month period," may be deleted.

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see [enclosed instructions"] OR [reverse side"], *provided, however,* that this notice may be abbreviated.

3. Writing off or deleting any credit balance of more than one dollar ($1.00) created after the date of entry of this order from a customer's account before respondent has made a cash refund or the customer has made a a fully offsetting purchase, unless such credit balance is not in fact owed to the customer, or unless respondent has complied with the requirements of Paragraph B below; *provided, however,* that if a credit balance is automatically credited against future purchases, that balance is not considered to be written off or deleted from a customer's account.

4. Failing to refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of entry

of this order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which a credit balance exists and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered,* That with respect to each credit balance owed to a customer in the amount of more than one dollar ($1.00) which was created at any time within the three-year period prior to the date of entry of this order, and which has not been refunded to the customer as of the date of entry of this order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *provided, however,* that nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s), in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s) shall clearly and conspicuously disclose on its face that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall effect complete compliance with the provisions of this paragraph no later than seven (7) months after the date of entry of this order, and the report required by Paragraph I of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the customer either in person or by mailing a check (or credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer, to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records. In the event that any such statement or check (or credit certificate) is returned to respondent with a notification to the effect that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement (or credit certificate) with an address correction request to the Post Office unless respondent has already done so. If the check or statement (or credit certificate) which has been remailed is returned to respondent and reflects an amount larger than fifteen dollars ($15.00), respondent shall then obtain from a credit bureau the most current address available for the customer by means of an in-file report or other report of information then existing in the credit bureau's file. If a new address is obtained, respondent shall remail the check or statement (or credit certificate) to the customer. If the customer is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the customer's account to be retained for one year from the date on which the remailed check or statement was returned so that offsetting purchases can be made and respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question. *Provided, however,* that in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph C and *provided, further,* that respondent has the right pursuant to the Commission's Rules, to petition the Commission to request a reopening of this proceeding to seek modification of Paragraph B with respect to costs incurred in complying with the requirement of obtaining credit reports if respondent concludes that compliance with such requirement is economically burdensome or inequitable.

C. *It is further ordered,* That if a customer requests, in person or by mail, a refund of a credit balance in any amount which had been initially reflected on such customer's account at any time within six years preceding the date on which the refund request is made, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with an individualized written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested. Mailing to respondent in the return envelope referred to in Paragraph (2) a periodic statement [or other form referred to in Paragraph (2)] which reflects a credit balance shall constitute a request for a refund of said credit balance.

D. *It is further ordered,* That, notwithstanding the foregoing, respondent may refund amounts of one dollar ($1.00) or less by refunding the cash equivalent in United States postage stamps unless the customer requests a cash refund. Along with and at the same time of such refund of stamps, respondent shall clearly and conspicuously disclose that if the customer prefers, the customer may receive cash, in lieu of stamps, if he notifies respondent by telephone, mail or in person. Respondent thereupon shall accept return of the stamps and shall promptly make the refund by check or cash.

E. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

F. *It is further ordered,* That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties or to transactions arising out of lay-away plans or installment sales contracts.

G. *It is further ordered,* That commencing not later than sixty days after the date of entry of this order, respondent shall maintain, for each of its retail operating divisions, the following data: the name and address of each customer who thereafter receives a refund of a credit balance; the date the credit balance was first reflected on the customer's account; the closing date of the billing cycle in which it was refunded; and the amount of the credit balance. Respondent shall also maintain for each of its retail operating divisions copies of all written explanations furnished pursuant to Paragraph C above. *Provided, however,* that respondent shall not be required to maintain the information required by this paragraph for a period in excess of six years from the date each individual credit balance was refunded or the date each individual explanation was furnished.

H. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

I. *It is further ordered,* That respondent shall, within ninety (90) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

J. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

K. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions.

IN THE MATTER OF

CITY STORES COMPANY

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

Docket C-2881 Complaint, Apr. 27, 1977 --- Decision, Apr. 27, 1977

Consent order requiring a New York City retailer to cease failing to furnish customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Roger J. Fitzpatrick, Hong S. Dea, Howard Daniels* and *John F. Lefevre.*

For the respondent: *Stuart M. Rosen, Weil, Gotshal & Manges,* New York City.

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 City Stores Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent City Stores Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 500 Fifth Ave., New York, New York. Respondent, through its divisions and wholly-owned subsidiaries, operates a total of 149 department, specialty, and home furnishing stores.

Lit Brothers division operates eleven department stores under the trade name Lit Brothers. Its principal office and place of business is located at 8th and Market St., Philadelphia, Pennsylvania.

Maison Blanche division operates seven department stores under the trade name Maison Blanche. Its principal office and place of business is located at 901 Canal St. (Box 60820), New Orleans, Louisiana.

Richards division operates eight department stores under the trade name Richards. Its principal office and place of business is 1 N.E. 1st St., Miami, Florida.

Loveman's division operates five department stores under the trade name Loveman's. Its principal office and place of business is located at 216 N. 19th St., Birmingham, Alabama.

Hearn's division operates a department store under the trade name Hearn's. Its principal office and place of business is located at 149th Street at 3rd Ave., Bronx, New York.

R. H. White's division operates two department stores under the trade name R.H. White's. Its principal office and place of business is located at Lincoln Plaza, Worcester, Massachusetts.

Franklin Simon division operates sixty-eight specialty stores under the trade name Franklin Simon. Its principal office and place of business is located at 560 Washington St., New York, New York.

B. Lowenstein & Bros. Inc., a wholly-owned subsidiary, operates four department stores under the trade name Lowenstein's. Its principal office and place of business is located at 85 N. Main St., Memphis, Tennessee.

W. & J. Sloane, Inc., a wholly-owned subsidiary, operates thirty-five home furnishing stores under the trade name W. & J. Sloane. Its principal office and place of business is located at 414 Fifth Ave., New York, New York.

The Mayer Furniture Co., a wholly-owned subsidiary of W. & J. Sloane, Inc. operates seven home furnishing stores under the trade name W. & J. Sloane. Its principal office and place of business is located at 1130 Connecticut Ave., Washington, D.C.

PAR. 2. Respondent City Stores Company is responsible for the formulation, control and direction of the policies and practices of the aforesaid divisions and subsidiaries including the acts and practices hereinafter set forth.

PAR. 3. Respondent City Stores Company sells and distributes merchandise in commerce by operating and controlling retail department, specialty and home furnishing stores in a number of states and by causing merchandise to be shipped from its warehouses and retail department stores for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other practices respondent maintains, and at all times mentioned has maintained, a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent permits customers who qualify for credit to charge purchases to revolving credit accounts or other charge accounts. On occasion, a customer's charge account balance consists of a credit on the customer's account which represents an amount of money owed to the customer by one of respondent's stores, rather than an amount of money owed to one of respondent's stores by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits given for the purchase price of returned merchandise.

PAR. 5. Typical and illustrative of respondent's practices in handling the credit balances of its customers are the following: Respondent through its divisions and subsidiaries provides each customer having a charge account credit balance with a periodic statement setting forth the amount of the credit balance. A periodic statement is mailed at the end of the billing cycle during which the credit balance is created and at the end of the five billing cycles immediately following. No additional periodic statement is provided to a customer for any billing cycle during which the credit balance is reflected on the account, unless business is transacted on the account.

A number of respondent's divisions or subsidiaries do not inform charge account customers having a credit balance that they are entitled to request and receive a cash refund of their credit balance. At no time do any of respondent's divisions or subsidiaries refund cash representing outstanding credit balances without request.

Through such acts and practices respondent's divisions and subsidiaries in a substantial number of instances have retained in their possession substantial dollar amounts of credit balances belonging to their customers.

PAR. 6. By failing to notify all customers whose charge accounts reflect credit balances that they have the right to request and receive cash payment of the amounts of their credit balances, and by failing to refund without request credit balances reflected on accounts on which no business has been transacted for a substantial period of time, respondent has caused a substantial number of its divisions' and subsidiaries' charge account customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondent through its divisions and subsidiaries as set forth in Paragraphs Five and Six above, were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

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 Bureau of Consumer Protection 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 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, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such 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 has violated the said Act, and that 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, 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 City Stores Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 500 Fifth Ave., New York, New York.

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

It is ordered, That respondent City Stores Company, a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer revolving credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each charge account customer

having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times in the six month period following the creation of the credit balance. *Provided, however,* that a periodic statement must be mailed or delivered as of the end of the first billing period during which the credit balance is created. *Provided further,* that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

2. Failing to notify each charge account customer having a credit balance created later than sixty (60) days from the date of entry of this order of his right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph One and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

This Credit Balance represents money we owe you. You may use it or obtain a refund by presenting your statement at our store or by returning, in the enclosed envelope, the bill top of the enclosed statement indicating thereon 'please refund.' If you do not charge against this credit or request a refund, a check will be mailed to you automatically within 7 months after your credit balance was created. But a credit balance of $1 or less will not be refunded unless specifically requested, and it will not be credited against future purchases after the seven month period." *Provided, however,* if respondent refunds without request credit balances of one dollar ($1.00) or less, the last sentence of such disclosure may be deleted.

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement or entirely on one side of a separate page. In the event such disclosure is placed on the reverse side of the periodic statement or on a separate enclosure then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see [enclosed instructions"] OR [reverse side"], *provided, however,* that this notice may be abbreviated.

3. Failing to refund to each charge account customer with a credit

balance of more than one dollar ($1.00) created after the date of entry of the order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which a credit balance exists and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered,* That with respect to each credit balance owed to a customer in the amount of more than one dollar ($1.00) which was created at any time within the three-year period prior to the date of entry of this order and which has not been refunded to the customer as of the date of entry of this order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *provided, however,* that nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s), in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s) shall clearly and conspicuously disclose on its face that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall effect complete compliance with the provisions of this paragraph no later than seven (7) months after the date of entry of this order. The report required by Paragraph H of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the customer either in person or by mailing a check (or credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown on respondent's records. In the event that any such statement or check (or credit certificate) is returned to respondent with a notification to the effect that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement (or credit certificate) with an address correction request to the Post Office unless respondent has already done so. If the check or statement (or credit certificate) which has been remailed is returned to respondent and reflects an amount larger than fifteen dollars ($15.00), respondent shall obtain from a credit bureau the most current address available for the customer in the credit bureau's files by means of an in-file report or other credit bureau report. If a new address is obtained, respondent shall remail the check or statement to the customer. If the customer is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the customer's account to be retained for one year from the date on which the remailed check or statement was returned so that offsetting purchases can be made, and upon such reinstatement, respondent shall be relieved of any further obligation to send any additional notices and/or any refund without request with respect to the credit balance in question. In the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered,* That if a customer requests, in person or by mail, a refund of a credit balance in any amount at any time within six years subsequent to the date on which the credit balance was created, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested. The returning of a bill top upon which the customer has indicated a request for refund, to respondent, shall constitute a request for a refund of the credit balance.

D. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered,* That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties.

F. *It is further ordered,* That respondent shall maintain for each of its retail operating divisions and subsidiaries the following data: name and address of each customer who was sent a refund without request of a credit balance; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. *Provided, however,* that respondent shall not be required to maintain such data with respect to a customer who was sent a refund without request in excess of six (6) years from the date such refund was made.

G. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

H. *It is further ordered,* That respondent shall, within ninety (90) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

I. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

J. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions and subsidiaries.

233-738 O - 77 - 22

IN THE MATTER OF

ATLANTIC RICHFIELD COMPANY

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

Docket C-2882. Complaint, Apr. 27, 1977 --- Decision, Apr. 27, 1977

Consent order requiring a Los Angeles, Calif., manufacturer and marketer of petroleum products to cease failing to furnish credit card customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Hong S. Dea.*

For the respondent: *David L. Roll, Steptoe & Johnson,* Washington, D.C.

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 Atlantic Richfield Company, a corporation, has violated the provisions of said Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent Atlantic Richfield Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with a principal office and place of business located at 515 South Flower St., Los Angeles, California.

PAR. 2. Respondent Atlantic Richfield Company manufactures and markets various petroleum products throughout the United States. It markets gasoline domestically for resale in approximately 37 states and the District of Columbia.

PAR. 3. Respondent sells and distributes petroleum products in commerce in a number of states by causing its products to be shipped from its refineries and from the places of business of its various suppliers to respondent's storage areas and retail gasoline service stations for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, customers of respondent who qualify for credit may charge purchases to gasoline credit card accounts at certain retail gasoline service stations. On occasion a customer's charge account balance consists of a credit on the customer's account which represents an amount of money owed to the customer by respondent, rather than an amount of money owed to respondent by the customer. This credit balance is the result of, among other things, over-payments by the customer or credits given for the purchase price of returned merchandise.

PAR. 5. Typical and illustrative of respondent's practices in handling the credit balances of its customers prior to 1976, were the following:

Respondent provided to each customer having a charge account credit balance of one dollar ($1.00) or more a periodic statement setting forth the amount of the credit balance. This periodic statement was usually mailed at the end of the billing cycle during which the credit balance was created and during the two billing cycles immediately following. No additional periodic statement was provided to a customer for any billing cycle during which the credit balance was reflected on the account, unless business was transacted on the account. At no time was a customer having a credit balance adequately and specifically informed by respondent that he was entitled to request and receive a cash refund of his credit balance.

Respondent provided to each customer having a credit balance of less than one dollar ($1.00) one periodic statement setting forth the amount of the credit balance, mailed at the end of the billing cycle during which the credit balance was created. No additional periodic statement was provided to a customer for any billing cycle during which the credit balance was reflected on the account, unless business was transacted on the account. At no time was a customer having a credit balance adequately and specifically informed by respondent that he was entitled to request and receive a cash refund of his credit balance.

If a customer having a credit balance of one dollar ($1.00) or more did not request a refund in cash of the amount of the credit balance or transact further business on his account, respondent maintained the credit balance on the account. If a customer having a credit balance of less than one dollar ($1.00) did not request a refund in cash of the amount of the credit balance or transact further business on his account within one month after receipt of the periodic statement, respondent through bookkeeping entries, removed the credit balance from the customer's account. No cash payment to the customer was made at the time of the removal of his credit balance from his charge account.

Respondent did not refund cash representing an outstanding credit balance without a specific request by the customer.

PAR. 6. By failing to furnish to customers, during billing cycles in which credit balances of any amount remained outstanding, a sufficient number of periodic statements disclosing the amount of their credit balances; by failing to adequately and specifically notify customers whose charge accounts reflected credit balances that they had the right to request and receive cash payment of the amounts of their credit balances; and by failing to refund without request credit balances reflected on accounts on which no business had been transacted for a substantial period of time, respondent caused a substantial number of its charge account customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondent, as set forth in Paragraphs Five and Six above, were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

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 Bureau of Consumer Protection 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 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, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such 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 has violated the said Act, and that 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, 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 Atlantic Richfield Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 515 South Flower St., Los Angeles, California.

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

It is ordered, That respondent Atlantic Richfield Co., a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on gasoline credit card accounts or other retail consumer credit charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to credit card sales of petroleum and automotive products at service station outlets, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each charge account customer having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times in the six-month period following the creation of the credit balance; *provided, however,* that a periodic statement must be mailed or delivered during the first billing period succeeding the creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of his right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph (1) and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may use it or you may obtain a refund by returning the statement in the enclosed envelope. Please write across the statement 'refund requested.' If charges are not applied against this credit or you do not request a refund, a check will be mailed to you within seven months after your credit balance was created. But a credit balance of less than one dollar ($1.00) will not be refunded unless specifically requested, and it may not be credited against future purchases after the seven-month period."

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made entirely on the periodic statement or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see [enclosed instructions"] OR [reverse side"] *provided, however,* that this notice may be abbreviated.

3. Writing off or deleting any credit balance of more than one dollar ($1.00) created after the date of entry of this order from a customer's account before respondent has made a cash refund or charges have been applied to the account, unless such credit balance is not in fact owed to the customer, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of entry of the order the full amount of said credit balance no later than thirty-five (35) days from the end of the sixth consecutive billing cycle during which a credit balance exists and charges have not been applied against the account and the customer has not requested a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered,* That with respect to each credit balance owed to a customer in the amount of more than one dollar ($1.00) which was created at any time within the three year period prior to the entry of this order, and which has not been refunded to the customer as of the date of entry of the order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith. Respondent shall effect complete compliance with the provisions of this paragraph no later than six (6) months after the date of entry of this order, and the report required by Paragraph J of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be effected by mailing a check payable to the order of the customer to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records for said customer. If the check or statement is returned to respondent and reflects an amount larger than fifteen dollars ($15.00), respondent may remail such check or statement, and if such check or statement is returned following such mailing or following such mailing and remailing, respondent shall attempt to obtain from a credit bureau or other consumer reporting agency the most current address on file for that customer. If a new address is obtained, respondent shall remail the check or statement to the customer. If the customer is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the customer's account to be retained for one year from the date on which the check or statement was returned so that offsetting purchases can be made, and respondent shall be relieved of any further obligation to send any additional notice and/or any refund without request with respect to the credit balance in question; *provided, however,* that in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered,* That if a customer requests by mail a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed and not escheated as required by state law, or furnish the customer with a written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested. The receipt by respondent of a mailed periodic statement [or other form referred to in Paragraph (2)] which reflects a credit balance shall be deemed a request for a refund of said credit balance.

D. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to charges applied to the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered* That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credits created on delinquent customer accounts by the application of monies obtained by collection agencies in excess of the delinquent amount originally owed to respondent, where such excess represents attorney's fees, interest, court costs or other costs of debt collection.

F. *It is further ordered,* That respondent shall maintain the following data: name and address of each customer who received a refund without request of a credit balance; the date the credit balance was first reflected on the customer's account and the date of the first mailing of the refund; and the amount of the credit balance. *Provided, however,* that respondent shall not be required to maintain the information required by this paragraph for a period in excess of six years from the date each individual credit balance refund was first mailed.

G. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

H. *It is further ordered,* That this order shall not be deemed to have been violated if:

(1) respondent shows by a preponderance of evidence that its failure to comply with this order was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error; and

(2) within twenty (20) days from the time respondent discovers or should reasonably have discovered the error, respondent notifies the Commission in writing of the nature, extent, and apparent cause of the error and of the steps it has taken or it will take to rectify the error and prevent its recurrence; and

(3) within sixty (60) days from the time respondent discovers or

reasonably should have discovered the error, respondent takes all actions necessary to assure that all customers affected by the error promptly receive all the rights and benefits to which they are entitled pursuant to the terms of this order.

I. *It is further ordered,* That if respondent is of the opinion that changed conditions of fact or law require that this order be altered, modified or set aside, or that the public interest so requires, respondent has the right, pursuant to the Commission's Rules of Practice, to file with the Commission a petition requesting a reopening of the proceeding for that purpose.

J. *It is further ordered,* That respondent shall, within ninety (90) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

K. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

L. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to all management personnel whose duties involve the accounting and bookkeeping treatment of credit balances.

IN THE MATTER OF

GLOBE NEWSPAPER CO., INC.

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

Docket C-2883. Complaint, Apr. 29, 1977 --- Decision, Apr. 29, 1977

This consent order, among other things, requires a Dorchester, Mass., newspaper publisher to cease misrepresenting the role, identity, and purpose of telephone solicitors; failing to disclose the amount of charitable donations it will make in exchange for the purpose of newspaper subscriptions; and placing in the hands of others the means and instrumentalities by which the public may be deceived. Further, the firm is required to donate $70,000 to the St. Jude Research Hospital; maintain files containing inquiries and complaints relating to proscribed practices; and institute a surveillance program designed to insure solicitors' compliance with the terms of the order.

Appearances

For the Commission: *Lois M. Woocher, Arthur E. Levine,* and *Paul A. Manoff.*

For the respondent: *Bingham, Dana & Gould,* Boston, Mass.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commision Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Globe Newspaper Co., Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, 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 in that respect as follows:

PARAGRAPH 1. Respondent Globe Newspaper Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its principal office and place of business located at 135 William T. Morrissey Boulevard, Dorchester, Massachusetts.

PAR. 2. Respondent has been, and is now engaged in the publishing, advertising, offering for sale, and sale and distribution of the *Boston Globe* newspaper and other publications.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent has been and is now engaged in a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in that respondent has caused said publications to be shipped, mailed and distributed from its place of business to purchasers located in various States of the United States other than the state of origination. Respondent transmits and receives, and causes to be transmitted and received, invoices, checks, monies and other business papers or documents in the course of advertising, selling, or otherwise distributing and collecting payments for said publications among and between the several States of the United States.

PAR. 4. In the course and conduct of its business of offering to sell and selling the *Boston Globe* newspaper and other publications, as aforesaid, respondent has entered into business arrangements with certain telephone solicitation companies who, in turn, employ or hire "solicitors" or other representatives to sell said publications. Acting through these telephone solicitation companies, respondent, through various direct and indirect means and devices, places into operation and controls, directs, supervises, recommends and otherwise implements sales methods whereby members of the general public are contacted by telephone solicitors and, by means of statements, representations, acts and practices as hereinafter set forth, are induced to enter into oral agreements with respondent which provide for the purchase of the *Boston Globe* newspaper and other publications and for payment therefore.

Respondent has paid for rent, telephone, advertising costs and other business expenses of said telephone solicitation companies; assisted, aided, and cooperated in the preparation of the sales solicitation program employed by said companies; and maintained final authority over the contents of said sales program.

In this manner, respondent, directly or indirectly, controls, furnishes the means, instrumentalities, services, and facilities for, condones, approves and accepts the pecuniary benefits flowing from the acts, practices and policies hereinafter set forth, of said telephone solicitation companies.

PAR. 5. Respondent, in the course and conduct of its business as aforesaid, acting through its telephone solicitation companies' salespersons has made statements and representations, directly or indirectly, respecting the terms and conditions of its publication subscription offers designed and intended to induce the sales of said publications. Representative of such statements but not all inclusive thereof are the following.

A. Written statements prepared by respondent include:

> This is _____ calling on behalf of the Boston Globe for the Danny Thomas St. Jude's Leukemia Hospital for children. If you will take the Boston Globe for 90 days, the Boston Globe will make a donation to the St. Jude's Hospital.

> Almost everyone takes one or more newspapers and when they realize that contributions are the only means that many of these unfortunate children have to receive this expensive treatment FREE; they feel proud of their decision to have this paper delivered for 90 days.
>
> However, we are not asking for a direct donation, as the donation would be made by the Boston Globe and it's a grand and easy way to help * * * in the fight against Leukemia * * *.

B. Statements of salespersons of respondent's solicitation company acting under the control of the respondent have included:

> If you sign up for the Boston Globe for a trial period of just three months, the Globe has agreed to donate matching funds to St. Jude's Children's Hospital.
>
> I don't know exactly the amount of the donation given to St. Jude's Hospital but it's sizeable.
>
> If you subscribe to the Globe for 16 weeks then the entire subscription price will be donated to charity.

In the aforesaid manner, the respondent has represented, directly or by implication, that:

1. The telephone solicitors selling the *Boston Globe* newspaper and respondent's other publications are employed by or for the benefit of a charitable or non-profit organization.

2. Respondent donates all or a substantial amount of the total subscription price of the *Boston Globe* newspaper for the specified trial period to St. Jude's Hospital or other charitable or non-profit organization.

PAR. 6. In truth and in fact:

1. The telephone solicitors selling the *Boston Globe* newspaper and respondent's other publications are not employed by or for the benefit of a charitable or non-profit organization but are employed by a telephone solicitation company, Media Sales Inc., which has entered into a business arrangement with respondent to sell respondent's publications.

2. Respondent does not donate all or a substantial amount of the total subscription price of the *Boston Globe* newspaper for the specified trial period to St. Jude's Hospital or other charitable or non-profit organization. To the contrary, respondent donates a minimum amount of the subscription price to the charity. Thus, for a 13 week subscription to the *Boston Globe* newspaper costing $26, respondent pays $.25 to St. Jude's Hospital.

Therefore, the representations, acts and practices as set forth in Paragraph Five hereof, were, and are, unfair practices and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of its business respondent, acting through the telephone solicitation companies, offers for sale and sells the *Boston Globe* newspaper and other publications without disclosing that the dollar amount of the donation given by respondent to St. Jude's Hospital is \$.25. Such fact is material and, if known to potential customers, would be likely to affect their decision to purchase the *Boston Globe* newspaper or other publication. Therefore, failure to disclose such material fact is misleading and a deceptive and unfair act or practice.

PAR. 8. By and through the use of the aforesaid acts and practices, respondent places in the hands of telephone solicitation companies, their salespersons, and others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 9. The use by respondent, directly or indirectly, of the aforesaid false, misleading, deceptive and unfair representations, acts or practices has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of a substantial number of subscriptions to the *Boston Globe* newspaper and other publications of respondent.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, have been to the prejudice and injury of the public and have constituted unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

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 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 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, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such 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 has violated the said Act, and that 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, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Globe Newspaper Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 135 Morrissey Boulevard, city of Boston, Commonwealth of Massachusetts.

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

It is ordered, That respondent Globe Newspaper Co., Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any newspaper, newspaper subscription or other product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any representative or other person soliciting a purchaser or prospective purchaser with the intent or with the result of inducing or securing a subscription, order for, or the purchase or agreement to purchase of the *Boston Globe* newspaper or other product is performing services on behalf or primarily for the benefit of or represents any charitable, educational, social, or other association, or any individual or firm other than respondent; or affirmatively misrepresenting in any manner, the identity of the solicitor or of his or her firm and the business they are engaged in.

2. Failing affirmatively to disclose clearly and conspicuously during the initial contact or solicitation of a purchaser or prospective purchaser, in connection with any offer to make a donation to or otherwise to benefit any charitable, educational, social, or other association or person other than a person whose sole benefit is in the form of a payment or receipt of monetary remuneration in the

normal course of the sale and delivery of newspapers, the terms, conditions, nature and exact amount expressed in dollars and as a percentage of the total cost to the purchaser or prospective purchaser of any such donation and benefit to said charitable, educational, social, or other association or person.

3. Furnishing or otherwise placing in the hands of others, the means and instrumentalities by and through which the public may be misled or deceived in the manner or by the acts and practices prohibited by this order, with the knowledge that said means and instrumentalities are likely to be used in an unfair or deceptive manner.

It is further ordered, That:

(A) Respondent pay the sum of seventy thousand dollars ($70,000) as a donation to the St. Jude's Children's Research Hospital located at 332 North Lauderdale St., Memphis, Tennessee 38101, a charitable organization. This sum shall be paid in two annual installments of thirty-five thousand dollars ($35,000) each. The first of such payments shall be made no later than sixty (60) days after the date of service of this order; and the second payment shall be made within one year following the date of the first payment;

(B) Respondent shall within thirty (30) days after each payment referred to above file with the Boston Regional Office a report in writing setting forth the manner in which compliance with subparagraph (A) of this paragraph was made and the records and documents demonstrating such compliance;

(C) Respondent herein deliver a copy of this decision and order to any person including present and future employees, agents, solicitors and independent contractors who in connection with any offer of a donation or benefit covered by Paragraph 2 of this order promotes, offers for sale or sells subscriptions to any product included within the scope of this order;

(D) Respondent herein provide each person or entity so described in subparagraph (C) of this paragraph with a form returnable to the respondent clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order; retain said statement during the period said person or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request;

(E) Respondent herein inform each person or entity described in subparagraph (C) of this paragraph that the respondent will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondent that he or she will be bound by the provisions contained in this order;

(F) If such party as described in subparagraph (C) of this paragraph will not agree to file the notice set forth in subparagraph (D) above with the respondent and be bound by the provisions of this order, the respondent shall not use or engage or continue the use or engagement of such party to promote, offer for sale, sell or distribute any product included within the scope of this order;

(G) Respondent herein inform the persons or entities described in subparagraph (C) above that the respondent is obligated by this order to discontinue dealing with or to terminate the use or engagement of persons who continue on their own the deceptive acts or practices prohibited by this order;

(H) Respondent herein institute a program of continuing surveillance adequate to reveal whether the business practices of each person described in subparagraph (C) above conform to the requirements of this order;

(I) Respondent herein discontinue dealing with or terminate the use or engagement of any person described in subparagraph (C) above, who continues on his or her own any act or practice prohibited by this order as revealed by the aforesaid program of surveillance; and

(J) Respondent herein maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondent's business for inspection and copying.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

PROVIDENCE WASHINGTON INSURANCE COMPANY, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9063. Complaint, Nov. 24, 1975—Final Order, May 3, 1977

This order, among other things, requires a Providence, R.I., insurance company and its subsidiary, Providence Premium Service, Inc., to cease misrepresenting to delinquent debtors that legal action is imminent or that delinquent accounts have been referred to third parties for collection. Further, the firm is required to cease violating the Truth in Lending Act by failing, in connection with the extension of consumer credit, to use proper terminology and to provide such disclosures as are required by Federal Reserve Board regulations. Additionally, the order dismisses the complaint issued against Christopher F. Kempf in his individual capacity and as a named officer of the two firms.

Appearances

For the Commission: *Harold F. Moody* and *William P. McDonough.*

For the respondents: *John J. Curtin, Jr.* and *Daniel L. Goldberg, Bingham, Dana & Gould,* Boston, Mass. and *William P. Thornton,* in-house counsel for Christopher F. Kempf.

COMPLAINT

[1] Pursuant to the provisions of the Truth in Lending Act, and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Providence Washington Insurance Company, a corporation, Providence Premium Service, Inc., a corporation, and Christopher F. Kempf, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, 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 in that respect as follows:

[2] PARAGRAPH 1. Respondent Providence Washington Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 20 Washington Place, Providence, Rhode Island.

Respondent Providence Premium Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20 Washington Place, Providence, Rhode Island. Respondent Providence Premium Service, Inc. is a wholly-owned subsidiary of Providence Washington Insurance Company.

Respondent Christopher F. Kempf is an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of the corporations, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

The respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of lending money to the public in connection with the financing of insurance premiums.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents are now, and for some time last past have been, engaged in oral and written communications with debtors located in various States of the United States and at all times mentioned herein have maintained a substantial course of trade through the collection of delinquent accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

[2] PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the payment of alleged delinquent accounts, the respondents mail or cause to be mailed to alleged delinquent debtors various form letters and other printed material.

Typical and illustrative, but not all inclusive, of said form letters and other printed material are the following:

(1)

James F. Travers
Attorney At Law
20 Washington Place
Providence, RI 02901

Tel: (401) 331-6612

Dear ————:

I represent M.V. Service, Inc. in its claim against you for ———— due on the account listed below. Please contact this office and arrange to settle this account without delay. If I fail to hear from you, appropriate legal action will be taken.

Very truly yours,

James F. Travers

Acct. No. ————

[4] (2)

James F. Travers
Attorney At Law
20 Washington Place
Providence, RI 02901

Tel: (401) 331-6612

Dear ————:

This is your final notice. I wrote to you on ———— making claim against you for ———— due M.V. Service, Inc. I have received no reply. If I fail to hear from you within 15 days of the date of this letter, legal action will be started against you without further notice.

Very truly yours,

James F. Travers

PAR. 5. By and through the use of the letters described in subparagraphs One and Two of Paragraph Four, and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication, to those to whom said letters are mailed that:

1. Respondents have referred delinquent accounts to an independent third-party attorney for institution of legal action.

2. Failure to remit payment or arrange to settle delinquent accounts immediately or within a stated period of time will result in the institution of legal action.

[5] PAR. 6. In truth and in fact:

1. Respondents have not referred delinquent accounts to independent third-party attorneys for institution of legal action. On the contrary, respondents' employees prepare and transmit the collection letters to such delinquent accounts.

2. Failure to remit payments or arrange to settle delinquent accounts immediately or within a stated period of time will not result

in the institution of legal action. On the contrary, respondents have never instituted legal action to collect delinquent accounts.

Therefore, the statements, representations, acts and practices set forth in Paragraphs Four and Five were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition in or affecting commerce, with corporations, firms, and individuals engaged in providing services of the same general kind and nature as those provided by the respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that such statements and representations were and are true and into the payment of substantial sums of money to the respondents by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

[6] COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 10. In the ordinary course and conduct of their business as aforesaid, respondents regularly offer to extend and for some time last past have regularly extended consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 11. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused, and are causing, their customers to enter into contracts for the purchase of insurance, by executing a binding Premium Finance Agreement, hereinafter referred to as the "agreement." Respondents provide these customers with no consumer credit cost disclosures other than on the statement.

By and through the use of the agreement respondents:

(1) Failed in some instances to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(2) Failed in some instances to disclose the annual percentage rate accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(3) Failed to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.

[7] (4) Failed to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

(5) Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

(6) Failed to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

(7) Failed to use the term "finance charge" to describe the sum of all charges, as required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

(8) Failed to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

(9) Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

(10) Failed to make all disclosures required by Regulation Z clearly, conspicuously, and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 12. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY ALVIN L. BERMAN, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 2, 1976

PRELIMINARY STATEMENT

[1] The Federal Trade Commission issued its complaint in this proceeding on November 24, 1975,[1] charging respondents Providence Washington Insurance Company (hereinafter sometimes [2] referred to as "PW"), Providence Premium Service, Inc. (sometimes hereinafter referred to as "PPSI") and Christopher F. Kempf, individually and as an officer of said corporations, with having violated the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), the implementing regulation promulgated thereunder (Regulation Z, 12 C.F.R. 226), and the Federal Trade Commission Act.

More specifically, Count I of the complaint charges that respondents, in violation of Section 5 of the Federal Trade Commission Act, misrepresented to alleged delinquent debtors that respondents had referred their delinquent accounts to an independent third-party attorney for institution of legal action and that failure to remit payment or to arrange to settle the accounts immediately or within a stated period of time would result in the institution of legal action.

PPSI admitted having made the specific written communications to debtors alleged in the complaint, but denied that it had thereby made the misrepresentations as alleged. PW and Kempf essentially denied responsibility for the alleged activities of PPSI.

Count II of the complaint alleges violations of the Truth in Lending Act, Regulation Z—the implementing regulation promulgated thereunder by the Board of Governors of the Federal Reserve System, and the Federal Trade Commission Act. These violations are alleged in connection with the making of "credit sales" as that term is defined in Regulation Z. The documents involved are so-called Premium Finance Agreements pursuant to which consumer credit was extended for the purpose of paying insurance premiums to insurance companies. It is alleged that these agreements were the sole source of consumer credit cost disclosure to customers and that certain specified disclosures allegedly required by various portions of Sections 226.8(b) and (c) of Regulation Z had not been made. It is also alleged that respondents failed to make all disclosures required by Regulation Z clearly, conspicuously and in a meaningful sequence, as is required by Section 226.6(a) of Regulation Z.

PPSI, which is not an insurance company, admitted generally that,

[1] Complaint was mailed on December 23, 1975.

prior to October 1, 1974, it entered into premium finance agreements with customers, which agreements contained the only consumer cost disclosures provided to said customers and that certain agreements and forms of agreements used by PPSI employees between July 1, 1969 and October 1, 1974, were [3] deficient under Regulation Z. PPSI further admitted the specific deficiencies alleged in the complaint, but did not admit that it thereby violated Regulation Z.[2] It denied having violated Regulation Z in any further particulars.

Again, as under Count I, PW and Kempf essentially denied responsibility for the alleged activities of PPSI.

As an affirmative defense, the respondents asserted that both Counts I and II of the complaint are precluded by reason of the McCarran-Ferguson Act, 15 U.S.C. 1011, *et seq.* Other affirmative defenses raised by PPSI are (1) that it voluntarily discontinued the conduct complained of in Count I prior to institution of this proceeding, does not engage in such conduct and there is no likelihood of its ever doing so in the future; (2) that it terminated its activities in the premium finance business (the subject matter of Count II) on October 1, 1974, other than for the collection of outstanding debts; that said termination arose from business and economic considerations and there is no likelihood of PPSI reentering the field; and (3) that a number of the alleged violations occurred due to inadvertent use by PPSI representatives of forms which had been superseded and that any errors or omissions resulted from human error.

Additional affirmative defenses raised by PW are that PW did not control, supervise, initiate, authorize or participate in the complained of activities of PPSI nor did it direct the day-to-day operation of PPSI; that PW is engaged [4] in the business of insurance—not the business of financing insurance premiums, and has no intention of engaging in the business of financing insurance premiums either directly or through subsidiaries.[3]

Kempf affirmatively pleaded that he did not directly perform or authorize any of the allegedly unlawful acts; that he is not the alter

[2] In particular, PPSI affirmatively alleged that failures to accurately disclose the annual percentage rate as required by Section 226.8(b)2 of Regulation Z were overstatements, not for the purpose of circumvention or evasion of disclosure requirements and, hence, pursuant to Section 226.6(h) of Regulation Z, were not violations of the regulation.

PPSI also denied that the failure to use the term "unpaid balance of cash price," as allegedly required by Section 226.8(c)(3) of Regulation Z, violated the regulation.

[3] An exception was recited with respect to a situation in Texas, where PW indirectly, through a subsidiary and an affiliate, sells insurance on credit.

ego of either PW or PPSI; and that he does not control either corporation.[4]

In addition to the complaint and answers thereto, pertinent submittals of the parties include the following: complaint counsel's Requests for Admissions addressed to respondents, dated February 25, 1976, and respondents' responses thereto, dated March 31, 1976; Stipulation of Facts, Set No. 1, filed April 13, 1976; Respondents' Motion for Summary Decision, filed April 26, 1976, including memorandum in support thereof and affidavits of Fred L. Jaquith and William P. Thornton, Jr., dated April 23, 1976, attached thereto; complaint counsel's Motion for Summary Decision, filed April 26, 1976, and memorandum in support thereof; the respective oppositions of the parties to the motions of opposing parties for summary decision and the replies to such oppositions; affidavit of Margaret J. Gilhooly, dated May 11, 1976; and the trial briefs of the parties.[5]

[5] Hearings were held on June 21 and June 22, 1976, at the conclusion of which the record was closed. Proposed findings and briefs were filed by the parties on August 2, 1976. Replies were filed on August 9, 1976. This initial decision is based on the record as a whole. Proposed findings of fact and conclusions of law submitted by the parties have been given careful consideration and to the extent they have not been included herein either in the language proposed or in substance, they are rejected as not supported by the evidence or as immaterial or irrelevant.[6]

Throughout this decision, there are findings which are numbered for convenience of reference. Numbered findings may be found as follows:

Findings 1—8	pages 16—22
" 9—15	" 28—30
" 16—32	" 30—35
" 33—37	" 37—44
" 38—50	" 44—49
" 51—58	" 50—51
" 59—63	" 52—54

[4] The above recitation of affirmative defenses is not to be taken as a determination that respondents have the burden of proof, or even the burden of going forward, with respect to all such matters. It simply constitutes a recitation of those matters pleaded by respondents in the form of affirmative defenses.

[5] As a matter of convenience, the Jaquith affidavit was received in evidence as Respondent Exhibit (RX) 10; the Thornton exhibit was received in evidence as RX 11; the Gilhooly affidavit was received as RX 12; and the Stipulation was received as RX 13.

In admitting the several affidavits into evidence, the undersigned advised the parties that their use would be limited to the extent that they were not controverted by opposing counsel. Transcript of Proceedings, p. 190 (Tr. 190).

[6] Abbreviations used in this decision include:

Tr.—Transcript of proceedings.

CX—Commission exhibit.

RX—Respondent exhibit.

Other findings and conclusions included or encompassed in other portions of this decision, though not numbered, are nevertheless findings of the undersigned.

As recited above, both complaint counsel and respondents filed motions for summary decision on April 26, 1976. Respondents' motion was grounded on their affirmative defense that both counts of the complaint are barred as to all respondents by reason of the McCarran-Ferguson Act, 15 U.S.C. 1011, *et seq.* Complaint counsel, on the other hand, moved for summary decision on the merits as to the two corporate respondents in reliance upon the pleadings, admissions and stipulations. On May 27, 1976, the undersigned denied respondents' motion for summary decision and granted in part and denied in part the motion of complaint counsel.

[6] This initial decision is based in large part upon the findings, reasonings, and conclusions enunciated in the undersigned's order of May 27, 1976, ruling upon the motions for summary decision. Rather than refer to the contents of that order, it is deemed preferable to incorporate pertinent portions into this initial decision and physically make them a portion hereof. This will allow for a continuity of reading in one decision without the necessity of consulting a different document. At the same time, additional findings, discussions and conclusions are made on the basis of the hearings and further contentions and presentations of the parties, or as otherwise appropriate.

MCCARRAN-FERGUSON ACT DEFENSE

Since there would be no need to consider the details of the challenged acts and practices if the entire action were held barred by reason of the McCarran-Ferguson Act, that issue will be considered first. Here follows that portion of the undersigned's order dealing with respondent's motion for summary decision by reason of the McCarran-Ferguson Act.[7]

It is uncontested that respondent Providence Washington Insurance Company (PW) is in the business of insurance and that respondent Providence Premium Service, Inc. (PPSI), an indirectly wholly-owned subsidiary of PW, is (or was until October 1974) in the business of financing insurance premiums.

The McCarran-Ferguson Act was passed in reaction to the decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior thereto, it had been assumed that issuance of a policy of insurance was not a transaction in commerce and that regulation of

[7] In reproducing the portions of the order of May 27, 1976, footnote numbers have been changed to run consecutively with others in this initial decision. Findings have similarly been renumbered.

insurance transactions rested exclusively with the states. *Paul* v. *Virginia*, 8 Wall. 168, [7] 183 (1869). In *South-Eastern Underwriters*, it was held that insurance transactions were subject to federal regulation under the commerce clause, and that the antitrust laws, in particular, were applicable. Congress reacted by passing the McCarran-Ferguson Act. As stated in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429 (1946), the Congressional "purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance."[8]

The McCarran-Ferguson Act, in pertinent part, provides as follows:

> §1011. Congress declares that the continued regulation and taxation by the several States of the *business of insurance* is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of *such business* by the several States.
>
> §1012.
>
> (a) The *business of insurance*, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of *such business*.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the *business of insurance*, or which imposes a fee or tax upon *such business*, unless such Act specifically relates to the *business of insurance: Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the *business of insurance* to the extent that *such business* is not regulated by State law. (*emphasis added;* 15 U.S.C. 1011, 1012).

[8] It may be noted at the outset that the portion of the act crucial to disposition of respondents' motion is the phrase "business of insurance."

The Truth in Lending Act, 15 U.S.C. 1601, *et seq.*, does not specifically relate to the business of insurance. The McCarran-Ferguson Act exemption would apply, therefore, if (1) the activities at issue are part of the business of insurance and (2) if so, if those aspects of the business of insurance are regulated by state law. The leading case in shedding light upon the question of whether the activities at issue are part of the business of insurance—the case with which all others start in reaching their individual decisions with respect to the factual situations that are under scrutiny—is *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969). In appraising what was intended by the concept, the "business of insurance," the Supreme Court stated (at pp. 459-460):

[8] See, *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458 (1969).

> * * *The statute did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply* * *Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul* v. *Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance." (Emphasis in original.)

[9] Thus, we start with the basic concept that the "business of insurance" has to do with the contract of insurance, the relationship between the insurance company and its policyholder, and that other activities of insurance companies which relate to their status as reliable insurers must also be included.

As the Court stated in *SEC* v. *Republic National Life Insurance Co.,* 378 F. Supp. 430, 436 (S.D.N.Y. 1974), "*National Securities* indicates that the MFA [McCarran-Ferguson Act] is to be narrowly construed in the face of valid federal regulatory interests: accomodation of federal and state regulatory interests is to be sought." And see, *Hill* v. *National Auto Glass Co., Inc.,* 1971 Trade Cases, ¶73,594 at p. 90,459 (N.D.Cal. 1971).

In balancing the scope of the McCarran-Ferguson Act with the legitimate thrust of the Truth in Lending Act, the Commission, in *Peacock Buick, Inc.,* Dkt. 8976, Order Denying Petition For Reconsideration [87 F.T.C. 379], 3 CCH Trade Reg. Rep. ¶21,105, made the following observation:

> If the "business of insurance" intrudes upon the business of financing, we think it does so only at the point at which the borrower or his lender may seek to deal with *insurer* regarding particular details of the policy being purchased. To hold otherwise, we believe, would do little to effectuate the Congressional desire to leave regulation of the business of insurance to the states, but do much to thwart the clear federal interest in preventing deception* * *in credit financing generally. (Emphasis in original; at p. 20,965 [*supra,* at 382].)

Applying this analysis to the instant case, we are compelled to conclude that the credit transactions here involved do not pertain to the particular details of the policy being purchased. The policy is purchased from PW, or such other insurance company as may be involved. The credit, as extended by PPSI to the insured, does not purport to involve the insurer regarding any of the policy's details.

The policy is a self-contained document quite apart from the credit arrangement.

[10] PW is an insurance company engaged in the business of insurance. Whatever exemptions the McCarran-Ferguson Act might afford to application of the Federal Trade Commission and Truth in Lending Acts to transactions of PW in selling insurance on credit or in collecting money owed it for insurance premiums, they are inapplicable here. For whatever reasons it may have, PW has seen fit that a separate corporation, PPSI, conduct the business of financing insurance premiums for its customers, including the collection of outstanding debts owed to PPSI arising from such financing. Further, PPSI has financed insurance premiums due to other insurance companies and has acted to collect outstanding debts owed to PPSI arising from such other financing (Gilhooly Affidavit, dated May 11, 1976; RX 12).

PPSI is not an insurance company. It is in the business of extending consumer credit and, in the course of that business, it collects outstanding obligations to it. It is not engaged in the business of insurance simply because its loans are limited for the purpose of financing insurance premiums. It is no more in the business of insurance than a company which lends money for a number of purposes, including the financing of insurance premiums. When PPSI lends money to finance insurance, it pays the full premium due to the insurance company (PW or other). There is no debtor-creditor relationship between the insurance company and the policyholder, since all obligations exist between PPSI and its debtor. See Jaquith affidavit in support of respondents' motion for summary judgment (RX 10 A, B).

The situation is similar to that involved in *Boutell* v. *Walling,* 327 U.S. 463 (1946). That case involved a common carrier which owned a service company which furnished maintenance service to the carrier's trucks. The Supreme Court held that the service company's employees were not within the exemption for "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" contained in Section 13(b)(1) of the Fair Labor Standards Act prior to 1966 (29 U.S.C. (1964 ed.) 213(b)(1)). The Court reasoned that the jurisdiction of the Interstate Commerce Commission was, in the main, limited to carriers and their employees and, on the basis of the corporate arrangement chosen by the parties, the service company was not a carrier although the work it performed was solely for the carrier. (See particularly 327 U.S. at 467–68.) PPSI is no more engaged in the business of insurance than was the company which serviced the common carrier's trucks engaged as a common carrier.

[11] "One who has created a corporate arrangement, chosen as a means of carrying out his business purpose, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Corp.* v. *United States,* 326 U.S. 432, 437 (1946). PPSI, which is not an insurance company and is not engaged in the business of insurance, having been set up to arrange for, process and collect loans for the purpose of financing insurance premiums, the McCarran-Ferguson exemptions do not apply to the activities of PPSI.[9] The case here is even stronger since PPSI's activities in the course of financing insurance premiums are not limited to insurance issued by PW.

PPSI cannot be said to be in the "business of insurance" merely because an insurance policy is tangentially involved. *Peacock Buick, Inc.,* Dkt. 8976, Order Denying Petition For Reconsideration, March 2, 1976 [*supra*], 3 CCH Trade Reg. Rep. ¶21,105. Though the borrower may appoint PPSI as his attorney to cancel the insurance in the event the insured fails to make a payment when due, and assigns to PPSI as security various benefits under the policy,[10] this does not make the lender-borrower relationship between PPSI and the insured a part of the contractual relationship between PW or other insurer and the insured. PPSI's relationship to the business of insurance is similar to that of one who lends money to the purchaser [12] of a house and secures a deed of trust as security in the event of default of mortgage payments. The mortgagee, simply because he can exercise rights with respect to the property in event of default on the debt, is not in the business of selling real property. Neither is PPSI in the business of insurance.

Respondents' reliance upon *Addrisi* v. *Equitable Life Assurance Society of United States,* 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975), and *Dexter* v. *Equitable Life Assurance Society of the United States,* 1975-2 Trade Cases ¶60,601 (2nd Cir. 1957), for the proposition that lending activities of insurance companies to induce persons to secure insurance are exempt under the McCarran-Fergu-

[9] See also, *Commander Leasing Co.* v. *Transamerica Title Insurance Co.,* 477 F.2d 77, 86 (10th Cir. 1973), where the Court indicated that if the complaint had been amended to charge two defendants with acting solely as agents to abstract titles for other defendants who issued title insurance, rather than charging them with providing "title proof and assurance [insurance]," the McCarran-Ferguson Act exemption might not have applied to the two agents. Abstracting titles is an essential element of the business of issuing title insurance. Yet, doubt was expressed as to whether the activities of a third party in performing this service was itself the "business of insurance." Here, it is not essential to sell insurance on credit. To the extent a third party, PPSI, provides premium financing to those who want to purchase insurance, PPSI is in the business of extending credit—not in the business of insurance.

[10] The contract, however, is not limited to this alternative. Under the Premium Finance Agreement, PPSI, upon default of payment, may declare the entire balance due and payable. See Tab B to Jaquith affidavit (RX 10 M).

son Act as part of the business of insurance, is misplaced. In both cases, the activities were those of insurance companies whose insurance business activities (activities undertaken in the course of securing insurance business) were held regulated by the states involved. PPSI is not in the business of insurance. The same distinction applies to the decisions in *Ben* v. *General Motors Acceptance Corp.*, 374 F. Supp. 1199 (D. Colo. 1974)[11] and *Gerlach* v. *Allstate Ins. Co.*, 338 F. Supp. 642 (S.D. Fla. 1972), upon which respondents also rely.

Respondents would construe language of the Supreme Court in *SEC* v. *National Securities, Inc.*, *supra*, which appears at 393 U.S. 459-60, to hold that the McCarran-Ferguson Act exemption extends to people who are neither the insurance company nor the insured. To the contrary, the language relied upon follows the statement, "The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*" (emphasis in original). The discussion relied upon then goes on to limit the application of the McCarran-Ferguson Act to insurance companies so as to cover only the "business of insurance." See pp. 8-9, *supra*, for discussion of what insurance company activities are involved. Thus, the language relied upon by respondents did [13] not purport to expand the "business of insurance" concept beyond the activities of insurance companies, but limited that concept to recognize that not all activities of insurance companies constitute the "business of insurance."

The other cases relied upon by respondents as being in accord with their expanded concept of the "business of insurance" all involved *activities of insurance companies* which, while not part of the insurance company—insured contractual relationship, were closely related to or affected that relationship.[12]

Having found (1) that the acts and practices in question are not part of the "business of insurance," there is no need to consider (2) the extent to which the various states have regulated the business of insurance. In any event, the considerations under the second question, as pertinent here, would in part have paralleled those under which the first was answered. As stated in *American Family*

[11] Respondents point out that in *Ben* v. *General Motors Acceptance Corp.*, the McCarran-Ferguson Act exemption was applied to a premium finance company defendant. It is not clear that the problem was directly presented to that court, since it resolved the case upon an allegation that GMAC acted with its subsidiaries to sell insurance.

[12] These cases include *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958); *California League of Independent Ins. Producers* v. *Aetna Casualty and Surety Co.*, 175 F. Supp. 857 (N.D. Cal. 1959); *Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (3d Cir. 1973); *Schwartz* v. *Commonwealth Land Title Insurance Co.*, 374 F. Supp. 302 (E.D. Pa. 1974); *Robertson* v. *People of California*, 328 U.S. 440 (1946); *Proctor* v. *State Farm Mutual Automobile Insurance Company*, C.A. No. 249-72 (D.D.C. Dec. 18, 1975); *Nankin Hospital* v. *Michigan Hospital Service*, 361 F. Supp. 1199 (E.D. Mich. 1973).

Life Assurance Co. of Columbus v. *Planned Marketing Associates, Inc.*, 389 F. Supp. 1141, 1146 (D.C. Va. 1974):

> Thus, the State anti-trust and restraint of trade regulation which would oust federal anti-trust and restraint of trade legislation must be State regulation of anti-trust and restraint of trade activities which directly or indirectly affect the relationship between the insurer and its insured.

In the instant case, the trade activities said by respondents to be regulated do not directly or indirectly affect the relationship between an insurance company and its insured. The relationship here involved is that between PPSI and its debtors in the granting and collection of loans and PPSI is not an insurance company. The relationships between PW, or other insurance companies, and their insured are not involved.

[14] In *California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co.*, 175 F. Supp. 857, 860 (N.D. Cal. 1959), the Court held:

> This Court is of the opinion that a State regulates the business of insurance within the meaning of §1012(b) when a State statute generally proscribes (F.T.C. v. National Cas. Co., 1958, 357 U.S. 560, 78 S. Ct. 1260, 2 L.Ed. 2d 1540) or permits or authorizes certain conduct on the part of the insurance companies.[13]

Any state proscription, permission or authorization of conduct on the part of insurance companies would not constitute exempting regulation under the McCarran-Ferguson Act [applicable to this case], since PPSI is not an insurance company.

For some period up to October 1974, PPSI was licensed by Illinois, Connecticut, Florida, Kentucky, Massachusetts, Virginia and Washington to engage in the business of insurance premium financing (Tab A to Jaquith affidavit; RX 10 D, F-K). PPSI, however, was not licensed as an insurance company, and the licenses noted above do not reflect state regulation affecting the relationship between an insurer and its insured. During the same period of time, PPSI was licensed by Colorado, Rhode Island, and Wyoming to make loans, not limited to the financing of insurance premiums, under statutory provisions covering the making of loans in general (Tab A to Jaquith affidavit; RX 10 C, E, L). Such laws of general application would not be deemed to have been enacted "for the purpose of regulating the

[13] See *Ohio AFL-CIO* v. *Insurance Rating Board*, 451 F.2d 1178, 1181 (6th Cir. 1971) and *Holly Springs Funeral Home* v. *United Funeral Service*, 303 F. Supp. 128, 135 (N.D. Miss. 1969), where this language was cited with approval.

business of insurance." See, *Hamilton Life Insurance Company of New York* v. *Republic National Life Insurance Company,* 408 F.2d 606, 611 (2d Cir. 1969); *SEC* v. *Republic National Life Insurance Co.,* 378 F. Supp. 430, 436 (S.D.N.Y. 1974).

[15] It was upon the foregoing considerations that respondents' motion for summary decision in reliance upon the application of the McCarran-Ferguson Act was denied.

During the course of the hearings, respondents called the undersigned's attention to *Cochran* v. *Paco, Inc.,* 400 F. Supp. 219 (N.D.Ga. 1976), where it was held that the Truth in Lending Act was inapplicable to an insurance premium finance agreement between a premium finance company and an insured because of the McCarran-Ferguson Act. This decision was not available in the advance sheets until after respondents filed their motion for summary decision and after the undersigned's order of May 27, 1976. During the hearings, respondents stressed facts of record and introduced additional evidence in an effort to demonstrate that the principles enunciated in *Cochran* v. *Paco, Inc.* applied to the instant case and that it should be decided in the same manner. In their brief, respondents have also relied upon *Lowe* v. *Aarco-American, Inc.,* No. 76-1226, 7th Cir., June 22, 1976, decided the very day hearings were closed in the instant case. This case also holds that the activities of a lender of money for insurance premiums are exempt from the provisions of the Truth in Lending Act by reason of the McCarran-Ferguson Act.

The undersigned has studied both recent cases relied upon by respondents and is respectfully of the opinion that they are incorrectly decided insofar as they extend McCarran-Ferguson Act exemption to the lending activities of premium finance companies. The undersigned, of course, is aware of the precedential effect of the two decision, particularly that of *Lowe* v. *Aarco-American, Inc.* [14] but, at this stage of the development of the law on this issue, feels compelled to decide the matter as he perceives it should be resolved. At the same time, it is deemed suitable that pertinent findings be made for appropriate use in the event a reviewing authority should disagree with the undersigned's views on the application of the McCarran-Ferguson Act exemption on the basis of *Lowe* v. *Aarco-American, Inc., Cochran* v. *Paco, Inc.,* or otherwise. **[16]**

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[14] Complaint counsel have advised in their brief that *Cochran* v. *Paco, Inc.* is on appeal to the United States Court of Appeals for the Fifth Circuit.

ADDITIONAL FINDINGS FOR MCCARRAN-FERGUSON ACT CONSIDERATION [15]

1. PW, through Western Alliance Insurance Company (a wholly-owned subsidiary of PW) and Providence Lloyds (an affiliated unincorporated organization under Texas law), both insurance companies, accepts promissory notes in payment for insurance premiums and collects on such notes. This is done only in Texas, where state law permits and encourages such a practice (PW Answer 2.2; RX 13B; Thornton, Tr. 155). While other states do not prohibit the sale of insurance on credit, they treat such sales as "non-admitted." They would discount or disallow such transactions when evaluating the financial responsibility of PW. Such an evaluation would reduce the company's credited surplus. This would reduce the amount of premiums the company could write, which in turn would result in reduced profits. Consequently, when an insured in any state other than Texas requires credit, it is PW's practice to arrange for financing through a premium finance company—not to extend credit itself. In that way, PW gets full credit for a cash transaction; its ability to write additional insurance is not impaired; and the insured is able to secure financing of the premium (Thornton, Tr. 155-58).

2a. In engaging in the business of insurance premium financing, PPSI's only business, PPSI followed what is the general industry practice, although variations occurred in individual cases. The agent or broker representing the insurance company would offer the insured the opportunity to finance his insurance premiums. If the insured opted to finance with PPSI, the insurance agent would fill in the blanks on a PPSI form of premium finance agreement which the insured would sign. The insured would at that time give the agent his downpayment. While several different forms were used, all appointed PPSI as the insured's attorney-in-fact to cancel his insurance policy in the event of nonpayment of installments. The completed insurance premium finance agreement would be sent by the agent to PPSI for acceptance. [17] Upon receipt and acceptance, PPSI would normally forward the entire premium balance due to the agent who, after taking his commission, would forward the balance of the total amount of the policy to the insurance company. (In some instances, the proceeds of the premium finance transaction would be sent directly to the insurance company.)

2b. Thereafter, the insured is to pay the debt installments directly to PPSI. If those payments are not made when due, PPSI

[15] Findings made under any heading are not limited for use under that heading but are applicable to the entire decision.

sends the insured a notice that, unless he pays, PPSI will act to cancel his insurance. If payment is not received within a specified period of time, PPSI, acting as the insured's attorney-in-fact, effectuates the cancellation of the insurance by sending a cancellation notice to the insurance company, with a copy to the insured. Upon cancallation, the insurance company computes the amount of unearned premium, net of the agent's commission, and credits that sum to the agent. The agent adds to that sum the amount of any unearned commission and sends the total unearned premium to PPSI. If this sum exceeds the balance due to PPSI from the insured, the amount of any such overage is sent to the insured. If the unearned premium returned to PPSI is less than the amount due from the insured, PPSI may attempt to collect the shortfall from the insured. This general description of insurance premium financing is generally the same on so-called "direct-bill sales," except that in those instances no agent is involved (Thornton, Tr. 158-60; RX 2).

3. Following is an excerpt from a PPSI premium finance agreement which contains the exact terms of the provision whereby PPSI is given the authority to act as attorney-in-fact for the insured and the conditions under which PPSI may effect cancellation of the policy:

> In consideration of the payment by Providence Premium Service Inc. (hereinafter referred to as PPS) to the insurance company(ies) or the producer named above to be made by PPS in the amount of the AMOUNT FINANCED, the undersigned insured promises to pay to the order of PPS at the address shown above the TOTAL OF PAYMENTS according to the schedule shown, and the insured also:
>
> 1. Assigns to PPS as security for this obligation all unearned and return premiums, dividends and loss payments payable from time to time to the [18] insured under the policies listed above, and directs the insurance company to pay all such sums directly to PPS; and any such funds received by PPS shall be applied to the balance due hereunder including interest and late charges, and PPS shall pay any excess to the insured and the insured shall remain liable for any deficiency.
> 2. Irrevocably appoints PPS as his attorney-in-fact to receive all sums described in paragraph 1 and, upon default by the insured, to cancel any or all policies listed above, and, in furtherance of the powers given herein, to execute and deliver all documents and negotiate all instruments for the payment of money all on behalf of the insured.
> 3. Agrees that upon default, PPS may declare the entire unpaid balance due and payable immediately and that "default" as used herein means the failure to make any payment when due and the cancellation, termination or assignment of any or all of the insurance policies whether caused by the insured or not.
>
> (RX 2)

4. While the insurance company regards the premium as having been paid in full, as a matter of insurance accounting, the entire

premium is not treated as income when received. It is taken into income as earned. The remainder is placed into an account called the Unearned Premium Reserve. If a loan is properly calculated, there should be an unearned premium over and above the amount of loan due when the policy is cancelled. The unearned premium is calculated in either of two ways. When the insurance company cancels, a pro rata method is used which is simply the number of days over 365 times the premium. When the insured cancels, a short rate table is used, which provides the insurance company greater amounts to compensate for the expenses of putting the business on the books. When the premium finance company cancels a policy, it is acting for the insured so that the short rate formula, which is less favorable to the insured, is used (Thornton, Tr. 158-165).

5. Of course, the very act of cancellation affects the insurance company-insured relationship. Further, if reinstatement is requested after such cancellation, the insurance company has the opportunity to refuse to reinstate for some [19] reason totally unrelated to financing. It gives the insurance company an opportunity to get out of an undesirable contract. In instances where there is a disagreement between the finance company and the insured as to whether payment has been made, the finance company may cancel the policy for failure to make payment while the argument is going on. Sometimes, where there is a lienholder, the insurance company may be required to give 30 days notice of cancellation to the lienholder but only the usual 10 to the insured. This may give rise to a situation where the insured may be liable to pay for a loss incurred during the 30-day period although he may not be insured at the time (Thornton, Tr. 166, 197-199, 224).

6. Section 4.304 of the Uniform Consumer Credit Code-Insurance, which (according to Section 4.102(2)) is the only provision applicable to loans the primary purpose of which is the financing of insurance, reads as follows:

Cancellation by Creditor

Sec. 4.304. A creditor shall not request cancellation of a policy of property or liability insurance except after the debtor's default or in accordance with a written authorization by the debtor, and in either case the cancellation does not take effect until written notice is delivered to the debtor or mailed to him at his address as stated by him. The notice shall state that the policy may be cancelled on a date not less than 10 days after the notice is delivered, or, if the notice is mailed, not less than 13 days after it is mailed.

7. As previously found, PPSI was licensed to engage in the business of insurance premium financing in Illinois, Connecticut,

Florida, Kentucky, Massachusetts, Virginia, and Washington, and was generally licensed to make loans in Colorado, Rhode Island, and Wyoming (see p. 14, *supra*).

a. The Connecticut Code covering the activities of insurance premium finance companies is specifically inapplicable to insurance companies and state and national banking institutions (Sec. 38-290). The contents and disclosures to be made in insurance premium finance agreements are specified (Sec. 38-297); and various notice and distribution of assets provisions are specified [20] in the event the premium finance company cancels the insurance policy on behalf of the insured.

b. The portion of the Florida Insurance Code covering premium finance companies similarly exempts banking type institutions (Sec. 627.826(2)). It does require particular disclosures to be made in the agreement and that the agreement form be filed and approved by the state insurance department prior to use (Secs. 627.838 and 627.839); and has provisions similar to those in the Connecticut statute covering the event of cancellation of the policy by the premium finance company under a power of attorney or other authority to do so.

c. The Illinois Code covering premium finance companies also exempts banks, insurance companies and similar financial institutions from its provisions (Sec. 513), except that even such institutions are covered by Section 521, which contains provisions similar to those of Connecticut and Florida to be effective in the event of cancellation of the policy by the creditor under a power of attorney. Section 519, which is not applicable to insurance companies, banks and financial institutions does specify the form and contents of a premium finance agreement.

d. The Kentucky Code covering insurance premium financing is inapplicable to insurance companies and banking type institutions. As applicable to insurance premium finance companies, it has provisions specifying the contents of the agreement (Sec. 8) as well as provisions specifying notice and disposition of assets requirements in the event of cancellation by the premium finance company under a power of attorney. (Sec. 11).

e. The Massachusetts Chapter covering insurance premium finance agencies excludes insurance companies (Sec. 1.2). It does cover banks and financial institutions in general (Sec. 2). Administration is the responsibility of the Commissioner of Banks (Sec. 5) who may issue rules and regulations except that he may [21] not allow less stringent disclosure requirements than those required by the Truth in Lending Act and Regulation Z (Sec. 7). The premium finance agreement must be on a form approved by the Commissioner of Banks and must disclose certain specified information (Sec. 13). Provision for notice and rights of the parties in event of cancellation of the policy is spelled out in Section 21.

f. Chapter 18 of the Virginia statute which covers insurance premium finance companies expressly excludes banks, trust companies, savings and loan associations and the like from the restrictions and obligations of that Chapter. As applied to insurance premium finance companies, Chapter 18 does require that no premium finance agreement may be used until approved by the Commissioner of Insurance (Sec. 38.1-74). Chapter 18 contains no provisions covering notice and/or disposition of funds in the event of cancellation of a policy by the premium finance company.

g. The Washington State Insurance Premium Finance Company Act covers all persons engaged in the business of entering into insurance premium finance agreements. Banks and other financial institutions are subject to the regulatory provisions of the Act under all premium finance transactions wherein an insurance policy other than life or disability is made security or collateral for the debt. Information to be disclosed in the agreement is specified (Sec. 48.56.080) and provisions are made for notice requirements in event of cancellation by the premium finance company under a power-of-attorney as well as for the return of unearned premiums. (Secs. 48.56.110, 120.)

h. Colorado and Wyoming have adopted the Uniform Consumer Credit Code-Insurance, which requires only advance written notice of the prospective cancellation of property or liability insurance. (See Finding 6 above.) There are no requirements as to the form of or disclosures on a premium finance agreement, nor any as to the [22] distribution of unused premiums.[16]

8. In addition to the activities of hundreds of premium finance companies, premium finance loans are made by banks and other financial institutions (Thornton, Tr. 211-12; obvious also from state laws discussed above which recognize that banks and other financial institutions make insurance premium finance loans). "The banks are interested in this business" (Thornton, Tr. 212).

We turn now to a consideration of *Cochran* v. *Paco, Inc.*[17]

In *Cochran* v. *Paco, Inc.*, the court held that a premium finance

[16] Respondents have failed to call the attention of the undersigned to any enactments in Rhode Island covering the activities of insurance premium finance companies, in which state PPSI is licensed to engage in the General Loan Business (Jaquith affidavit, Tab A; RX 10E).

[17] Discussion is directed primarily to *Cochran* v. *Paco, Inc.*, since the court in that case detailed the reasons for its decision. This is not true of *Lowe* v. *Aarco-American, Inc.*, which is a *per curiam* opinion which treats the sale of insurance by a broker and the financing of premiums by a premium finance company as the credit sale of insurance. This, the court held, is part of the "business of insurance" covered by the McCarran-Ferguson Act exemption.

agreement entered into between an insurance premium finance company licensed under the Georgia Code (§84-5304) and an insured was a part of the "business of insurance" within the meaning of the McCarran-Ferguson Act and so exempt from application of the Truth in Lending Act.

The court recognized that the question involved was "where the 'business of insurance' ends and the business of consumer financing begins." 409 F. Supp. at p. 221. The court also recognized that insurance premium finance companies perform functions similar to those of other finance companies; that, similar to the power of the normal lender to accelerate the debt in the event of nonpayment and to foreclose on the security, which is often the item that has been financed, the insurance premium finance company in the event of nonpayment of installments may exercise a power of attorney to cancel the insurance.

[23] Despite this acknowledged similarity to other finance companies subject to the Truth in Lending Act, the court held that premium finance companies play an integral part in the insurance transaction because the finance company is legally empowered to act as an agent for the insured and terminate the policy, in which event the finance company must comply with strict notice and rebate requirements of the Georgia law. The court reasoned that if the state were not free to regulate premium finance companies, the entire state regulatory structure of insurance contracts could be frustrated.

The court also held that insurance premium financing was part of the business of insurance because if the insured failed to pay installments to the finance company, the result would be the same as if he defaulted in payments to the insurer—the policy would be cancelled; that, therefore, such finance agreements and the finance company's activities have considerable impact on the cost of the policies, the terms thereof, and the likelihood of the insured's recovery in accordance with the terms of the policy; and that there was also a danger of cancellation in the event the finance company failed to make the payments to the insurance companies.

In the opinion of the undersigned, the district court correctly recognized that there were two businesses involved: (1) the business of insurance, which is exempt under the McCarran-Ferguson Act, to the extent regulated by the states; and (2) the business of consumer financing, which is not, regardless of the extent of state regulation. The court incorrectly held that the McCarran-Ferguson Act granted exemption from application of the Truth in Lending Act to the business of consumer financing of insurance premiums reasoning that such business of financing might have an effect upon the business of insurance. But the McCarran-Ferguson Act did not grant broad, general exemptions to businesses which might affect the business of insurance. The exemption was strictly limited to the business of insurance itself. As developed, *supra*, the business of insurance is conducted by insurance companies. It is also conducted by their brokers and agents. Also, as previously developed, the McCarran-Ferguson Act is to be narrowly construed in the face of valid federal interests to regulate credit financing generally.

[24] "The statute [McCarran-Ferguson Act] did not purport to make the States supreme in regulating all the activities of insurance *companies*" (emphasis in original). *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969). Also, *Hamilton Life Insurance Co. of N.Y.* v. *Republic National Life Insurance Co.*, 408 F.2d 606, 611 (2d Cir. 1969). "In *National Securities* the court held that 'the business of insurance' pertained to those activities *peculiar* to the insurance industry. Business activities of insurance companies not peculiar to the insurance industry were found to be subject to federal regulatory laws." (emphasis in original). *American Family Life Assurance Co. of Columbus* v. *Planned Marketing Associates, Inc.*, 389 F. Supp. 1141, 1145 (E.D. Va. 1974).

There is nothing about the lending activities of premium finance companies that is peculiar to the insurance industry. The financing of insurance premiums, even as analyzed by the district court, is very little different from the business of financing the purchase of other commodities on credit. A lender of money cannot be said to be engaging in all the various businesses which furnish goods and services for which the lender provides financing.

While the district court relied upon the fact that when a policy is cancelled by the lender acting under power of attorney authority from the insured, the insurer must give certain statutory notice and comply with rebate requirements, such requirements could continue to be imposed by the states. There is nothing in the Truth in Lending Act that purports to cover such a situation. That Act, as applied to the instant case, involves solely the disclosures made by a lending company at the time it extends credit. Requiring insurance premium finance companies to comply with the Truth in Lending Act would do nothing to impair, and would not touch upon, the area of regulation by the states that comes into play at such time as the lending company, acting for and on behalf of the insured, takes action with respect to the insurance policy. Therefore, the concerns of the district court with respect to the matters which it considers a state must be free to regulate in the event of cancellation of a policy, are not involved in the instant case.[18]

[25] In both *Lowe* v. *Aarco-American, Inc.* and *Paco* v. *Cochran,* the courts relied upon the existence of state statutes regulating the activities of premium financing companies—statutes of Illinois and Georgia, respectively. The enactment of such statutes, however, does not make the business of premium finance companies the business of insurance.[19] In any event, the interpretation of what constitutes the business of insurance is a federal, not a state, question. *Fry* v. *John Hancock Mutual Life Insurance Co.,* 355 F. Supp. 1151 (N.D. Texas 1973); *Monarch Insurance Co.* v. *Commissioner of Internal Revenue,* 420 F.2d 36 (7th Cir. 1969).

As developed during the hearings, PW deliberately does not sell insurance on credit for the very reason that such insurance transactions would be to the disadvantage of PW. The states, other than Texas, would treat such transactions as "non-admitted" with financial repercussions to PW (see Finding 1, *supra*). It is for this reason that PW and other insurance companies do not sell insurance on credit, but arrange for others to finance the cost of the policy for the insured.

It would be incongruous to hold that a deliberate effort on the part of an insurance company to arrange for the extension of credit by another so it will not be considered a part of the insurance transaction by the states should, nevertheless, be held to be a part of the business of insurance in order to bring into play the McCarran-Ferguson Act. Since states do not recognize the financing of insurance premiums by third parties as a part of the business of insurance for the purpose of evaluating insurance companies, such transactions should not be considered as a part of the business of insurance for the purpose of bringing into effect the McCarran-Ferguson Act exemption.

[26] Insurance premium finance loans are made by banks and other financial institutions as well as by premium finance companies (Finding 8, *supra*). Using the ten states in which PPSI has conducted the business of insurance premium financing, we find that the Connecticut, Florida, Kentucky and Virginia statutes which apply to insurance

[18] Note, for example, the Texas law covering the financing by insurance premium finance companies (Title 79, Ch. 12, RCS, 1925, as amended), which specifically provides that the Truth in Lending Act and the applicable portions of Regulation Z shall prevail in the event of a conflict with state law (Article 12.12), and then goes on to impose notice and return of unearned premium requirements when a premium finance company cancels the contract of insurance under a power of attorney authority (Article 12.17).

[19] In addition to Illinois, where insurance companies are not subject to statutory specifications covering the form and content of premium finance agreements, other states in which PPSI was licensed to engage in business also specifically exclude insurance companies from coverage of premium financing company legislation. These are Connecticut, Kentucky and Massachusetts. See Finding 7, *supra.*

premium finance companies expressly exclude banks and similar financial institutions from their coverage. And in Washington, banks and other financial institutions are subject to the regulatory provisions of that state's premium finance company act only where an insurance policy other than life or disability is made security or collateral for the debt. (Finding 7, *supra*).

Thus, the very same type of loan for the purpose of paying insurance premiums would, under *Lowe* v. *Aarco-American, Inc.* and *Cochran* v. *Paco, Inc.*, be exempt from the Truth in Lending Act depending upon whether the loan was made by an insurance premium finance company or by a bank or other similar financial institution. Certainly, the very same type of loan as that made by a bank does not become a part of the business of insurance because it is made by an insurance premium finance company. In neither case is the loan a part of the business of insurance.

It is noted that Section 108 of the Truth in Lending Act specifically provides that banks, savings and loan associations and credit unions are to be covered by the Act with enforcement as to such lending institutions committed to various named government agencies; and that the Federal Trade Commission is given enforcement authority with respect to all types of lenders not specifically committed to some other government agency. This again evidences the intent that loans of the nature here involved, whether provided by banks and the like or by insurance premium finance companies, are subject to the provisions of the Truth in Lending Act.

There is still another aspect of the inapplicability of the McCarran-Ferguson Act exemption to the instant case—and that is with respect to the allegations of Count I of the complaint dealing with misrepresentations made to alleged delinquent debtors by PPSI in the course of efforts to collect alleged delinquent accounts. As has been developed, these delinquencies arise after the creditor has cancelled the insurance policy and has offset all unused premiums which have been returned by the insurance company (Findings [27] 2(b) 4). At this point, there is no longer a policy of insurance. PPSI is not attempting to collect unpaid premiums. There are no unpaid premiums. PPSI simply is a creditor attempting to collect monies due it by debtors. Under no stretch of the imagination (or stretch of application of the McCarran-Ferguson Act) can this collection attempt be deemed to be a part of the business of insurance.

The undersigned's holding as to the McCarran-Ferguson Act exemption and its lack of application to the activities of PPSI made in the course of denying respondents' motion for summary decision is reaffirmed as the correct disposition of the issue in question for the reasons there stated and as supplemented herein.

This holding, however, is inapplicable to PW's sale of insurance on credit in Texas. In Texas, as part of the business of selling insurance, the insurance company takes a note in payment of the insurance premium and collects on the note (Finding 1). Unlike the situation when PPSI is utilized, the insurance company has not received the entire premium, but rather the insured is paying the premium on time to the insurance company. This method of paying premiums centers around the contract of insurance and the relationship between the insurance company and the policyholder—matters which were held in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459-460 (1969), to be the core of the "business of insurance" as that term is used in the McCarran-Ferguson Act. And see those cases cited at pages 12 and 13, *supra,* which were distinguished in their application to PPSI because PPSI is not an insurance company.

National Securities, Inc. also makes it clear that the "McCarran-Ferguson Act was an attempt * * * to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation," and that "fixing of rates is part of" the "business of insurance." 393 U.S. at pp. 459, 460. The premiums paid on an insurance policy is a key element of the business of insurance. *Proctor* v. *State Farm Mutual Automobile Insurance Co.,* C.A. No. 249-72 (D.D.C. December 18, 1975). And this includes the payment of premiums on time. *Gerlach* v. *Allstate Insurance Co.,* 338 F. Supp. 642, 649 (S.D. Fla., 1972); *Ben* v. *General Motors Acceptance Corp.,* 374 F. Supp. 1199, 1201 (D. Colo. 1974).

[28] I conclude, therefore, that PW's sale of insurance on credit in Texas is part of the "business of insurance" within the meaning of the McCarran-Ferguson Act. The next question is whether PW's activities are regulated by the State of Texas.

As part of its Insurance Code, Texas has passed an act to regulate trade practices in the business of insurance within the intent of the McCarran-Ferguson Act "by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Texas Insurance Code, Article 21.21, Sec. 1.

A state "regulates" the business of insurance when it generally proscribes or authorizes certain conduct on the part of insurance companies. *California League of Independent Producers* v. *Aetna Casualty & Surety Co.,* 175 F. Supp. 857, 860 (N.D. Cal. 1959); *Holly Springs Funeral Home* v. *United Funeral Service,* 303 F. Supp. 128, 135 (N.D. Miss. 1969). State power to regulate, established by the McCarran-Ferguson Act, also includes the discretion to permit practices which might otherwise violate federal law. *Dexter* v. *Equitable Life Assurance Society of the United States,* 1975-2 Trade Cases ¶60,601, at p. 67,665 (2d Cir. 1957).

Texas has enacted regulatory legislation for the very purpose of meeting the intent of the McCarran-Ferguson Act and covering all practices intended to be encompassed within the state as unfair methods of competition and unfair or deceptive acts or practices, the very language of the Federal Trade Commission Act. Thus, Texas has effectively pronounced what shall be prohibited and what shall be permitted. PW's activities in selling insurance on credit in Texas, therefore, are deemed regulated by that state and so exempt under the McCarran-Ferguson Act. See *Crawford* v. *American Title Insurance Co.,* 518 F.2d 217, 218-19 (5th Cir. 1975).[20]

Corporate Respondents[21]

9. Respondent Providence Washington Insurance Company (PW) is a corporation organized, existing and doing business [29] under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 20 Washington Place, Providence, Rhode Island (Admitted, PW Answer 1.1;[22] Stipulation No. 1).

10. Respondent Providence Premium Service, Inc. (PPSI), formerly M. V. Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20 Washington Place, Providence, Rhode Island (Admitted, PPSI Answer 1.1; Stipulation No. 2).[23]

11. Respondent PPSI is wholly owned by respondent PW through PW's wholly-owned subsidiaries Motor Vehicle Casualty Company and York Insurance Company (Admitted, PW Answer 1.2; PPSI Answer 1.2; Stipulation No. 3).

Business of PPSI and Jurisdiction of Commission over Challenged Activities of PPSI

12. PPSI has been engaged in the business of financing insurance premiums prior to October 1, 1974 (Admitted, PPSI Answer 2.2;

[20] Complaint counsel do not appear to contest this conclusion (Br., pp. 25-26).

[21] Findings 9-15 are taken from the undersigned's partial summary decision of May 27, 1976. Finding and footnote numbers have been changed to correspond with overall numbering sequences used in this initial decision.

[22] While references throughout are to answers of particular corporate respondents, it is noted that each respondent has incorporated as part of its answer the answers of the other respondents.

[23] The summary decision erroneously recited that PPSI was a Rhode Island corporation.

Stipulation No. 5). During all or a portion of the period of time from January 1, 1972 to October 1974, respondent PPSI was licensed to engage in the business of financing insurance premiums in the States of Colorado, Connecticut, Florida, Illinois, Kentucky, Massachusetts, Rhode Island, Virginia, Washington, and Wyoming (Admission No. 28; Stipulation No. 6).

13. In the course and conduct of its business as aforesaid, PPSI is now, and for some time last past has been, engaged in oral and written communications with debtors located in various States of the United States (Admitted, PPSI Answer 3; Stipulation No. 8).

[30] 14. Based on Findings 12 and 13 above, it is found that PPSI maintains, and at all times relevant has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. (See also, PPSI Answer 3).

Competition

15. In the course and conduct of its business, and at all times mentioned herein up until October 1, 1974, PPSI has been in substantial competition in or affecting commerce with corporations, firms, and individuals engaged in providing services of the same general kind and nature as those provided by PPSI (Admitted, PPSI Answer 7).

COUNT I—DEBT COLLECTION VIOLATIONS

16. In the course and conduct of its business, and for the purpose of inducing the payments of alleged delinquent accounts, PPSI mails or causes to be mailed to alleged delinquent debtors various form letters and other printed material (Admitted, PPSI Answer 4.1).

17. Examples of form letters sent prior to October 1974 are the following:

a.[24]

James P. Travers
Attorney at Law
20 Washington Place
Providence, Rhode Island 02901

Dear ————:

I represent M. V. Service, Inc.[25] in its claim against you for ———— due on the account listed below. Please contact this office and arrange to settle this

[24] For exhibits of this type, see CX 37, 39, 41, 42, 44, 45, 47, 49 and 50.

[25] M. V. Service, Inc. is the name formerly used by PPSI. (See Finding 10, *supra*).

account without delay. If I fail to hear from you, appropriate legal action will be taken.

Very truly yours,

James F. Travers

Acct. No. ————

[31] b.[26]

James F. Travers
Attorney at Law
20 Washington Place
Providence, Rhode Island 02901
Tel: (401) 331-6612

Dear ————:

This is your final notice. I wrote you on ———— making claim against you for ———— due M. V. Service, Inc. I have received no reply. If I fail to hear from you within 15 days of the date of this letter, legal action will be started against you without further notice.

Very truly yours,

James F. Travers

(Admitted, PPSI Answer 4.1;
Stipulation No. 9)

18. By and through the use of the letters described in paragraph 17 above, PPSI has represented, directly or by implication, to those to whom said letters are mailed, that PPSI has referred delinquent accounts to an independent, third-party attorney for collection and institution of legal action, and that failure to remit payments or to arrange for settlement of delinquent accounts immediately or within a stated period of time, will result in the institution of legal action by said third-party attorney. That these representations were made is clear from an examination of the letters themselves.

19. Both letters are on the letterhead of "James F. Travers, Attorney at Law, 20 Washington Place, Providence, Rhode Island 02901" and purport to be signed by James F. Travers. Nothing in either letter indicates that Travers [32] is an employee of PW acting in an employee capacity.[27]

20. In the first letter (CX 37), Travers states, "I represent M. V.

[26] For exhibits of this type, see CX 38, 40, 43, 46, 48 and 51.

[27] As developed at the hearings, Travers has a private line that goes directly to his office rather than through the PW switchboard. This is the same number that appears on the letterhead of the collection letters. Travers or his secretary, who also works for PW, would answer the phone. Travers tried to answer his own telephone. If a recipient of a collection letter would call in response to the letter, Travers would not tell him that he was an employee of PW (Travers, Tr. 122-123, 132).

Service, Inc. in its claim against you* * *" and requests that the addressee contact "this office" to settle the account; that if "I fail to hear from you" appropriate legal action will be taken. The representation is clearly made that Travers, an independent attorney at law, is in that capacity representing M. V. Service, Inc., has had the delinquent account turned over to him for collection and will institute legal action if he does not hear from the debtor.

21. The followup letter (CX 38) is also on Travers' letterhead and, like the first, identifies James F. Travers as an Attorney at Law, 20 Washington Place, Providence, Rhode Island. Again, reference is made to the sender of the letter in terms of the singular "I" and the letter reflects that it is Travers, the attorney at law, who previously wrote; that it is Travers, the attorney at law, who has received no reply; and it is Travers, the attorney at law, who is affording the recipient his final notice; and that if Travers, the attorney at law, does not hear from the alleged debtor within 15 days, he will institute legal action without further notice.

22. Contrary to the representation made when the letters were sent, the accounts in question had not been referred to a third-party attorney for institution of legal action (PPSI Answers 5.1, 6.1). While PPSI asserts that it has, on occasion, instituted legal action to collect delinquent accounts (PPSI Answer 6.2), this answer does not negate the false representation that the accounts had already been referred to a third-party attorney who was immediately prepared to institute legal action upon the expiration of 15 days unless he heard from the alleged debtor within that time.

[33] Findings 16 through 22 above are adopted from the undersigned's order granting partial summary decision and are still appropriate for ultimate disposition of this case. These findings are supplemented by the following which reflect what was further developed during the course of hearings.

23. James F. Travers, while admitted to practice as an attorney at law in Massachusetts and Rhode Island, has been an employee of PW for 27 years. He has been an assistant vice president since January 1973, and was secretary of PW prior to that time. His duties are varied, but he is primarily in charge of audits and is responsible for insurance claims that are in excess of $25,000. Occupying an office at PW's 20 Washington Place, Providence, Rhode Island, place of business, he is nowhere on the premises identified as an attorney at law. Other than for his connection with the debt collection form letters reproduced in Finding 17, for which he received no compensation from PPSI, Mr. Travers is not engaged in the practice of law (Travers, Tr. 116, 127, 133).

24. The collection letters were prepared by Mr. Travers in conjunction with Mr. Russell Bray, then General Manager of M. V. Service, Inc. The letters were prepared some time in 1971, when Bray approached Travers and requested his assistance in M. V. Service, Inc.'s[28] collection efforts (Travers, Tr. 117-118, 127).

25. Travers, however, had little or nothing to do with the utilization of the collection letters. They were automatically prepared and sent out by PPSI employees according to an established PPSI routine. Mr. Franklin D. Iavelo, General Manager of PPSI (and General Manager Bray before him), instructed PPSI's employees to fill in the blanks on the form letters and send them out as appropriate. A reproduction of Travers' signature was already imprinted on the forms and he would not even know that a collection letter over his signature had been sent. He did not see the letters and had nothing to do with them.[29] If no response was received, he would know [34] nothing about it. He would take no action. The entire matter was handled by PPSI personnel (Iavelo, Tr. 82-84, 99-100, 105; Travers, Tr. 120-122, 124-125).

26. If Travers was contacted by telephone by a recipient of a form letter, he would relay any message to PPSI's General Manager for his action. If there were any disputes, the caller would be referred to PPSI's General Manager. Any mail responses would similarly be referred (Iavelo, Tr. 84; Travers, Tr. 121-124).[30]

27. The form letters were automatically prepared and sent out as part of a routine before the accounts were to be turned over to a collection agency. Travers never instituted legal action to collect any accounts. While the second collection letter gave 15 days, following which legal action was to be instituted without further notice, after about 30 days, if payment had not been made, PPSI's General Manager would choose accounts to turn over to a collection agency. Some of the smaller accounts would not be so referred, but would be dropped. Accounts were not specifically sent to collection agencies for institution of suits. They were sent for purposes of dunning, which was followed, in some instances, by institution of legal action by the collection agency. These were the only legal actions ever instituted to

[28] As PPSI was formerly called M. V. Service, Inc., the two names are being used interchangeably (See Finding 10).

[29] A copy of the letter would be sent for Travers' files so he could refer to it in the event he received a telephone response. For the first few months, the form letters were given to Travers for signature. This was too much bother, so presigned forms were substituted to avoid inconveniencing him (Travers, Tr. 120-122).

[30] The only action Travers would ever take would be to grant an extension of time for making payments or agree to a settlement of the account for a lesser amount. This was more or less automatic because of the relative small amounts of the debts and the anticipated problems in collecting (Travers, Tr. 121, 129-130). This lends additional weight to the conclusion that institution of legal action was not truly contemplated.

collect on the outstanding accounts (Iavelo, Tr. 84, 99-100, 105-106, 111; Travers, Tr. 124, 134).

28. PPSI annually handled 15,000 to 18,000 insurance premium finance accounts. The form letters in question were sent to about 10 percent or to 1,500 to 1,800 accounts annually (Iavelo, Tr. 85).[31] The form reproduced in Finding 17(a) was sent first, followed within a reasonable length of time by the form reproduced in Finding 17(b) (CX 37-40, 42, 43, 45-47, 48-51; Iavelo, Tr. 82).

[35] 29. It is clear from the foregoing that, contrary to the representations made in the form letters, the accounts in question had not been referred to an attorney for the institution of legal action. PPSI simply arranged to utilize the name and stationery of an employee of its parent corporation who was in fact an attorney, but who was not practicing his profession. The collection letters were prepared and transmitted by PPSI employees without the participation, indeed without the knowledge, of the attorney whose name was utilized.

30. Further, failure to remit payment or arrange to settle delinquent accounts immediately or within a stated period of time would not result in the institution of legal action. PPSI did not institute legal action to collect delinquent accounts as threatened in the collection letters, either through the attorney whose name was mentioned or otherwise.

31. Any institution of legal action was unrelated to the threats contained in the collection letters. To the extent legal action may have taken place, it followed events after a subsequent determination to send selected accounts to collection agencies for purposes of dunning. And see Finding 22.

32. Therefore, the statements and representations contained in the collection letters reproduced in Finding 17 and the acts and practices engaged in in connection with said letters are false, misleading and deceptive and are to the prejudice and injury of the public. The use by PPSI of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that such statements and representations were true and into the payment of substantial sums of money to PPSI by reason of said erroneous and mistaken belief. This may be inferred from the very nature of the practice and the large number of

[31] Travers' estimate was that a total of 400 to 500 letters were utilized from 1971 through August 1974, although he later stated he had no real basis for his estimate (Travers, Tr. 128, 131-132). Iavelo is deemed by far the better authority in this regard. Travers' estimate reflects his lack of knowledge as to the letters that were sent. Under either estimate, the number sent was substantial.

instances in which it was utilized from 1971 until August 1974 (Finding 24; Travers, Tr. 125).

The following, taken from the undersigned's order of May 27, 1976, granting partial summary decision to complaint counsel is fully applicable to the findings and conclusions now reached with respect to Count I of the complaint.

[36] The false and deceptive nature of the letters is evident from a reading thereof. They sufficiently and convincingly demonstrate their tendency or capacity to mislead or deceive. Evidence of deception is not required, either in the nature of consumer testimony or a sampling of public opinion. *Montgomery Ward & Company, Inc.* v. *FTC,* 379 F.2d 666, 670 (7th Cir. 1967); *Double Eagle Lubricants, Inc.* v. *FTC,* 360 F.2d 268, 270 (10th Cir. 1965); *Zenith Radio Corp.* v. *FTC,* 143 F.2d 29, 31 (7th Cir. 1944); *Charles of the Ritz Dist. Corp.* v. *FTC,* 143 F.2d 676, 679-680 (2d Cir. 1944). Further, even if a statement may be construed in a literally true fashion, if susceptible of a misleading interpretation, it will be construed against the user thereof. *Murray Space Shoe Corp.* v. *FTC,* 304 F.2d 270, 272 (2d Cir. 1962); *Ward Laboratories, Inc.* v. *FTC,* 276 F.2d 952, 954 (2d Cir.), *cert. denied,* 348 U.S. 826 (1960).

The acts and practices of PPSI recited in the above findings made under Count I constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

It is clear that false representations were made that would have the tendency or capacity of inducing recipients of the letters to take prompt action with regard to their alleged debts. This falls in the general category of false and deceptive acts and practices violative of Section 5 of the Federal Trade Commission Act. A number of cases have so been decided which involve comparable representations of a claim having been turned over for collection to a third party or the threat to take prompt legal action in the event steps leading to payment are not taken. See, *e.g., William H. Wise Co.* v. *FTC,* 246 F.2d 702 (D.C. Cir.), *cert. denied,* 355 U.S. 856 (1957), *affirming* 53 F.T.C. 408; *Wilson Chemical Co.,* Dkt. 8474, 64 F.T.C. 168 (1964); *United States Pencil Co.,* Dkt. 5929, 49 F.T.C. 734 (1953); *Teitelbaum,* Dkt. 5930, 49 F.T.C. 745 (1953); *Family Publications Service, Inc.,* Dkt. C-604 (Consent), 63 F.T.C. 971 (1963); *Encyclopedia Britannica, Inc.,* Dkt. 8908 [87 F.T.C. 421], 3 CCH Trade Reg. Rep. ¶21,119 (3/9/76). Further, deception is the evil the statute is designed to prevent and there is violation regardless of whether the alleged debtors may owe

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the money. *Floersheim* v. *FTC*, 411 F.2d 874, 878 (9th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970).[32] [37]

COUNT II — TRUTH IN LENDING ACT VIOLATIONS

33. In the ordinary course and conduct of its business, for a period of time prior to October 1, 1974, PPSI regularly offered to extend and regularly did extend consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System (Admitted, PPSI Answer 10.1).

34. Prior to October 1, 1974, customers of PPSI entered into Premium Finance Agreements with it, which agreements contained the only consumer credit cost disclosures provided to said customers. Different forms of said agreements were used from time to time and certain agreements and forms of agreements used by PPSI employees between July 1, 1969 and October 1, 1974 were deficient under Regulation Z (Admitted, PPSI Answer 11.1).[33]

Section 226.8(b) of Regulation Z requires that certain specified disclosures be made in a consumer credit transaction. PPSI has admittedly engaged in consumer credit transactions. Thus, Section 226.8(b) is applicable. Section 226.8(c) of Regulation Z requires that certain additional specified disclosures be made in the case of a consumer credit transaction which is a "credit sale." Section 226.2(t) of Regulation Z defines "credit sale" as meaning "any sale with respect to which consumer credit is extended or arranged by the seller." Section 226.2(h) reads as follows:

> (h) "Arrange for the extension of credit" means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit [38]
>
> * * * * * * *
>
> (2) Has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit.

The following findings bear upon whether the extensions of consumer credit here involved were also credit sales within the

[32] Complaint counsel need not establish an intent on the part of respondents to deceive; and good or bad faith on the part of respondents is immaterial in finding a violation. *Feil* v. *FTC*, 285 F.2d 879 (9th Cir. 1960); *Koch* v. *FTC*, 206 F.2d 311, 317 (6th Cir. 1953); *Ford Motor Co.* v. *FTC*, 120 F.2d 175, 181 (6th Cir. 1941). It is also immaterial whether respondents perceived the representations to be false and deceptive. *Gimbel Bros., Inc.* v. *FTC*, 116 F.2d 578, 579 (2d Cir. 1941).

[33] Findings 33 and 34 constitute the incorporation of what were Findings 19 and 20 of the order granting partial summary decision to complaint counsel.

meaning of Sections 226.2(t) and 226.2(h) so that the additional disclosure requirements of Section 226.8(c) are applicable.

35. PW field representatives promoted PPSI premium financing services to insurance broker-agents (Thornton, Tr. 168). These broker-agents were the agents of PW in selling insurance. They had full authority to bind PW pending issuance by PW of the formal policy. These same broker-agents offered the insured the opportunity to secure premium financing for said policies from PPSI (Thornton, Tr. 158, 177, 224-225; RX 10).

36. PPSI sent the insurance agents finance kits which contained the premium finance agreement forms, rate books and all necessary information on how to fill in the blanks on a form. The agents were aware of the credit terms, filled in the disclosure portions of the form and sent the filled-in form to PPSI. PPSI would check the forms and if there were any errors, it would return the forms to the insurance agents for completion or correction. The insurance agents prepared the documents used in connection with the extension of credit (Iavelo, Tr. 87-89, 91-92, 95-97, 106-107; Thornton, Tr. 158-159; RX 10).[34]

From the foregoing, it is obvious that the insurance agents arranged for the extension of credit for purchasers of insurance within the meaning of Section 226.2(h) of Regulation Z. The agents provided and offered to provide consumer credit [39] to be extended by another person under a relationship pursuant to which they had "knowledge of the credit terms and participate[d] in the preparation of the contract documents required in connection with the extension of credit." This, in turn, under Section 226.2(t) of Regulation Z, makes the sale of insurance by PW's agents "credit sales"[35] so that the requirements of Section 226.8(c) of Regulation Z (as well as those of Section 226.8(b)) apply to the credit transactions involved in this case.[36]

[34] The brokers involved were mostly PW agents (Iavelo, Tr. 88). However, the routine described in Findings 35 and 36 was also followed with respect to financing of insurance premiums owed to companies other than PW (Jaquith affidavit; RX 10A, B). Those broker-agents would then be the agents of the other insuring companies involved.

[35] The holding that these are "credit sales" is solely on the basis of the particular definitions contained in Sections 226.2 (t) and 226.2(h) of Regulation Z for purposes of determining whether the disclosure requirements of Section 226.8(c) apply.

As previously found (Finding 1), PW does not sell insurance on credit except in Texas. The finding that PPSI's credit financing of insurance premiums are "credit sales" under the particular definitions contained in Regulation Z does not undermine the determination that such extensions of credit are not part of the "business of insurance" as that term is used in the McCarran-Ferguson Act.

[36] This conclusion finds support in Federal Reserve Board Public Position Papers No. 225, January 5, 1970, and No. 370, July 7, 1970 (Truth in Lending Manual, Vol. II, pp. E 187 and 243). It is immaterial whether the agent-brokers are themselves considered to be selling insurance, as considered in the Position Papers, or to be acting as agents of the insurance company. Under either concept, the seller is "arranging" for the extension of credit.

37. By and through the use of the agreements referred to in Finding 34, PPSI failed in some instances:

a. To disclose the annual percentage rate computed in accordance with Section 226.5 of Regulation Z as is required in a credit transaction by Section 226.8(b)(2) of Regulation Z. (Admitted, PPSI Answer 11.2(1). Examples of violations where the space for disclosure of the annual percentage rate was left blank are CX 3, 4, 6, 7, 9, 10, 13, 17, 18, 21, 23; see CX 30 and 32 for instances where the rate disclosed was improperly computed.)

[40] b. To disclose the annual percentage rate accurately to the nearest quarter of one percent, computed in accordance with Section 226.5 of Regulation Z as is required in a credit transaction by Section 226.8(b)(2) of Regulation Z. (Admitted, PPSI Answer 11.2(2). The exhibits noted under a. above also evidence violations as here admitted and found. Violations are particularly evidenced by CX 30 and 32 and Travers, Tr. 179).[37]

c. To use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as is required in the case of a credit sale by Section 226.8(c)(1) of Regulation Z (Admitted, PPSI Answer 11.2(3); Also evidenced by CX 7 and 9).

[41] Respondents have objected to the admission of CX 7 and 9 as these two exhibits were not signed by the applicants, contending that there is no indication of an executed credit contract. While not signed by the applicants, CX 7 and 9 are as valid applications for the loans as CX 3, 4, 6, 10-15, 17, 18, 21-23, 25-30 and 32-36, which are so signed. CX 7 and 9 are loan application forms which provide a space for the signature of the agent or broker, but not for the insured-applicant. The form itself provides that the application is made on behalf of the insured[38] who is named in the application and reveals that the application is accompanied by the insured's check or money order payable to the order of M. V. Service, Inc., which represents the

[37] Respondents contend that CX 30 and 32 are instances where PPSI followed instructions of Rhode Island authorities not to show annual percentage rates in excess of 21 percent (the normal limit in Rhode Island without violating usury laws) in instances where the finance charge was under $10.00 (Thornton, Tr. 179-180; RX 1). As acknowledged by respondents, however, (Br. 19), state rulings inconsistent with federal law are superseded by federal law.

PPSI has alleged that failure accurately to disclose the percentage rate as required by Section 226.8(b)(2) of Regulation Z were overstatements, not for the purpose of circumvention or evasion of disclosure requirements and, hence, pursuant to Section 226.8(h) of Regulation Z, are not a violation of the regulation. The exhibits and testimony noted above, however, reveal (1) failures to make any annual percentage rate disclosures and (2) understatements of the annual percentage rate.

Thornton testified that annual percentage rates disclosed as 21 percent were actually as high as 40, 48, 50 or 60 percent (Tr. 179). CX 30 and 32, which disclosed 21 percent annual rates, should have revealed true rates of 50 and 90 percent, respectively (CX 52, 53).

[38] William P. Thornton, General Counsel, Corporate Secretary and member of the Board of Directors of PW (Tr. 134), considers that, in some instances, the broker or agent is the agent of the insured (Tr. 225).

downpayment and all matured payments; and that a copy of the application has been retained by the insured. It is clear, therefore, that an insured has made as valid and binding an application for credit on the CX 7 and 9 type application form as he has on others in the record, subject only to approval by PPSI.

The CX 7 and 9 type form does not use the term "cash price" to describe the purchase price of the transaction. CX 9 being dated July 13, 1971, and CX 7 being dated November 16, 1972, it is obvious that this deficient form was in use for an extended period of time. There is no reason not to believe that many such forms were utilized over a substantial period of time and that many such applications were accepted.[39] In any event, as noted above, [42] the violation has been admitted.[40]

d. Failed to use the term "cash downpayment" to describe the downpayment in money as is required in the case of a credit sale by Section 226.8(c)(2) of Regulation Z (Admitted, PPSI Answer 11.2(4); violation also evidenced by CX 3, 4, 6, 7, 9-15, 17, 18, 21-23, 25-30 and 32-36).

e. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as is required in the case of a credit sale by Section 226.8(c)(3) of Regulation Z (Admitted, PPSI Answer 11.2(5); violation also evidenced by CX 3, 4, 6, 7, 9-15, 17, 18, 21-23, 25-30, 32-36; RX 2; Thornton, Tr. 176).[41]

Respondents point out that the enumerated disclosures required by Section 226.8(c) of Regulation Z are prefaced by the phrase "the following items, *as applicable,* shall be disclosed." (Emphasis added.) Respondents argue that since the "amount financed" is disclosed and this amount is exactly the same as the "unpaid balance of cash price," there would be no point in making the same disclosure again—that the requirement of Section 226.8(c)(3) is not *applicable.*

I do not so read Section 226.8(c). It is well recognized that the requirements of Regulation Z are intended to provide credit disclosures in a uniform and complete manner so that borrowers may get

[39] Respondents assert (Br. 22-23) that the CX 7 and 9 form was printed May 1969 (a fact not apparent on the exhibits as respondents state), prior to the July 1, 1969 effective date of Regulation Z, so that there is no basis for inferring that this type application was used or accepted after Regulation Z became effective. These documents, however, dated in 1972 and 1971, respectively, were uncovered in PPSI's files and are authentic (Tr. 42, 47-49, 56). When applications were unacceptable, they would be returned to the agent (Iavelo, Tr. 91-92, 95-97, 106-107). Further, the preparation of the form so close to the effective date of Regulation Z gives rise to the inference that it was prepared in contemplation thereof.

[40] Paragraph Eleven of the complaint very clearly alleges failures to comply with requirements of Regulation Z subsequent to July 1, 1969, the effective date thereof. Respondents cannot, at this late date, attempt to avoid the effect of admissions of failure to comply with such requirements by asserting, as they have (Br. 23 n. **), that they might have been admitting to omissions in forms prior to July 1, 1969.

[41] Downpayments were always cash, usually in the form of checks (Iavelo, Tr. 92-93, 101).

all of the information to which they are entitled and so may more easily compare the terms of one credit offer with that of another. Information as to "unpaid [43] balance of cash price" and "amount financed" are both applicable to the credit transactions here involved.[42] If creditors were to be allowed to choose which of the terms to use when disclosing required information, as PPSI has done,[43] the purpose of Regulation Z would be defeated.

f. Failed to use the term "amount financed" to describe the amount of credit extended, as is required in the case of a credit sale by Section 226.8(c)(7) of Regulation Z (Admitted, PPSI Answer 11.2(6); evidenced also by CX 7 and 9).[44]

g. Failed to use the term "finance charge" to describe the sum of all charges, as required by Section 226.4 of Regulation Z to be included therein, as is required in the case of a credit sale by Section 226.8(c)(8)(i) of Regulation Z (Admitted, PPSI Answer 11.2(7); evidenced also by CX 7 and 9).[45]

h. Failed to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as is required in a credit transaction by Section 226.8(b)(3) of Regulation Z (Admitted, PPSI Answer 11.2(8); evidenced also by CX 7 and 9).[46]

[44] i. Failed to disclose the "deferred payment price" as described in Section 226.8(c) (8)(ii) of Regulation Z and as is required in the case of a credit sale by that Section (Admitted, PPSI Answer 11.2(9); evidenced also by CX 3, 4, 6, 7, 9-15, 17, 18, 21-23, 25-30 and 32-36).[47]

j. Failed to make all disclosures required by Regulation Z clearly, conspicuously, and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

The violation of Section 226.6(a) of Regulation Z follows from the violations recited above in Findings 37a-i.

The failures to conform with the requirements of Regulation Z, as recited in Finding 37 above, constitute violations of Sections 226.6(a), 226.8(b) and 226.8(c) of Regulation Z, as indicated in such finding, and hence are violations of the Truth in Lending Act and, pursuant to

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[42] This conclusion finds support in Federal Reserve Board Public Position Paper No. 370, July 7, 1970 (Truth in Lending Manual, Vol. II, p. E 243).

[43] Until preparation of RX 2 in June 1973, PPSI's forms used neither the term "unpaid balance of cash price," as required by Section 226.8(c)(3), nor the term "deferred payment price," as required by Section 226.8(c)(8)(ii). (See Finding 37i, *infra.*) When William Thornton, Jr. prepared the revised form RX 2 in June 1973, *he elected* to include the term "deferred payment price" as preferable to use of the term "unpaid balance of cash price" (Thornton, Tr. 175, 215).

[44] See discussion of CX 7 and 9 under Finding 37c. above.

[45] See discussion of CX 7 and 9 under Finding 37c. above.

[46] See discussion of CX 7 and 9 under Finding 37c. above.

[47] Findings 37a-i, expanded by discussion and record citations, are derived from Finding 21 of the undersigned's partial summary decision of May 27, 1976.

Section 108(c) of that Act, 15 U.S.C. 1607(c), constitute violations of the Federal Trade Commission Act.

LIABILITY OF RESPONDENT PROVIDENCE WASHINGTON INSURANCE COMPANY

38. As already established (Finding 11), PPSI is wholly owned by PW through PW's wholly-owned subsidiaries Motor Vehicle Casualty Company and York Insurance Company. PW, in addition, owns Western Alliance Insurance Company, Providence Lloyds (at one time called Texas Casualty Insurance Co.), a non-incorporated insurance organization, Providence Washington Insurance Company of Alaska, and Providence Washington General Agency of Alaska. All of these companies together with Providence Washington Life Insurance Company, which at one time was a subsidiary of PW but was transferred to another corporation for tax reasons, are known as the "Providence Washington Group." The Providence Washington Group has no legal entity. It is just a grouping of companies that do business together in the sense that their facilities are offered in a package to insurance agents of PW (Thornton, Tr. 139-142, 155, 222).

[45] 39. Booklets promoting PPSI's premium financing service are distributed to PW's agent-brokers. The covers of these booklets list a number of the insurance companies in the Providence Washington Group (including PW) and identify them as the Providence Washington Insurance Group. PPSI is described on the cover as "A Facility of the Providence Washington Insurance Group" (RX 2; Tr. 113).

40. M. V. Service, Inc. (PPSI) was acquired in 1963 by PW as part of a package deal along with three insurance companies: Motor Vehicle Casualty Company, Farmers Equitable Insurance Company, whose name was later changed to York Insurance Company, and Farmers Equitable Life Insurance Company. All were acquired from the same source (Thornton, Tr. 171).

41. PW was founded in 1799 and is the third oldest insurance company in the country. It writes just about every type of insurance written by a non-life company and operates in almost every state. PW was acquired by Gulf and Western Industries in the late 1960's. Gulf and Western transferred PW's stock (99.3 percent thereof) to Gulf and Western's subsidiary, Associates Corporation of North America. Later, in September 1974, PW's shares were transferred to Associates First Capital Corporation, which is the parent of Associates Corporation of North America (Thornton, Tr. 135-136, 142-143, 153-154).

42. PW and PPSI share a common management.

a. Deane S. Jaeger was President of PW from January 1, 1972 to

October 1974, and Chairman of the Board of Directors of PPSI from January 1, 1972 to October 1974 (Admission Nos. 1 and 2).

b. Fred L. Jaquith is a member of the Board of Directors of both PW and PPSI and has served in these capacities from January 1, 1972 to October 1974 (Admission Nos. 3 and 4).

c. James R. Thwing is a member of the Board of Directors of both PW and PPSI and has served in these capacities from January 1, 1972 to October 1974 (Admission Nos. 5 and 6).

[46] d. Christopher F. Kempf is, and has been since September 20, 1971, a Senior Vice President of PW (Admitted, PW Answer 1.3); is, and has been since at least January 1, 1972, President of PPSI (PPSI Answer 1.3; Admission No. 9); is, and has been from January 1, 1972 to October 1974, a member of the Board of Directors of PPSI (Admission No. 8); and is, and has been from January 1, 1972 to October 1974, a member of the Board of Directors of PW (Admission No. 7).

e. At least from January 1, 1972 to October 1974, there was a direct line of authority from the President of PW to the office manager of PPSI, to the extent that Deane S. Jaeger, President of PW, was, between January 1, 1972 and October 1974, the immediate supervisor of Christopher F. Kempf, Senior Vice President of PW (Admission No. 11), who in turn, during the period of time from January 11, 1973 to October 1974, as President of PPSI, was the immediate supervisor of Frank Iavelo, Office Manager of PPSI (Admission Nos. 19 and 20).[48]

43. PW and PPSI share the same address at 20 Washington Place, Providence, Rhode Island (Findings 8 and 9, *supra*). The building is a four-story affair. PW usually accommodates at least one other tenant. The only designation on the outside of the building is Providence Washington Insurance Company. There is a central reception hall but no directory indicating where anything else is in the building. One who signs in and gets a visitor's pass ascertains from the receptionist where the various departments of PW are.[49] PPSI is located in an area which is part of one floor that is set apart from other areas by a six-foot high partition with an identifying sign on it. This is where its business was transacted (Thornton, Tr. 203-204).

[47] 44. PW and PPSI shared a common mailroom.[50] PPSI also utilized PW's computer which was operated by PW personnel. PPSI had five employees, in addition to the General Manager, in its

[48] Finding 42 reflects Finding 10 of the May 27, 1976 order granting partial summary decision.

[49] Witness Iavelo testified that there was a directory type sign in the lobby of the building which identified where each department of PW was located and also listed PPSI (Tr. 103).

[50] PPSI would be billed monthly for its share (Iavelo, Tr. 82-83).

Providence, Rhode Island office, whose payroll and personnel records were maintained by PW. PPSI employees were also covered by the PW retirement plan. The employees of PPSI were paid by checks drawn on the account of PW through the bookkeeping department of PW. While PPSI had a different phone than that of PW, the phone was billed through PW. PPSI would make reimbursement. PPSI was also billed for a rental charge (Iavelo, Tr. 82-83, 85-86, 87, 89, 90, 104).

45. Thornton has testified that PPSI had money available for insurance premium loans through some capital of its own and some earned surplus, but that mostly it utilized borrowed funds from banks and also borrowed money from Associates Corporation of North America, the parent of PW (Tr. 167-168). A September 18, 1974 memorandum from Deane S. Jaeger, then President of PW and Chairman of the Board of PPSI, states that funds used by PPSI have been borrowed from Associates Corporation of North America (RX 3).

46. PPSI's financing services were promoted through PW offices and PW field representatives. As these PW representatives would go from agent to agent trying to induce them to place their better insurance business with PW, they would also try to press them to utilize PPSI's services (RX 3; Thornton, Tr. 168).

47. James F. Travers has been a full-time employee of PW for 27 years. In 1971, he was approached by the general manager of PPSI and was requested to help compose form letters for use by PPSI to aid in their collection efforts. At that time, Travers was Secretary of PW. The collection letters were prepared by Travers in conjunction with the general manager of PPSI. Travers allowed his name and signature to appear on the letters and the telephone number which appears thereon is that of a telephone located in Travers' office on the premises of PW. Service of that telephone was billed to and paid by PW. For the first few months, Travers would sign each letter. Subsequently, pre-signed letters were used. When a recipient of a letter called Travers on the telephone, he was authorized to grant an extension of time for making payments or agree to a settlement of the account for a lesser [48] amount. Copies of collection letters were sent to Travers so he could refer to them when called by recipients thereof. (Admission Nos. 13 and 14; Stipulation Nos. 9 and 10; Travers, Tr. 117-118, 120-122, 129-130, 132; and see Findings 23, 24, 25 and 26).

48. When Travers started working with the PPSI general manager to formulate the letters, Travers notified his immediate supervisor James R. Thwing, Vice President of the Claims Department of PW, and Mr. Thwing said it was a fine project. Thwing was also aware of the arrangement under which letters went out, calls were received by

Travers and Travers reached working agreements with the alleged debtors (Travers, Tr. 118-119, 124).

49. Travers spoke with the general manager of PPSI after learning that the Federal Trade Commission had submitted a proposed consent decree covering the practice with the letters. Travers told the general manager to stop using the letters and their use was stopped (Travers, Tr. 126, 130).

50. William P. Thornton was employed by Associates Corporation of North America, the parent of PW, in August 1972 to serve as counsel for PW and, in that capacity, to attend to the legal needs of PW and its subsidiaries, including PPSI and other members of the Providence Washington Group. He was the only attorney on the scene in Providence. After his arrival, he saw the Travers collection letters and was asked to substitute his name for Travers'. He refused since he did not want to get involved in collecting small amounts and answering the phone. As part of his duties, either late 1972 or early 1973, he reviewed the forms and practices of PPSI. He discovered what he considered to be shortcomings on the forms and brought them to the attention of PPSI personnel. He prepared a revised form, RX 2, in June 1973, which effected various changes. He discovered a particular practice that raised difficulties and worked out a procedure with PPSI which he believed would solve the problem. He also discovered the practice of using the annual percentage rate of 21 percent on Rhode Island finance agreements when in fact the true annual percentage rate was much higher. He directed the general manager of PPSI to stop the practice and to start disclosing the accurate annual percentage rate. When the investigator of the Federal Trade Commission came to the PPSI premises in the summer of 1973, it was Thornton who opened the PPSI files to him and arranged to have copies made of whatever he wanted. During the period in question, Thornton **[49]** was paid by mail by Associates Corporation of North America. In January 1974, Thornton became Secretary of PW and in September 1974, he became General Counsel of PW (Thornton, Tr. 134-139, 143-145, 147-148, 171-176, 179, 187; Admission Nos. 23 and 24).

Discussion

In *P. F. Collier & Son Corp.* v. *FTC,* 427 F.2d 261, 267 (6th Cir.), *cert. denied.,* 400 U.S. 926 (1970), the court stated, "* * *[W]here the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute."

After sustaining Commission findings to the effect that the parent exercised actual control over the day-to-day policies and operations of its subsidiaries, the court made the following alternative holding (427 F.2d at p. 270):

> In the alternative, however, the law is clear that where a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb the illegal trade practices, active participation by it in the affiars of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed.

In *Beneficial Corp.*, 3 CCH Trade Reg. Rep. ¶20,959 (1975) [86 F.T.C. 119], the Commission applied the principles enunciated in *P. F. Collier & Son Corp.* to hold a parent company vicariously liable for the acts and practices of its subsidiaries. In so doing, it examined the pattern and framework of the whole enterprise which disclosed, *inter alia,* the sharing of a common management, the exercise by the parent of financial control over the affairs of the subsidiaries (including the making of funds available to the subsidiaries to make consumer loans), the provision of services by service subsidiaries, the holding out by the subsidiaries of themselves as being part of a single organizational entity along with the [50] parent, trading by the subsidiaries on the name and goodwill of the parent, establishment by the parent of a retirement plan for the employees of the subsidiaries, and use by the subsidiaries of an advertising slogan of the parent.

Findings 38-50 establish, in substance, all of the above-noted elements relied upon in *Beneficial Corp.* to hold the parent corporation vicariously liable for the challenged acts and practices of the wholly-owned subsidiary. Without belaboring the findings already made, the pattern and framework of the entire enterprise, including the relationship between PW and its personnel and PPSI, even more strongly evidences the latent power of PW to control the acts and practices of PPSI.

It is held, therefore, that PW is vicariously responsible for the acts and practices of PPSI.

Respondents have argued that, to the extent PW may be held liable for the activities of PPSI, this would, in effect, be a finding that PW engaged in financing insurance premiums as a part of its own business of insurance. This is not so. Based upon the pleadings and evidence, the findings are that PPSI, not PW, engaged in financing insurance premiums; and that PPSI, not PW, violated the Federal Trade Commission Act, the Truth in Lending Act and Regulation Z in the various particulars stated. Further, PPSI has financed insurance premiums paid to other insurance companies and has acted to collect outstanding debts owed to PPSI arising from such other financing (p. 10, *supra*). Such situations are not remotely connected with PW's business of insurance. PW is simply being held vicariously liable for the acts and practices of PPSI for the reasons given above.

As the Commission ruled in *Beneficial Corp.* (at p. 20,814 [86 F.T.C. at 159]), in finding a parent corporation vicariously liable for conduct of its subsidiary, it was not holding "that the subsidiary is a mere tool and its corporate entity a mere fiction."

LIABILITY OF CHRISTOPHER F. KEMPF

51. Christopher F. Kempf is currently Senior Vice President and a director of PW and has been employed by PW for over 25 years. He has been President of PPSI since September 1971, prior to which time he had no experience in premium financing (Kempf, Tr. 229-232).

[51] 52. When Kempf became President of PPSI, he was also a director of three or four PW regional offices. He allocated between 5 and 10 percent of his time to PPSI and the remainder of his time to his position as an officer of PW (Kempf, Tr. 232).

53. While Kempf was in charge of PPSI operations on a general basis and had final authority on matters of substance or policy, he was not involved on a day-to-day basis (Iavelo, Tr. 86; Thornton, Tr. 146, 170; Kempf, Tr. 246).

54. When Mr. Kempf became President of PPSI, Russell Bray was a Senior Vice President and General Manager of PPSI. He was replaced by Frank Iavelo as general manager of the company. Bray was General Manager of PPSI from approximately 1970 to June 1973. Iavelo was General Manager from June 1973 to November 1974. Bray and then Iavelo ran the operations of PPSI (Iavelo, Tr. 77; Travers, Tr. 127-128; Thornton, Tr. 170; Kempf, Tr. 232-233).

55. The collection letters (CX 37 and 38) were the idea of Russell Bray and were drafted by Russell Bray and James Travers (Travers, Tr. 117-118).

56. Kempf did not participate in the preparation or use of collection letters nor in any followup activities (Iavelo, Tr. 82-84; Travers, Tr. 120-122, 126, 128).

57. The PPSI General Manager (Bray or Iavelo) was in charge of setting up, approving or disapproving premium finance applications and agreements (Iavelo, Tr. 78, 88; Kempf, Tr. 245).

58. PPSI employees were under the supervision of the general manager (Iavelo, Tr. 82-85).

In consideration of the foregoing findings (51-58), there is no basis for holding Christopher F. Kempf liable for the unlawful activities here found either in his individual capacity or as a named officer of respondent corporations.[51] [52]

DISCONTINUANCE OF PRACTICES AND WITHDRAWAL FROM BUSINESS

Respondents contend that they have discontinued the practices complained of and that they have withdrawn from the business of premium financing with no likelihood of reentry, so that no cease and desist order is warranted.

59. PPSI withdrew from the premium finance business effective October 31, 1974, and terminated the employment of Iavelo, the premium finance specialist. This followed a deliberate business decision to do so made without relation to the Commission's investigation of PPSI, and was based upon financial considerations, including low profits and losses, the necessity to expend additional capital to beef up PPSI personnel, stiff competition, high interest rate levels and opportunities to invest needed capital in more productive endeavors (Thornton, Tr. 186, 205-207; Kempf, Tr. 233-236, 241; RX 3, 4, 5, 6, 8).

Respondents argue from the above that there is no likelihood of PPSI or any other subsidiary or affiliate of PW entering the insurance premium financing business again; that the same reasons which influenced withdrawal from the business would preclude reentry, particularly now since PPSI no longer has its experienced personnel[52] and would face the costs not only of continuing a going enterprise but of starting up again (Br. 12-14).

60. I do not agree with respondents' contentions. Most of the major insurance companies have subsidiaries that engage in insurance premium financing (Thornton, Tr. 211). PW is an established, major, nationwide insurance company (Finding 41).[53] It has had a wholly-owned subsidiary (PPSI) operating as an insurance premium finance company from 1963 until October 31, 1974 (Thornton, Tr. 171). It is to PW's and PW's agents' financial advantage to have insurance financing available [53] (Finding 1; Thornton, Tr. 195-196).

[51] Complaint counsel did not submit any proposed findings as to the responsibility of Christopher F. Kempf and their proposed order does not name this respondent.

[52] These "experienced personnel" in the Providence office consisted of the General Manager and five "girls" whom he supervised in performing clerical and routine type functions (Iavelo, Tr. 77, 85, 87, 89, 91-92, 95-96, 100).

[53] The PW group had a projection of $85 million of insurance to be written in 1975 and expects to write $60 million of insurance in 1976 (Thornton, Tr. 153-154).

PW has entered a special contractual arrangement with AFCO, the largest company in the insurance premium field, to arrange for financing in lieu of PPSI. Under this contract, PW is required to make different unearned premium payments to AFCO than it would to any other premium finance company (Thornton, Tr. 226).

61. Under all of these circumstances, it cannot be deemed unlikely that, with a change in economic conditions, PW may reevaluate its economic priorities and have a subsidiary engage in insurance premium financing as do most of its major competitors. There has been no decision to dissolve PPSI (Thornton, Tr. 226); and even if PPSI were dissolved, PW would not be precluded from forming a new corporation.[54]

As for PPSI's asserted lack of capital to begin anew, PPSI has financed its past operations with funds borrowed from Associates Corporation of North America, the parent of PW (Finding 45). Neither should it have difficulty in finding qualified personnel, since there are hundreds of premium finance companies in the field and insurance premium loans are also made by banks and other financial institutions (Finding 8).

62. From 1971 until termination of their use in August 1974, some 1,500 to 1,800 of the Travers collection letters (CX 37, 38) were sent annually (Finding 28). The Commission's investigation at PPSI's place of business commenced in July or August 1973, at which time the Commission investigator secured copies of the collection letters in question (Iavelo, Tr. 79-81). These letters were not discontinued, however, until August 1974, when respondents were proffered a proposed consent agreement by Commission personnel which respondent personnel understood to advise that their collection procedure violated the Federal Trade Commission Act (Iavelo, Tr. 102; Travers, Tr. 124-125).

63. Travers' testimony that there was no likelihood that this type of collection form letter or a similar form would be used in the future was limited to his own personal position that he would not involve himself in something that had been questioned as improper or illegal (Tr. 130-131). However, when Thornton, [54] counsel for PW and legal advisor of PPSI, had an opportunity to examine the Travers letters, he did nothing to stop their use. He was simply interested that his name not be used in collecting small amounts and that he not be bothered with answering the phone (Tr. 143-145).

Thus, the letters were not discontinued until after the hand of the Federal Trade Commission was on the shoulder of the violator, a

[54] Indeed, this is a reason for including PW in the order that is to issue.

circumstance which will not support a conclusion that the practices will not be resumed. *Zale Corp.,* 78 F.T.C. 1195, 1240 (1971).[55] "* * *[T]he fact that illegal conduct has been discontinued does not render a controversy moot * * * [case citations omitted], nor does it cast upon complaint counsel the burden of proving that the practices will be resumed." *Skylark Originals, Inc.,* 80 F.T.C. 339, 354 (1972). Respondents have failed in their burden of establishing that the practices will not be resumed. Travers' testimony noted in Finding 63 falls far short. See *Cotherman* v. *FTC,* 417 F.2d 587, 595 (5th Cir. 1969); *Coro, Inc.* v. *FTC,* 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965).

Respondents (Br. 17-18) take the position that they came into compliance with the Truth in Lending Act in June 1973, when they utilized the revised form RX 2. RX 2 was the Rhode Island form printed in June 1973. It was used as a prototype for forms prepared for other states. The forms were in the process of being prepared when the Commission investigator called on PPSI in July or August 1973 (Iavelo, Tr. 77, 79-81, 107; Thornton, Tr. 107-08; 174).

As already found, however (Finding 37e), RX 2 was deficient in that it did not use the term "unpaid balance of cash price" to make necessary disclosures. But even beyond that, respondents have admitted in their answers that certain agreements and forms of agreements used by PPSI employees from July 1, 1969 until October 1, 1974 were deficient under Regulation Z (Finding 34). This answer admission coupled with the averment in the answers that failure to disclose "unpaid balance of cash price" was not a violation of Regulation Z, constitutes [55] an admission that there were other violations of Regulation Z extending until October 1, 1974. Respondents' answers constituting pleadings under which the hearings were held cannot, at this late date, be circumvented by respondents.

Respondents adduced testimony to the effect that broker-agents were advised to return all outstanding premium finance forms and replace them with the RX 2 type revision (Thornton, Tr. 176). From this they argue that the unauthorized utilization of prior defective forms was the cause of any violations subsequent to dissemination of RX 2. All forms, however, were sent to PPSI for review and acceptance (Findings 2, 36). PPSI, therefore, had the opportunity to review any defective application forms and return them to the agent-brokers for completion of up-to-date forms. If, in fact, any of the admitted violations subsequent to June 1973 were caused by the

[55] "Certainly the mere discontinuance of an offending practice in the face of inquiry by a law enforcement agency can under no circumstances be argued to amount to a defense." *Fedders Corp.,* Dkt. 8932, 3 CCH Trade Reg. Rep. ¶20,825, at 20,693 (1975) [85 F.T.C. 38 at 72].

utilization of superseded forms, PPSI cannot escape responsibility. The forms were sent to PPSI for review and acceptance and PPSI bears full responsibility for accepting such deficient forms. Further, many of the violations on forms executed prior to June 1973, consisted of omissions to fill in particular informative blanks or filling them in incorrectly. The utilization of a revised form would not cure this type of a violation.

In summary, respondents have admitted to failures to comply with specific provisions of Sections 226.8(b) and (c) of Regulation Z. These admitted failures, supplemented by evidence thereof, have been found to constitute violations of Regulation Z. Respondents have further admitted that violations of Regulation Z continued practically until the time PPSI stopped engaging in the business of premium financing. Finally, it has been found that respondents have failed to establish that there is no likelihood that the business will be resumed.

DISCUSSION OF ORDER

Respondents assert that the order should be limited to the specific violations proved. To the contrary, as stated in *P.F. Collier & Son Corp.* v. *FTC,* 427 F.2d 261, 276 (6th Cir.), *cert. denied,* 400 U.S. 926 (1970), "It is well established that 'the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices', *Jacob Siegal Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611 * * * (1946) and that, 'it must be allowed effectively to close all roads to the prohibited goal so that the order may not be bypassed with impunity.' *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473 * * * (1952). So long as there is a 'reasonable [56] relation' between the remedy and the unlawful practice, the courts will not interfere."

As to Count I, respondent corporations should not be permitted to misrepresent that delinquent accounts have been, or will be, referred to an attorney for institution of legal action, regardless of whether the attorney is an employee of respondents or an independent practitioner. Neither should respondents be permitted to misrepresent that delinquent accounts have been, or will be, referred to any third party, attorney or not, for collection action.

PPSI has not taken action in the past to institute or to cause legal proceedings to be instituted in the collection of delinquent accounts. It has, however, referred delinquent accounts to collection agencies.

Representations as to turning accounts over to attorneys and institution of legal action, therefore, are being prohibited outright.[56] Respondents are being ordered not to misrepresent that delinquent accounts have been or will be referred to a third party for collection action.

As to Count II, Regulation Z having been violated by reason of failure to make certain disclosures required by Section 226, and in the manner required, it is appropriate to prohibit the withholding of other Section 226 disclosures and to insure that all disclosures are made in the required manner. *Virginia Mortgage Exchange, Inc.*, Dkt. 9007, 87 F.T.C. 182, Feb. 10, 1976, at p. 9.[57]

In view of the holding (pp. 27-28, *supra*) that the sale of insurance on credit by PW in Texas is part of the "business of insurance" within the meaning of the McCarran-Ferguson Act [57] regulated by the state, the order excludes PW's activities in connection therewith. There is no need to consider whether such an exclusion would be appropriate with respect to other states, since Texas is the only one in which PW sells insurance on credit.[58]

The theory under which this case was tried was that PPSI, in connection with the extension of consumer credit, as "consumer credit" is defined in Regulation Z, violated certain disclosure requirements of that regulation; and that PW should be held vicariously liable for PPSI's violations. PW was not charged with having violated Regulation Z by reason of its activities in arranging for the extension of consumer credit. The proposed order submitted by complaint counsel, however, would, *inter alia,* apply in connection with any "arrangement for the extension of consumer credit."

When PPSI stopped extending premium financing, PW arranged for AFCO, the largest premium finance company in the field, to carry the financing of PW insureds. PW agents were advised of this arrangement and it was recommended that financing be handled with AFCO (RX 7, 8; Thornton, Tr. 207-208, 226; Kempf, Tr. 243-244). Under complaint counsel's proposed order, PW could be held liable for arrangements made by their agents in securing insurance premium financing by AFCO or any other company. This goes beyond the theory under which this case was tried against PW.

Further, steps taken by an insurance company to arrange for

[56] If changed conditions of fact should justify changing an outright prohibition, respondents may petition the Commission for such change under Section 3.72(b) of the Commission's Rules.

[57] This also disposes of respondents' contention (Proposed Findings and Conclusions, p. 27) that any order should be limited to the form of the agreement used. Further, respondents' violations have gone beyond the utilization of improper forms. They have included instances where information was omitted where spaces for disclosure were provided, as well as instances where incorrect information was inserted.

[58] Again, if changed conditions of fact should justify expanding the exclusion, PW may petition the Commission for such expansion under Section 3.72(b) of the Commission's Rules.

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others to extend premium financing may well be deemed a normal and reasonable business effort, part of the business of insurance within the meaning of the McCarran-Ferguson Act.[59]

[58] Accordingly, the provision under discussion appearing in complaint counsel's proposed order does not appear in the order being issued.[60]

Conclusions

1. The Federal Trade Commission has jurisdiction over respondents and the practices of PPSI as herein found.

2. The aforesaid acts and practices of respondent PPSI have violated the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), the implementing regulation promulgated thereunder (Regulation Z, 12 C.F.R. 226) and the Federal Trade Commission Act (including Section 5 thereof (15 U.S.C. 45)), in the manners found herein.

3. The aforesaid acts and practices of respondent PPSI are not exempt from Federal action by reason of the McCarran-Ferguson Act (15 U.S.C. 1011, *et seq.*); although the acts and practices of respondent PW performed in connection with the sale of insurance in Texas are so exempt.

4. Respondent PW is vicariously liable for the aforesaid acts and practices of respondent PPSI.

5. There is no basis for holding respondent Christopher F. Kempf liable for the aforesaid acts and practices either in his individual capacity or as a named officer of respondent corporations.

6. The aforesaid acts and practices, as herein found, were and are to the prejudice and injury of the public and of respondent PPSI's competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in or affecting commerce within the intent and meaning of the Federal Trade Commission Act. They also constitute violations of the Truth in Lending Act and Regulation Z promulgated thereunder.

7. The proceeding is in the public interest and it is in the public interest that the following order issue. [59]

ORDER

I

It is ordered, That respondents Providence Washington Insurance

[59] Any such McCarran-Ferguson Act exemption, however, would not extend to a third party, not engaged in the business of insurance, which extends credit; nor would such exemption extend to the parent corporation vicariously liable for the activities of the subsidiary finance company under the circumstances here established, regardless of the fact that the parent happens to be an insurance company.

[60] Neither did it appear in the Notice Order accompanying the complaint.

Company and Providence Premium Service, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of, or attempts to collect, accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing by any means, directly or by implication, that delinquent accounts have been or will be referred to an independent, third-party attorney or to any attorney for institution of legal action.

2. Representing by any means, directly or by implication, that:

(a) Respondents are prepared to institute, or cause to be instituted, legal proceedings in the collection of delinquent accounts.

(b) Legal action with respect to an allegedly delinquent account has been, or is about [**60**] to be, or may be initiated.

3. Misrepresenting by any means, directly or by implication, that any delinquent account has been or will be referred to any third party for collection action.

II

It is further ordered, That respondents Providence Washington Insurance Company and Providence Premium Service, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*) do forthwith cease and desist from:

1. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

[**61**] 3. Failing to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.

4. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to use the term "unpaid balance of the cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

6. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

7. Failing to use the term "finance charge" to describe the sum of all charges, as required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

8. Failing to use the term "total of payments" to describe the sum of the payments scheduled to [62] repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

9. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8) (ii) of Regulation Z.

10. Failing to make all disclosures required by Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

11. Failing in any consumer transaction to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

Provided, however, that the foregoing provisions of Parts I and II of this order shall not apply to any extension of credit for payment of premiums afforded in connection with the sale of insurance on credit in the State of Texas where the creditor is the seller of the insurance; nor shall they [63] apply to the acts and practices of the seller of insurance in connection with the collection of, or attempts to collect, unpaid balances of premiums for such insurance sold in Texas.

It is further ordered, That the complaint against Christopher F. Kempf in his individual capacity and as a named officer of Providence Washington Insurance Company and Providence Premium Service, Inc. be, and it hereby is, dismissed.

It is further ordered, That respondent corporations deliver a copy of this order to cease and desist to all present and future personnel of respondents now or hereafter engaged in the consummation of any extension of consumer credit, other than an extension of credit in Texas exempted from the foregoing provision of this order, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent corporations notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

MAY 3, 1977

BY DIXON, *Commissioner:*

[1] Complaint in this matter was issued on November 24, 1975, charging respondents Providence Washington Insurance Company (hereinafter referred to sometimes as "PW"), Providence Premium Service, Inc. (hereinafter "PPSI"), and Christopher Kempf, individually and as an officer of said corporations with violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), and the implementing regulation promulgated thereunder (Regulation Z, 12 C.F.R. 226). The complaint alleged in particular that PW and PPSI had used deceptive practices in the course of collecting debts, representing that accounts had been referred to an independent, third-party attorney who intended to take legal action, when such was not the case, and that PW and PPSI had violated numerous disclosure requirements of the Truth in Lending Act in the course of financing insurance premiums.

[2] A brief trial was held before Administrative Law Judge (ALJ) Alvin Berman, who entered an initial decision sustaining the bulk of the complaint as to PW and PPSI, while dismissing the individual respondent. Judge Berman held that PPSI, a company engaged solely in the business of financing insurance premiums, had failed to make various required Truth in Lending disclosures and had used deceptive techniques in debt collection . He further held that PPSI was not immunized from liability by the McCarran-Ferguson Act (15 U.S.C. 1011, *et seq.*) because its challenged practices did not constitute the "business of insurance." Providence Washington Insurance Company was held vicariously liable since it owned and controlled the operations of PPSI. The Judge also rejected respondents' contention that the necessity for a remedial order was obviated by the fact that PPSI had discontinued the business of premium financing, and he accordingly recommended entry of an order to cease and desist.

This matter is before the Commission on the appeal of respondents PW and PPSI from the initial decision. In our view the initial decision deals ably with the points in contention and for the reasons indicated hereinafter is sustained, with minor modifications.

I. THE MCCARRAN-FERGUSON DEFENSE

The centerpiece of respondents' defense is their claim that the challenged practices are shielded from Commission scrutiny by the McCarran-Ferguson Act (hereinafter sometimes MFA). Respondents contend that PPSI's credit extension and debt collection activities are an inseparable adjunct to the "business of insurance," which MFA exempts from federal regulation to the extent that state regulation exists. The ALJ found to the contrary that insurance premium financing is a business of its own, distinct from the business of insurance at least when conducted, as here, by parties other than insurance companies.

The Commission affirms the ALJ's conclusion that insurance premium financing by a premium finance company, and the described practices in particular are not the "business of insurance" within the meaning of the McCarran-Ferguson Act. We do not reach the question of whether the same conduct, if undertaken by an insurance company, would be protected.

[3] A. FACTUAL BACKGROUND

The facts are largely uncontested. As the law judge observed, PPSI is a wholly-owned and controlled subsidiary of PW, engaged solely in the business of financing insurance premiums (I.D. 1).[1] When a customer of PW seeks to finance an insurance policy, the agent will suggest that PPSI can provide the money. If the customer enters into a financing agreement, it is forwarded for signature to PPSI, which then sends the loan proceeds to the insurance agent who deducts a commission and remits the balance to PW. PW, the insurer, considers the premium paid, and the debtor/policyholder makes required installment payments to PPSI, the lender. (Tr. 158-59; I.D. 2-4).[2] If those payments are not kept current, PPSI notifies the insured that it will effect [4] cancellation of the policy if remittance is not received by a certain date (typically a date within the period paid for by the previous installment). Upon failure to meet this deadline, PPSI, whose contracts confer authority to act as the policyholder's attorney-in-fact, sends a cancellation notice to the insurance company,

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[1] The following abbreviations are used herein:
I.D. — Initial Decision, Finding No.
I.D. p. — Initial Decision, Page No.
Tr. — Transcript of Testimony, Page No.
CX — Complaint Counsel's Exhibit No.
RX — Respondents' Exhibit No.

[2] The record indicates that in some instances PPSI also loaned money to pay for policies written by insurance companies outside the Providence Washington Insurance Group. (I.D. p. 10; Gilhooly Affidavit, dated May 11, 1976; RX 12)

with a copy mailed to the erstwhile insured. All unearned premiums are rebated to PPSI with any overage subsequently returned to the policyholder. (I.D. 2b; p. 26).[3]

It appears from the record that PPSI, like other premium finance companies which are subsidiaries of insurance companies was created principally to avoid the effect of state insurance codes which treat the payments due to an insurance company from a policyholder who is paying by installment as "non-admitted" assets. Except in Texas, non-admitted assets may not be counted by the insurer for the purpose of computing its surplus/premiums ratio, which in turn affects the volume of insurance the insurer is allowed to write. (I.D. 1). When the proceeds from a policy are received immediately from a lender, however, they are "admitted," even though the lender may be a wholly-owned subsidiary of the insurer. (Tr. 155-58; I.D. 1).

[5] While it appears that premium finance companies account for a large share of premium financing, other financial institutions have been attracted to this area of consumer credit.[4] As PW's General Counsel observed, "[t]he banks are interested in this business." (Tr. 212, I.D.8). Of the ten states which licensed PPSI, seven regulated it as an insurance premium financer,[5] and three classified it with lenders in general. None placed it in a category with insurance companies. (I.D. 7; p. 14)

B. LEGAL ISSUES

The McCarran-Ferguson Act provides in relevant part that

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That* * *the Federal Trade Commission Act, as amended, shall be applicable to the business

[3] In theory, as one witness observed, insurance premium financing should be a relatively safe business. By making the down payment sufficiently large, timing installments prudently, and canceling the policies of defaulting borrowers promptly, the lender can guarantee that the unearned premium will always exceed the balance due on the loan. (Tr. 159-160; I.D. 4). PPSI's extensive debt collection activities suggest, however, that theory is not always put into practice.

[4] For a related example *see, Cody* v. *Community Loan Corp. of Richmond Cty.*, No. 1863 (S.D. Ga. Feb. 4, 1976) describing a consumer finance company which originated a plan to sell its borrowers cancer insurance and finance the premiums from the proceeds of loans it provided.

[5] Of these, six states assigned insurance premium finance companies to insurance departments and commissioners and one, Massachusetts, supervised them through its Banks and Loans Division (RX 10C-L).

> of insurance to the extent that such business is not regulated by State law. [15 U.S.C. 1012]

[6] A threshold question is whether the activities challenged in this proceeding are part of the "business of insurance" as respondents contend, or the "business of financing" as complaint counsel and the ALJ maintain. If the latter, there can be no immunity; if the former, it must then be determined whether there exists state regulation sufficient to trigger the exemption.

The McCarran-Ferguson Act was passed in response to the Supreme Court's decision in *United States* v. *South-Eastern Underwriters Assn.,* 322 U.S. 533 (1944), which raised the spectre of pervasive federal antitrust encroachment upon what had previously been considered a state regulatory preserve, primarily involving insurance ratemaking. Congressional debate centered largely on the relationship between such ratemaking and the antitrust laws, and upon state taxation of insurance companies. *See SEC* v. *National Securities, Inc.,* 393 U.S. 450, 458-459 (1969). The legislative history thus sheds little light upon the present controversy, except perhaps to suggest that a somewhat limited range of activities was within its contemplation when Congress carved out the MFA exemption.

In *SEC* v. *National Securities, Inc., supra,* the Supreme Court sought to define the "business of insurance":

> The relationship between insurer and insured, the type of policy which would be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder* * *. [393 U.S. at 460]

[7] Difficulty arises where, as here, a transaction involves an insurance policy in some arguably incidental fashion, while partaking more substantially of activities of a sort not at all peculiar to insurance, and clearly subject to federal regulatory interests. As courts have recognized:

> *National Securities* indicates that the MFA is to be narrowly construed in the face of valid federal regulatory interests: accommodation of federal and state regulatory interests is to be

sought. [*SEC* v. *Republic National Life Insurance Co.*, 378 F. Supp. 430, 436 (S.D.N.Y. 1974)]

Applying these observations to the instant case, the ALJ concluded that what was principally involved here was the lending of money, and that the federal policy that money lending occur subject to various informative disclosures could not be thwarted by the fact that the money happened to be loaned to enable the borrower to buy an insurance policy. The judge also relied heavily on the fact that PPSI is not an insurer at all, but rather a finance company. [I.D. p. 27]

Respondents urge us to find that because PPSI's financing activities are inextricably intertwined with the insurance transaction it is covered by the MFA exemption, notwithstanding its indisputable characterization as a lender. We agree with respondents that the business of insurance need not necessarily be limited to the operations of insurance companies; and conversely many activities of insurance companies are not the business of insurance. *Compare Ben* v. *General Motors Acceptance Corp.*, 374 F. Supp. 1199, (D. Colo. 1974) with *Battle* v. *Liberty National Life Insurance Co.*, 493 F. 2d 39 (5th Cir. 1974), *cert. denied* 419 U.S. 1110 (1975) and *American Family Life Assurance Co.* v. *Planned Marketing Assoc., Inc.*, 389 F. Supp. 1141 (E.D.Va.1974). By the same token, however, it is clear that the activities of insurance companies are those most likely to involve the insurance business. Where MFA protection is sought for the activities of non-insurers, we think it especially critical that the transaction(s) in question be analyzed with precision, to ensure that the mere involvement of an insurance contract is not used to confer blanket immunity upon a wide range of activities that are not the business of insurance. *Peacock Buick, Inc.*, Dkt. 8976, Order Denying Petition for Reconsideration, March 2, 1976 [87 F.T.C. 379], 3 CCH Trade Reg. Rep. at 21,105 *aff'd*, No. 76-1287, (4th Cir., April 1, 1977).

[8] A central feature of the primary transaction under consideration here is that it does not involve relations between insurer and insured, *e.g.*, discussions concerning the details of a policy which may be issued, or the implementation of one which has been. The only issue in dealing with PPSI is how an insurance policy will be paid for. In soliciting the consumer's business, PW through PPSI is competing not at all with other sources of insurance, but rather with *other sources of money*, be they premium finance companies, banks, small loan companies or credit unions, and its conduct impinges upon competition within the financing industry rather than upon competitive forces within the insurance industry. *See Zelson* v. *Phoenix*

Mutual Life Insurance Co., No. 76-1197, slip op. at 7 (8th Cir. Feb. 4, 1977).

In deciding whether to take a loan from PPSI, the consumer must weigh the cost of that loan against the cost of money obtained from other sources. Nor is the consumer's only alternative a premium loan from a source other than PPSI. Money is money, whatever it may be used to buy. A consumer who doesn't like the terms of PPSI's loan may decide to buy the insurance policy with cash and make some other contemplated purchase on credit, or defer the acquisition of some item more expendable than insurance until credit conditions or the consumer's personal finances improve.

A consumer's ability to entertain the considerations described above depends, of course, upon access to information concerning the true costs of various sources of credit, and it was precisely such access which the Truth in Lending Act was designed to guarantee. 15 U.S.C. 1601; *see Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356 at 363-366 (1973). When a lender fails, as did PPSI on some occasions, to inform consumers of the annual percentage rate at which credit is being extended, (I.D. 37a) it engages in a practice with obvious implications for the business of financing, and one which undermines the federal interest in meaningful disclosure of the costs of credit. 15 U.S.C. 1601.

Similar observations are applicable to PPSI's debt collection activities, whose relationship to the business of insurance is confined to the fact that the purchase of an insurance policy (extinct by the time collection is attempted) has indirectly given rise to the debt. The mailing of dunning notices by a finance company certainly [9] has nothing to do with the relationship between insurer and insured, and indeed, we see nothing to distinguish the collection efforts of PPSI from those of creditors and collection agencies everywhere. *See American Family Life Assurance Co., supra,* at 1145. Once again, this category of activity is one as to which the federal interest in uniform regulation is longstanding.

The preceding discussion, of course, states only one side of the question. In considering this matter respondents have not allowed us to be unmindful of authority to the contrary, in particular the Seventh Circuit's decision in *Lowe* v. *Aarco-American, Inc.,* No. 76-1226 (7th Circuit June 22, 1976) and the district court decision in *Cochran* v. *Paco, Inc.,* 409 F. Supp. 219 (N.D. Ga. 1976). With all due respect, we must decline to follow these cases.[6]

[6] Respondents also cite the cases of *Gerlach* v. *Allstate Insurance Co.,* 338 F. Supp. 642 (S.D. Fla. 1972) discussed *infra,* and *Ben* v. *GMAC,* 374 F. Supp. 1199 (D. Colo. 1974), *Addrisi* v. *Equitable Life Assurance Soc. of the United*

(Continued)

[10] *Lowe* v. *Aarco-American, Inc.,* is a brief *per curiam* opinion. In support of its conclusion the court gave only this rationale:

> Contrary to the appellants' assertion, the "business of insurance" encompasses more than questions of the validity and enforceability of insurance policies or the limits of policy coverages. In a case very similar to the one before us, the statutory term was held to include also the setting of insurance rates and the terms for financing premiums as well as the disclosure of those terms. *Gerlach* v. *Allstate Insurance Co.,* 338 F. Supp. 642, 649-50 (S.D. Fla. 1972). [No. 76-1226, slip op. at 2.]

Our review of the case on which the *Lowe* court so heavily relied indicates that *Gerlach* addressed the question of premium financing only in dictum or at best as an alternative, and not carefully conceived justification for its disposition of the case. In fact the court stated early in its opinion:

> The transaction in this action[7] is not to be confused with the premium financing transaction, where the insured becomes obligated to a broker, bank, the issuing company or other creditor to pay the premium, or an indebtedness for premiums, and is contractually obligated to make payments* * *[338 F. Supp. at 647.] [11] When the court later turned to a discussion of the McCarran-Ferguson Act, it was almost as an afterthought:

> In view of the Court's finding that Allstate is not a "creditor" of plaintiff in a "consumer credit" transaction, a discussion of the McCarran Act and its application would not now be necessary for the determination of this suit. It will be discussed, however, in the event that the appellate court should find, contrary to this Court's holding, that Allstate's plan of installment premium payment is not part of its rate structure but is a "premium

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States, 503 F. 2d 725 (9th Cir. 1974), *cert. denied* 420 U.S. 929 (1975), and *Dexter* v. *Equitable Life Assurance Soc. of the United States,* 1975-2 Trade Cases, ¶60,601 (2d Cir. 1975). These latter cases involved the use of tie-ins to coerce the purchase of insurance and are inapposite here.

Sources reaching conclusions contrary to *Lowe* and *Paco* include various Federal Reserve Board letters, [Transfer Binder] (CCH) Consumer Credit Guide ¶¶30,041, 30,051, 30,176; and 30,406, and three commentators, D. Krischer, *"Truth in Insurance Premium Financing,* 30 Bus. Lawyer 969, 974-77 (1975); Comment, *The McCarran Act's Antitrust Exemption for "The Business of Insurance": A Shrinking Umbrella,* 43 Tenn. L. Rev. 329, 359 (1976) and Note, *The McCarran-Ferguson Act: A Time for Procompetitive Reform,* 29 Vand. L. Rev. 1271, 1283 (1976).

[7] The *Gerlach* transaction involved an installment payment plan offered by an insurance company. The court held that because each installment represented an agreement for future coverage which nonpayment and cancellation would prevent from accruing, no extension of credit would occur. This conclusion was bolstered by a finding that Allstate never sought to collect a deficiency from any policyholder whose account it had canceled for nonpayment. 338 F. Supp. at 647.

Such a situation is decidedly not present in the case of PPSI, which extends a loan to cover the entire cost of a policy and takes the contractual position that upon default it may declare the entire balance due and payable. (I.D. p. 11, n. 10; RX 10M). Moreover, PPSI did make efforts to collect deficiencies from defaulting borrowers.

> financing" arrangement, or in the event that the Court of Appeals' holding in *Mourning* v. *Family Publications Service, Inc.*, should be reversed by the Supreme Court.[8] [338 F. Supp. at 649.]

The opinion quoted part of *National Securities*, then noted that the Truth in Lending Act did not "specifically relate" to the business of insurance, and immediately proceeded to its conclusion:

> As the Supreme Court has made clear, the fixing of rates is a part of the "business of insurance." The next question, then, is whether there is state law regulating the fixing of insurance rates. The answer is in the affirmative. [*Id.*]

The court barely entertained the fundamental inquiry, *viz.*, whether the premium installment plan and the gratuitously included premium financing system were in fact aspects of the business of insurance. Instead it conclusively characterized these activities as "ratemaking," which indisputably falls within the exemption. That done, [12] a court could legitimately find state regulation sufficient to displace federal laws[9], but the characterization of financing as ratemaking seems a dubious premise from which to proceed.

We are not alone in doubting the applicability of *Gerlach*. In *Cochran* v. *Paco* itself the court reacted similarly:

> The plaintiff is correct in her assertion that *Gerlach* is not dispositive under the facts here. This case involves the somewhat more subtle question of where the "business of insurance" ends and the business of consumer finance begins. [409 F. Supp. at 221.]

The court in *Lowe* considered one other matter, after having settled to its satisfaction that premium financing was part of the business of insurance. It found that the Illinois Insurance Code had regulated the elements of the insurance business under discussion. But at the very end of the opinion the court added that:

> Since Illinois has regulated this aspect of the "business of insurance" in the same manner as would the Truth in Lending

[8] *Mourning* was *reversed*, 411 U.S. 356 (1973), and *vacated per curiam*, 488 F. 2d 979 (5th Cir. 1974), although, it is not clear whether the point for which it was here cited was explicitly rejected.

[9] One writer thinks the state and federal regulations could have been reconciled so as to avoid the application of the McCarran Act's supersedure mechanism, see Comment, *supra* n. 6, at 350. *See also Cody* v. *Community Loan Corp.*, No. 1863 (S.D. Ga. 1973), and *Jenkins* v. *Triangle Volkswagen*, No. C-74-199-D (M.D.N.C. 1975), cited in *Cochran* v. *Paco, Inc.*, 409 F. Supp. at 223.

> Act, there is no compelling reason to restrict the full sway of the McCarran Act in this case. [No. 76-1226, slip op. at 3.]

In the instant case, of course, not all states in which PPSI did business would provide their citizens the same protections as does the Truth in Lending Act. Under these critically different circumstances we believe the *Lowe* court might and should reach a different result.

[13] The second case advanced by respondents for the proposition that insurance premium financing is part of the business of insurance is the aforementioned *Cochran* v. *Paco.* While we agree with that opinion's rationale to a point, we think the district court overemphasized the premium financer's proximity to the insurance industry and erroneously relied on a state's definition of the business of insurance:

> Notwithstanding their demonstrated similarity to other finance companies subject to the Truth in Lending Act, premium financing companies play an integral part in the insurance transaction and the State of Georgia has therefore required licensing of such companies by the Commissioner of Insurance in a manner similar to the licensing of insurance companies * * *
>
> Thus, although the premium finance company performs much the same role as other finance companies, this role has been recognized by the state as forming an integral part of the insurer-insured relationship. [409 F. Supp. at 222.][10]

[14] On motion to alter or amend decision, the court amplified its theory in reaching the earlier decision. The result, it appears, was based at its core on an "impact" analysis:

> The plaintiff nevertheless seeks to convince the court that a premium financing company cannot be considered a part of the business of insurance because such a company has no control over the terms of an insurance policy, its reliability, or its cost. Rather, plaintiff argues, the company is merely a creditor, indistinguishable from other creditors, except for the fact that it has a power of attorney by which it may cancel the insured's policy.

[10] It has long been held that the meaning of "business of insurance" as used in the federal McCarran-Ferguson Act is a question of federal, not state law. *SEC* v. *Variable Annuity Life Insurance Co. of America*, 359 U.S. 65, 69 (1959).
In the instant case, moreover, resort to state characterizations for guidance yields little, since some states license premium finance companies through insurance departments while others do so through officials or departments concerned with banking or small loans. (See discussion *supra* at p. 5).

> Plaintiff's argument ignores the realities of the insurance business. Premium finance companies have experienced rapid growth in recent years because of the unwillingness of many insurance companies to sell certain forms of insurance through installment plans. The financing companies fill the gap by paying the insurance company the premiums in full and collecting the premium in installments from the insured. If the insured fails to pay the installments to the financing company, the result is the same as if he defaulted on payments to the insurer: the policy is canceled. Thus, although the finance company's activities have little effect on the insurance company's ability to pay on claims, they have considerable impact on the cost of the insurance, the terms of the policy, and the likelihood of the insured's recovery in accordance with the terms of the policy. This likelihood of recovery may be jeopardized not only by financing disagreements between the financing company and the insured, but also by a possible failure on the part of the financing company to make the required payment to the insurance company. Thus it is clear that the financing company is indeed a part of the business of insurance. (409 F. Supp. at 223)

We think it is far from clear that *all* the activities of the financing company are part of the "business of insurance," simply because one or a few of those activities may cause reverberations in the insurance world. Whatever its relevance, no evidence was presented here, nor cited in *Cochran* v. *Paco,* to support the proposition that premium financing has any measurable effect on the cost of insurance, the terms of the policy, or the likelihood of the policyholder's actual recovery. Only as to the last of these postulated effects does the contribution of premium financing seem to bear even a semblance of demonstrable relationship. As to this, it is hypothesized that because an additional party is introduced into the chain of premium payments, the possibility of disagreement or mistake grows and a policy may be inadvertantly terminated through the power of attorney vested in the finance company.

We do not dispute that the foregoing may occur, (although we have seen no evidence that it does) but we cannot agree that this possibility cloaks the entire operation of PPSI in the protective mantle of McCarran-Ferguson. Just as a small loan company's security interest in an automobile or a bank's deed of trust in a mortgaged house (see I.D. pp. 11-12, 24) does not convert these lenders into participants in the business of car selling or realty, neither does the right to "foreclose" on an insurance policy make an insurer or an insured out of a finance company. At most what it argues is that the particular act of canceling an insurance policy should be considered the "business of insurance." [11]

[16] In addition to the power of attorney to cancel insurance policies, respondents cite a list of factors which they consider to have an impact upon the business of insurance. (Respondents' appeal brief, at 16-18). We think these proffered features are also unpersuasive as dispositive indicia of the insurance business.[12] As the ALJ observed, "[T]he McCarran-Ferguson Act did not grant broad, general exemptions to businesses which might affect the business of insurance. The exemption was strictly limited to the business of insurance itself." (I.D. p. 23)

[17] For the foregoing reasons we must reject respondents' challenge to the initial decision. In our view, PPSI's activities, extending credit and collecting debts, are best characterized as the "business of finance" and most properly subject to federal regulations pertaining thereto. To be sure, PPSI is something of a hybrid, since its operations do bear some relationship to the business of insurance, and at least one small facet of those operations (the power of attorney to cancel a policy) might be deemed to involve the relationship between insurer and insured. Nevertheless, we do not think that this thread of insurance can be woven into a blanket exemption for the entire scope of a financing company's operations. Broad exemptions from the antitrust laws and from major consumer protection legislation ought not be conferred lightly, cf. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348 (1963), and we do not believe that Congress meant to do so when it enacted the McCarran-Ferguson Act.

To accept respondents' position here is to exempt a large segment of the *credit market* from the uniform protections against deceptive and unrevealing credit practices which Congress intended to bestow when it passed the Truth in Lending Act. This, we think, would serve only to thwart a legitimate federal regulatory interest, while doing nothing to further MFA's goal of federal non-interference with state-

[11] We note in this regard, however, that the activities of many non-insurers may "impact" upon the insured's receipt of policy benefits. For example, the negligence of a bank which offers automatic bill payment services but fails to pay the insurer may lead to policy cancellation as surely as the negligence of the premium financer.

[12] All of these purported "impacts" strike us as either inconsequential or of such character that to accept them as relevant would propel the MFA exemption deep into noninsurance aspects of the economy. Thus, (1) insurance premium financing facilitates the insurer-insured relationship (but so would any financing mechanism); (2) financing may affect the payment of the agent's commission which relates to ratemaking (but very nebulously indeed); (3) since the insured pays "premiums" in installments to a finance company and the payment of premiums is an element of the business of insurance, such payments are part of the business of insurance (however, the payments to the finance company are just that, installment payments on a consummated loan, not premiums). Other supposed impacts are restatements of the law (3b, 4b, 8b) or else relate to the power of attorney already discussed (3a-b, 4a-b, 5a-b).

regulated dealings between insurer and insured concerning the insurance policy.[13] Accordingly, we hold that the credit extension and debt collection activities of an insurance premium finance company are not the "business of insurance" within the meaning of the McCarran-Ferguson Act, and are, therefore, properly subject to the requirements of the Truth in Lending Act and Section 5 of the Federal Trade Commission Act.

[18] In reaching our conclusion we express no view as to whether practices similar to those involved here would be exempt if engaged in by the insurer itself. The ALJ concluded that they would be protected, but the issue was not squarely raised by the litigants on appeal, there is no need to resolve it,[14] and we have not adopted as part of our decision the ALJ's remarks at I.D. pp. 27-28 pertaining thereto. To be sure, an analysis that looks to substance over form might suggest that insurer and premium financer should be treated identically, and observation that respondents have made in support of *their* position, but one that we think argues more strongly for Truth in Lending application to insurers. On the other hand, there may be differences between the premium installments paid to an insurer directly and premium financing [see the discussion of *Gerlach* at pp. 10ff, *supra;* cf. FRB Opinoin Letter No. 262 (1970)] that warrant different treatment. Moreover, in a close case of statutory construction involving an exemption from the law, questions of form are perhaps not irrelevant. As the ALJ noted, PW created PPSI precisely in order to escape the effect of certain provisions of state insurance codes defining admitted assets. It would not offend our sense of fairness to discover that in so doing it had also escaped the effect of federal law exempting its insurance activities from federal regulation. [19]

II. Other Defenses—Discontinuance

Respondents contend that no order is necessary because PPSI has discontinued the business of financing insurance premiums, and gives no indication of resuming it. On this point we agree with the findings and conclusions of the ALJ at I.D. 59-61. PPSI continues to

[13] Respondents have not suggested what state policies pertinent to the business of insurance would be jeopardized by application of Truth in Lending to credit extensions by premium finance companies, which is consistent with their alternative defense that all violations of Truth in Lending on their part were eliminated by summer, 1973 (*infra* at p. 19). Having made this observation we hasten to note our recognition that the question of whether PPSI's activities are the "business of insurance" is one which precedes and is distinct from the question of whether state regulation exists and if it exists whether it clashes with federal law. What all this does suggest, however, is just how far afield respondents' position carries the MFA exemption from the situation which gave rise to it, *i.e.*, federal interference with regulatory functions traditionally reserved to the states.

[14] The ALJ properly found that PW was vicariously liable *for the acts of PPSI, which it controlled.* His proposed proviso to paragraphs I and II of the order, which we adopt, would ensure that the order applies to PPSI only when it acts through a financing subsidiary.

exist and there is no reason to conclude that the same factors that once make it seem desirable for PW to maintain a financing subsidiary will not recur.

Respondents also argue that no order as to Truth in Lending matters is needed because they had discontinued their violations before the "long arm" of the law fastened upon their shoulders. Respondents began to use an amended form of disclosure, RX 2, in June, 1973, and preparation of similar forms for other states was underway in July or August, 1973, when respondents were first made aware of the Commission's investigation. Thus, respondents contend, they had essentially ceased their violations without urging from the government. Respondents further note that the exhibits introduced by complaint counsel demonstrating violations all relate to the period prior to the time respondents were contacted by Commission representatives.

We reject this argument for several reasons. As the ALJ found, at least one violation did continue well beyond the commencement of the Commission's investigation, *i.e.,* failure to list "unpaid balance of cash price" in the disclosures (I.D. 37e; pp. 54-55). Moreover, respondents' answer to the complaint acknowledged that "certain agreements and forms of agreements used by PPSI employees between July 1, 1969 and October 1, 1974 were deficient under Regulation Z." (Answer, p. 3, ¶11.1) Respondents contend that this statement was meant only to admit violations during some unspecified portion of the 1969-1974 period, and not necessarily during the latter part of it. However, the complaint itself alleged simply violations "subsequent to July 1, 1969," and respondents' answer did not aver that all Truth in Lending violations were stopped by July, 1973. Instead, the only discontinuance defense raised as to Truth in Lending was the claim that PPSI had ceased premium financing on October 1, 1974.

[20] If it was respondents' position that all Truth in Lending violations had ceased as of summer, 1973, they chose an odd way to make the point by responding to a charge that violations occurred "subsequent to July 1, 1969" with an answer admitting only that "certain agreements and forms of agreements used by PPSI employees between July 1, 1969 and October 1, 1974 were deficient under Regulation Z." We cannot and do not believe that the same counsel who have briefed and argued with such commendable clarity before this Commission could have pleaded so ineptly before the Administrative Law Judge. In our view the fairest reading of respondents' answer is that it did concede violations throughout the period of July 1, 1969, through September, 1974, and that complaint counsel were

not obliged to introduce evidence from every portion of this period in light of the admission.[15]

Even were we to assume, *arguendo,* that respondents were in the process of halting all but one minor Truth in Lending violation at the time Commission investigators first contacted them, the undisputed fact remains that for a period of at least four years following the effective date of Truth in Lending, numerous significant violations of the law occurred, including nondisclosure of the annual percentage rate and the use of improper terminology and forms. (I.D. 37) [21] Respondents' alleged discontinuance prior to Commission intervention would perhaps argue in their favor that no order is needed[16] but the persistence of serious violations for at least four years prior thereto argues more persuasively that an order is appropriate to ensure there is no relapse into old ways.

III. Debt Collection Practices

The Administrative Law Judge found that respondents represented that they intended to take legal action against allegedly delinquent debtors when, in fact, it was not their practice to take such action against debtors who did not pay in response to the threat. The ALJ held that such practice was deceptive and unfair and we affirm that holding. (I.D. 16-32; respondents have not appealed from it.)

The Administrative Law Judge further found that respondents represented that one of their own employees was, in fact, an independent outside third-party collection attorney. The ALJ held that this practice was deceptive and unfair and we similarly affirm that holding. (I.D. 16-32; respondents do not dispute that the stated practice is deceptive, but appear to deny having engaged in it, *infra* at p. 22.)

[22] Respondents protest that the ALJ's order with respect to debt collection practices goes too far in several respects. First, it is alleged that the order flatly prohibits "representing" that accounts have been referred to a collection attorney and that legal action is contemplated. Respondents contend that the order should simply prohibit "misrepresenting" these matters. This point is well-taken,

[15] Theoretically complaint counsel needn't have introduced any evidence at all to prove Truth in Lending violations in light of respondents' admission, but the evidence actually introduced does permit analysis of the character of the violations.

[16] Some cases rejecting discontinuance as grounds for omission of an order have cited the offender's awareness of governmental interest as one reason to doubt that subsequent discontinuance obviated the need for relief, *e.g., Fedders* v. *FTC,* 529 F. 2d 1398 (2d Cir.), *cert. denied,* 45 U.S.L.W. 3244 (October 5, 1976). No case, however, of which we are aware, has held that discontinuance prior to contact by the government is necessarily reason for omitting an order, nor would such a holding make any sense. The point in time at which discontinuance occurs is obviously but one consideration bearing on the necessity for an order. See *Fedders, supra* which lists other considerations, *e.g.,* the length of time for which violations have persisted and their seriousness. (529 F. 2d at 1403)

and we have made the requested modification. We would note, however, that "contemplating legal action" is more than merely a state of the creditor's mind. Where legal action is threatened, but not taken in the face of nonpayment, it can be no defense to a charge of misrepresentation to contend that such action was nevertheless "contemplated" or "intended."

Respondents also maintain that the order should include no prohibition upon misrepresenting that an account has been referred to an independent, third-party attorney. Such a misrepresentation was clearly made by respondents, whose in-house attorney avoided PW or PPSI stationery and received incoming calls on a private line which did not go through the PW or PPSI switchboard. The materiality of the misrepresentation is most readily apparent from the pains which respondents took to perpetuate it. Many debtors may have no legal defense or justification for their arrears, but others do, and all are entitled to be dealt with honestly. Reference to a third party attorney may imply to the debtor an increased possibility of legal action. Certainly where the debtor has a possible defense it is most unfair for the creditor to *misrepresent* the likelihood that the matter will end up in court. For ease of compliance we note that respondents can avoid prior misrepresentations simply by ensuring that in-house collection letters are written, like other communications, on stationery emblazoned with the company name.

Finally, respondents object to a prohibition upon misrepresentations that matters have been or will be referred to an independent third-party collection agency. While this precise misrepresentation was not used by respondents, it is very similar to the deceptive claim which was made and we think it was properly included as fencing in. *FTC* v. *Mandel Bros. Inc.,* 359 U.S. 385, 393 (1959); *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611 (1946); *Fedders* v. *FTC, supra.*

In all other respects the decision of the ALJ is affirmed. An appropriate order is appended.

Final Order

This matter having been heard by the Commission upon the appeal of respondents' counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, having substantially denied the appeal, while granting it in minor part:

It is ordered, That pages 1-58 of the initial decision of the administrative law judge be, and they hereby are, adopted as the Findings of Fact and Conclusions of Law of the Commission, with the following exceptions: p. 27, final two paragraphs; p. 28, first four paragraphs.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

I

It is ordered, That respondents Providence Washington Insurance Company and Providence Premium Service, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of, or attempts to collect, accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting by any means, directly or by implication, that delinquent accounts have been or will be referred to an independent, third-party attorney or to any attorney for institution of legal action.

2. Misrepresenting by any means, directly or by implication, that:

(a) Respondents are prepared to institute, or cause to be instituted, legal proceedings in the collection of delinquent accounts.

(b) Legal action with respect to an allegedly delinquent account has been, or is about to be, or may be initiated.

3. Misrepresenting by any means, directly or by implication that any delinquent account has been or will be referred to any third party for collection action.

II

It is further ordered, That respondents Providence Washington Insurance Company and Providence Premium Service, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*) do forthwith cease and desist from:

1. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b) (2) of Regulation Z.

2. Failing to disclose the annual percentage rate accurately to the

nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Failing to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.

4. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to use the term "unpaid balance of the cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

6. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

7. Failing to use the term "finance charge" to describe the sum of all charges, as required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

8. Failing to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

9. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price", as required by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failing to make all disclosures required by Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

11. Failing in any consumer transaction to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

Provided, however, that the foregoing provisions of Parts I and II of this order shall not apply to any extension of credit for payment of premiums afforded in connection with the sale of insurance on credit in the State of Texas where the creditor is the seller of the insurance; nor shall they apply to the acts and practices of the seller of insurance in connection with the collection of, or attempts to collect, unpaid balances of premiums for such insurance sold in Texas.

It is further ordered, That the complaint against Christopher F. Kempf in his individual capacity and as a named officer of Providence Washington Insurance Company and Providence Premium Service, Inc. be, and it hereby is, dismissed.

It is further ordered, That respondent corporations deliver a copy of this order to cease and desist to all present and future personnel of respondents now or hereafter engaged in the consummation of any extension of consumer credit, other than an extension of credit in Texas exempted from the foregoing provision of this order, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent corporations notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporations or their successors and assigns shall, within sixty (60) days of the effective date of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the provisions of this order.

Chairman Pertschuk did not participate.