IN THE MATTER OF

HERBERT R. GIBSON, SR., ET AL.

Docket 9016. Interlocutory Order, May 18, 1978

Request for subpoena enforcement denied without prejudice to renew.

ORDER DENYING REQUEST FOR SUBPOENA ENFORCEMENT WITHOUT PREJUDICE TO RENEW

On April 20, 1978, the administrative law judge, pursuant to Commission Rule 3.22 certified complaint counsel's Request for Court Enforcement of the Subpoena Served on Commission Witness Nix. For the reasons discussed below, we deny complaint counsel's request without prejudice to renewal at a later date.

The subpoena in question was dated March 16, 1978, served on Mr. Nix on March 22, 1978, with a return date of April 11, 1978. On April 10, 1978, complaint counsel received a letter from Mr. Nix indicating that he would not be able to comply with the subpoena because of illness. Attached to his letter is a statement to that effect from his physician, Dr. William deVlaming. Additionally, Mr. Nix indicated that he could not remember much of the information about which he spoke with complaint counsel and remarked on the fact that complaint counsel had previously indicated that he would not be called to testify.

Complaint counsel takes issue with each of Mr. Nix's assertions and points out that "failing memory is not a valid basis for failing to appear." Moreover, complaint counsel argues that the testimony of Mr. Nix

> is crucial for several reasons. He is one of the few witnesses that will testify as to the issues raised under Count III of the Complaint. His testimony is expected to directly contradict the testimony previously presented by respondent, Gerald P. Gibson. His testimony is finally expected to link respondents, H.R. Gibson Sr., H.R. Gibson, Jr. and Gerald P. Gibson, to payments and receipt of illegal brokerage.

Nevertheless, the administrative law judge has recommended that the request be denied because of the length of time that may be involved in an enforcement proceeding and because of the likelihood that no substantive evidence will be elicited if Mr. Nix cannot recall the events in question. At the same time, the administrative law judge notes that Mr. Nix could possibly be a "crucial witness on whom complaint counsel placed considerable reliance."

We have determined that the best way to reconcile the needs of all parties is to deny without prejudice, complaint counsel's request with instructions that the administrative law judge and the parties consider the procedures of Commission Rule 3.33. Rule 3.33(a) provides that:

At any time during the course of a proceeding . . . the Administrative Law Judge, in his discretion, may order the taking of a deposition and the production of documents by the deponent.

Furthermore, Section 3.33(f) provides for the introduction into evidence of a deposition if the administrative law judge finds "that the deponent is unable to attend or testify because of age, sickness, infirmity or imprisonment."

In this way, Mr. Nix will not be removed from the care and supervision of his doctor, or otherwise inconvenienced to the possible detriment of his health.[1] Moreover, complaint counsel will have the benefit of whatever recollection Mr. Nix can bring to bear on the situation, and Mr. Nix's memory lapses will be duly noted on the record under oath.

By its action today, the Commission should not be seen as invalidating the outstanding subpoena against Mr. Nix. The procedure suggested is an alternative to lengthy enforcement proceedings and at the same time adheres to the needs of Mr. Nix. Whether enforcement proceedings will ultimately be required as to the presently outstanding subpoena we have no way of knowing. Nevertheless, complaint counsel will not be prejudiced in renewing the request if it is determined that Section 3.33 is not feasible or if Mr. Nix again refuses to comply. Accordingly,

It is ordered, That complaint counsel's Request for Court Enforcement of the Subpoena Served on Commission Witness Nix be, and the same hereby is, denied without prejudice to renewal at a later date;

It is further ordered, That the parties and the administrative law judge consider proceedings pursuant to Commission Rule 3.33.

[1] Apparently, Mr. Nix is not completely incapacitated by his illness as we note that on April 7th he was said to be

IN THE MATTER OF

SAFEWAY STORES, INCORPORATED

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

Docket 9053. Complaint, Sept. 3, 1975—Decision, May 18, 1978

This consent order, among other things, requires an Oakland, Calif. retail food store chain to cease over-pricemarking and failing to sell advertised items at or below advertised prices. Further, food stores are required to conspicuously post advertisements and notices encouraging customers to check prices of advertised items. The order additionally obligates the firm to maintain business records for a period of three years, and to establish a surveillance program designed to ensure compliance with the terms of the order.

Appearances

For the Commission: *Robert Eliot Easton, Sr.* and *James J. Angelone.*

For the respondent: *James F. Rill, Collier, Shannon, Rill, Edwards & Scott,* 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 Safeway 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 thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

(Alleging violations of Section 5 of the Federal Trade Commission Act.)

PARAGRAPH 1. Respondent, Safeway Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 4th and Jackson Sts., Oakland, California.

PAR. 2. Respondent is engaged in the operation of a chain of retail food stores, operating approximately 1950 stores in 27 states and the District of Columbia. Its volume of business is substantial, totalling approximately 6.77 billion dollars in retail food sales in 1973. In the operation of its retail food stores, respondent offers and sells to its customers an extensive line of groceries and other merchandise,

including food, drugs, cosmetics and devices as those terms are defined in the Federal Trade Commission Act, all of which are sometimes referred to hereinafter as "items." Some of said items are manufactured or processed by respondent at its manufacturing and processing plants located in various states. However, many of said items are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid items to be shipped and distributed from its manufacturing and processing plants or from its other sources of supply to its warehouses, distribution centers, or retail food stores located in various states other than the state or origination, distribution or storage of said items. In the further course and conduct of its business, respondent transmits contracts, business correspondence, monies and other documents from its stores, offices, and divisions located in states other than the states in which such contracts, correspondence, monies and other documents originated. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in the distribution, advertising, offering for sale, and sale of the items described in Paragraph Two, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, and for some time last past, respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the said items by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said items from responent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said items by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the attempted or actual purchase from respondent of the said items in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of those advertisements list or depict the said items and also contain statements and representations concerning the price or terms at which said items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's food stores at which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented, directly or by implication, that in those stores covered by such advertisements, during the effective periods of the advertised offers, the items listed or depicted in such advertisements would be sold to persons who attempted to purchase such items at prices at or below the advertised prices for such items.

PAR. 6. In truth and in fact, in a significant number of respondent's retail food stores covered by such advertisements, during the effective periods of the advertised offers, certain numbers of items listed or depicted in the said advertisements were marked with prices higher than the advertised prices, and, as a result, a substantial number of items marked with a higher price were sold to persons who purchased such items at prices higher than the advertised prices. Therefore, the statements and representations as referred to herein, were false, misleading and deceptive.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, by permitting the units of certain numbers of said items to remain marked with prices higher than the advertised prices and by selling a substantial number of items so marked to customers at prices higher than the advertised prices, during the effective periods of such advertised offers at a significant number of stores covered by said advertisements, respondent has been and now is engaged in unfair acts and practices.

PAR. 8. In the course and conduct of its business, and at all times referred to herein, respondent has been and now is in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices.

PAR. 10. The acts and practices as aforesaid were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

(Alleging violations of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. 424), and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three, Four, and Eight: respectively, of Count I hereof are incorporated by reference in Count II as if fully set forth verbatim.)

PAR. 11. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. 1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the Federal Register on November 14, 1969 (34 FR 18252). Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views and arguments, and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions, and additions thereto.

The Commission considered all relevant matters of fact, law, policy, and discretion, including the data, views, and arguments presented on the record by interested parties in response to the Notice as indicated in the accompanying Statement of Basis and Purpose (36 FR 8777 (May 13, 1971)) and as prescribed by law, determined that the adoption of the trade regulation rule was in the public interest, and, accordingly, promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 13, 1971, effective July 12, 1971.

PAR. 12. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products or other merchandise subject to the jurisdiction of Section 5 of the Federal Trade Commission Act are within the intent and meaning of, and are subject to, the provisions of the aforesaid Trade Regulation Rule.

PAR. 13. In connection with its advertisements disseminated as aforesaid, respondent, in a substantial number of instances, has failed to comply with Paragraph (2) of the Trade Regulation Rule by offering products for sale at stated prices by means of advertisements disseminated in areas served by certain of its stores which are covered by such advertisements and by failing in those stores to charge out to

such advertised products at prices at or below the advertised prices during the effective periods of the advertisements, thereby failing to make said advertised items conspicuously and readily available for sale at or below the advertised prices.

PAR. 14. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute unfair methods of competition and unfair or deceptive acts or practices violative of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint based upon alleged acts and practices of Safeway Stores, Incorporated, a corporation, also trading and doing business as Safeway, hereinafter referred to as respondent, and having served such complaint upon respondent and having withdrawn the proceeding from adjudication based upon a joint motion for withdrawal from adjudication filed by complaint counsel and counsel for respondent; and

The respondent and counsel for the Commission having executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid 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 had 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 accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed pursuant to Sections 2.34 and 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Safeway Stores, Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 4th and Jackson Sts., Oakland, 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

DEFINITIONS

"Retail Food Store" means any of respondent's stores within the United States engaged primarily in the sale of foods for home consumption, excluding convenience-type stores with less than 4,000 square feet of building area.

"Item" means any article of merchandise which differs from any other article as to commodity, product, brand, variety, style or form, grade, type of package or label, size or weight, provided, that size or weight is to be disregarded with respect to articles priced by a standard measure of weight or count.

"Scanned Item" means an item bearing a symbol, printed on or affixed to the packaging or container of such item, in any store in which it is electronically scanned by equipment which identifies and prints on a cash register tape the price of that item.

"Unit" means one consumer package of a packaged item or the smallest advertised quantity that a consumer may purchase of an unpackaged item, provided, for that purpose of paragraph I.A. (2) of the order, a unit of a multiple priced item (*e.g.*, three for 41 cents) shall consist of that quantity, count or weight to which the multiple price applies.

"Over-pricemarked Items" means an advertised item of which more than five (or in the event a display contains fewer than 20 units, more than one-fourth) of the units in any one display bear a marked price higher than the advertised price.

"Unmarked Item" means an advertised item of which no more than five (or in the event a display contains fewer than 20 units, not more than one-fourth) of the units in any one display are legibly marked with a price.

"Overcharged Item" means an over-pricemarked item or an unmarked item of which one or more units are charged out at higher than the advertised price.

"Survey" means a compliance survey conducted by or under the direction of the Federal Trade Commission of a sample of 50 or more retail food stores over a period of at least three different weeks with approximately equal numbers of stores surveyed during each week stores are surveyed. All store surveying shall be completed within a period of time not exceeding eight consecutive weeks. Stores to be surveyed shall be selected from at least three different Standard Metropolitan Statistical Areas (SMASs) with an approximately equal number of stores surveyed in each SMSA in which stores are surveyed.

with this definition, but which is otherwise to be determined at the discretion of the staff or the Commission. Respondent waives any rights it might have to challenge the admissibility into evidence of the results of the survey of the sample on the grounds that those results are not projectable to a universe greater than the sample. Respondent, however, retains the right to challenge the evidentiary weight to be given to or inferences to be drawn from the results of any such survey on any legally available basis. All data collected in the course of a survey are to be recorded.

ORDER

PROHIBITED PRACTICES

I. *It is ordered,* That respondent Safeway Stores, Incorporated, a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of items offered or sold in its retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing dissemination of, any advertisement by any means which offers or presents any items for sale at a stated price, unless throughout the effective period of the advertised offer, at each retail food store covered by the advertisement:

(1) each unit of each such advertised item, any of which are marked with a price, is individually, clearly and conspicuously marked with a price no higher than the advertised price; provided that in the case of overpricemarked scanned items, clear and conspicuous posting of the advertised price of such items at the point of display will be deemed compliance with this requirement; and

(2) each unit of each such advertised item is charged out to customers at or below the advertised price; provided that in the case of advertised items the ultimate price of whose units are determined by the total dollar amount of the customer's order or the use of a coupon, or other similar conditional price arrangement, the prices at which the units are sold, and not the prices marked on the units, shall govern.

Provided further, it shall constitute a defense of a charge of over-pricemarking or overcharging if respondent can show that such over-pricemarking or overcharging was due to circumstances beyond respondent's reasonable control. It will be presumed that any instance of over-pricemarking or overcharging found was due to circumstances beyond respondent's reasonable control if respondent can show that

such over-pricemarking and overcharging occurred despite respondent's reasonable procedures to eliminate all over-pricemarking and overcharging, and that upon learning of any specific instance or instances of such over-pricemarking or overcharging, respondent immediately acted to eliminate them and took reasonable measures to assure that they did not recur.

For respondent's procedures to be reasonable, respondent shall have the burden of establishing that:

(i) it has a reasonable basis in fact for concluding that its procedures for pricemarking and charging out advertised items are properly designed to achieve compliance with this order;

(ii) it has in effect a continuing surveillance program adequate to reveal whether its retail food stores are conforming with this order; and

(iii) respondent regularly conducts a review and analysis of results of the surveillance program adequate to determine whether changes in market conditions, technology or other changes make it necessary for respondent to revise its procedures for pricemarking and charging out advertised items to maintain compliance with this order.

II. A. No enforcement action will be brought against respondent for any alleged instances of overpricemarking or overcharging on the basis of a survey unless Respondent is notified in writing within three months following the completion of that survey that the survey has been conducted. At the time of said notice the Commission shall furnish respondent copies of written instructions to the persons making in-store observations, and sufficient documentary material that will reasonably enable Respondent to identify the stores, items and prices surveyed.

B. If, in any enforcement action brought against respondent, the Commission offers evidence purporting to establish an over-pricemarking rate for respondent, such rate shall be calculated by taking, as of the date(s) of any survey and for the stores selected, the total number of items over-pricemarked as a percent of the total number of advertised items than in effect for those stores.

III. *It is further ordered,* That throughout the effective period of such newspaper advertisement, respondent shall post conspicuously at or near each doorway affording entrance to the public of each retail food store,

(a) copy of the advertisement effective for that store; and

(b) the following statement:

Notice to Our Customers

advertised item you purchase against the price indicated in our ad and report any errors to store personnel. If errors are not corrected to your satisfaction, please advise the store manager.

IV. Respondent shall not be subject to any of the provisions of this order to the extent that such provisions shall have been rendered inconsistent with the Trade Regulation Rule regarding Retail Food Store Advertising and Marketing Practices, 16 C.F.R. 424 (1977) because of any future amendment to that rule.

V. *It is further ordered,* That:

A. Respondent shall forthwith deliver a copy of this order to each of its officers (excluding assistant officers) and to other of its personnel in its Retail Divisions (down to the level of and including store managers) who, directly or indirectly, have any responsibilities relating to pricemarking and charging out of advertised items in respondent's retail food stores, and respondent shall secure a signed statement acknowledging receipt of said order from each such person.

B. Respondent shall maintain a surveillance program adequate to reveal whether the business practices of its retail food stores conform to this order and shall upon request inform the duly authorized representative of the Commission as to the nature of such program.

C. Respondent shall, for a period of three years subsequent to the date of this order:

(1) Maintain business records which show the efforts taken to achieve continuing compliance with the terms and provisions of this order; and

(2) Furnish to the Federal Trade Commission copies of the records to be maintained under subparagraph (1) above, upon written request by any of its duly authorized representatives.

D. Respondent shall, all other provisions of this order notwithstanding, within 90 days following the end of each year, for a period of three years from the date this order becomes final, file with the Commission a report setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That respondent shall notify the Commission at least thirty 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 respondent which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent herein shall within 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

USLIFE CREDIT CORPORATION, ET AL.

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

Docket 9057. Complaint, Sept. 26, 1975—Final Order, May 23, 1978

This order, among other things, requires a Schaumburg, Ill. finance company and its parent corporation to cease, in connection with the extension of consumer credit, failing to provide consumers with the material and disclosures required by Federal Reserve System regulations.

Appearances

For the Commission: *Michael E.K. Mpras* and *Robert L. Patterson.*

For the respondents: *Edward W. Keane* and *Bruce E. Clark, Sullivan & Cromwell.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that USLIFE Credit Corporation, a corporation, and USLIFE Corporation, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the 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:

PARAGRAPH 1. Respondent USLIFE Credit 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 1300 North Meacham Road, Schaumburg, Illinois. Respondent USLIFE Credit Corporation is a wholly-owned subsidiary of USLIFE Corporation.

Respondent USLIFE Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 125 Maiden Lane, New York, New York.

Respondent USLIFE Credit Corporation operates through approximately two-hundred thirteen (213) wholly-owned subsidiary loan offices located in twenty (20) States of the United States. Each subsidiary is incorporated in the respective state in which it is located

Corporation, State Securities, Inc., Sterling Finance Company, Clermont Finance Company, Courtesy Finance Company, North American Finance Company, Best Finance Company and Midland Finance Company. [2]

Respondents USLIFE Corporation and USLIFE Credit Corporation formulate and control the policies, acts and practices of each of the wholly-owned subsidiaries, including the acts and practices hereinafter set forth.

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

PAR. 2. Respondents by and through their corporate subsidiary structure are now, and for some time last past have been, engaged in the offering to extend, and the extension of, consumer credit to the public.

PAR. 3. In the ordinary course and conduct of their business, as aforesaid, respondents regularly 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.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business as aforesaid, have charged, and are now charging, for credit life and/or credit accident and health (disability) insurance a substantial number of consumers who obtained a consumer loan from respondents.

Typical and illustrative, but not all-inclusive of the circumstances in which such insurance charges are incurred by consumers, are the following:

1. During the consumer's contact with respondents, respondents' personnel orally quote a monthly repayment figure which includes charges for credit life and/or credit accident and health (disability) insurance.

2. Respondents' personnel automatically include charges for credit life and/or credit accident and health (disability) insurance on the Loan Agreement, and, unless the consumer specifically objects to the inclusion of the charges for such insurance, the coverage becomes part of the credit transaction.

3. On that portion of the Loan Agreement which contains the statements "I desire credit life insurance," or "I desire credit life insurance and disability insurance," respondents' personnel, without the permission or authority of the consumer, place an "x" on the line for the borrower's signature. [3]

4. The Loan Agreement, filled out as indicated above, is presented

to the consumer for two signatures. The consumer is not told of the purpose of each signature. These signatures are intended (1) to indicate the consumer's desire for the insurance coverage, and (2) to acknowledge the consumer's receipt of the executed Loan Agreement.

5. Respondents' personnel place the charges for credit life and/or credit accident and health (disability) insurance in the "Record of Disbursements" section of the Loan Agreement, and these charges become part of the "amount financed," but are not included in the finance charge and thus the annual percentage rate is improperly computed.

PAR. 5. By and through the acts and practices described in Paragraph Four, and others of similar import, meaning and consequence, but not specifically set forth herein, respondents, in a substantial number of instances, obtain consumers' signatures through practices which operate, directly or indirectly, to defeat the elective language of the insurance authorization disclosures by obscuring from consumers knowledge about the option, by misrepresenting to consumers that their signatures are necessary solely for the purpose of consummating the credit transaction, and by discouraging the declination of the coverage when it is questioned. These practices have the effect of preventing substantial numbers of consumers from exercising their own independent, voluntary choice whether to obtain credit life and/or credit accident and health (disability) insurance.

Therefore, respondents, in a substantial number of instances, induce their customers to incur charges for credit life and credit accident and health (disability) insurance without said customers making a knowing, affirmative election to have such insurance and, thereby, respondents have failed to obtain from each of their customers a "specific dated and separately signed affirmative written indication of [their] desire" to obtain such insurance, as required by Section 226.4(a)(5) of Regulation Z, in spite of the existence of language to the contrary in the loan disclosure statement.

PAR. 6. By and through the acts and practices described in Paragraphs Four and Five hereof, respondents have failed to include the charges for credit life and/or credit accident and health (disability) insurance in the finance charge when a specific dated and separately signed affirmative written indication of the consumer's desire for such insurance has not been obtained as required by Section 226.4(a)(5) of Regulation Z, and thereby respondents: [4]

1. Failed to compute and disclose accurately the "finance charge," as required by Sections 226.4 and 226.8 of Regulation Z; and

2. Failed to compute and disclose accurately the "annual [illegible]

ge rate" to the nearest quarter of one percent, as required by Sections 26.5 and 226.8 of Regulation Z.

PAR. 7. In the further course and conduct of their business as foresaid, respondents obtain borrowers' signature on that portion of he Loan Agreement which contains the statements "I desire credit life nsurance," or "I desire credit life insurance and disability insurance," nd said signatures are not specifically dated as required by Section 26.4(a)(5) of Regulation Z.

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act, espondents' aforesaid failure to comply with Sections 226.4, 226.5 and 26.8 of Regulation Z constitute violations of that Act and, pursuant to ection 108 thereof, respondents have thereby violated the Federal rade Commission Act.

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW JUDGE

JANUARY 27, 1977

PRELIMINARY STATEMENT

In a complaint dated September 26, 1975, the Federal Trade Commission (Commission) charged respondents, USLIFE Credit Corporation (USLIFE Credit) and its parent, USLIFE Corporation (USLIFE), with violations of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*), the Truth in Lending Act (15 U.S.C. 1601, *et seq.*) and its implementing regulation (Regulation Z – 12 C.F.R. 226) (Complaint, ¶¶ One and Eight). The gravamen of the charges is that in offering to extend and in extending consumer credit to the public: [2]

(1) Prospective borrowers were orally quoted a monthly repayment figure which included charges for credit life and/or credit accident and health (disability) insurance (Complaint, ¶ Four, 1);

(2) Charges for credit life and/or credit accident and health (disability) insurance were automatically included in loan agreements unless the borrower specifically objected to their inclusion (Complaint, ¶ Four, 2);

(3) X's were placed on loan agreements on the lines calling for the borrower's signature to indicate he or she wished to have credit life and/or disability insurance without the borrower's permission or authority (Complaint, ¶ Four, 3);

(4) When loan agreements, filled out as indicated above, were presented to the borrower, he was not told the purpose of the two signatures called for (*i.e.*, one to indicate insurance was desired and the

other to acknowledge receipt of the executed loan agreement) (Complaint, ¶ Four, 4); and

(5) Premium costs of insurance were included in the "Record of Disbursement" section of the loan agreement thus becoming part of the amount financed, but such premiums were not included in the finance charge and therefore the "Annual Percentage Rate" was improperly computed (Complaint, ¶ Four, 5).

The alleged result of these and similar acts and practices was that the language on the loan agreement that insurance was optional was defeated:

> . . . by obscuring from consumers [borrowers] knowledge about the option, by misrepresenting to consumers that their signatures are necessary solely for the purpose of consummating the credit transaction, and by discouraging the declination of the coverage when it is questioned.

[3] It was further alleged that as a consequence:

> . . . respondents, in a substantial number of instances, induce their customers to incur charges for credit life and credit accident and health (disability) insurance without said customer making a knowing, affirmative election to have such insurance and, thereby, respondents have failed to obtain from each of their customers "a specific dated and separately signed affirmative written indication of [their] desire" to obtain such insurance, as required by Section 226.4(a)(5) of Regulation Z, in spite of the existence of language to the contrary in the loan disclosure statement. (Complaint, ¶ Five)

In addition, respondents were charged with having failed to compute and disclose accurately: (1) the finance charge as required by Sections 226.4 and 226.8 of Regulation Z; and (2) the annual percentage rate to the nearest quarter of one percent, as required by Sections 226.5 and 226.8 of Regulation Z. These violations allegedly occurred because respondents did not ". . . include the charges for credit life and/or credit accident and health (disability) insurance in the finance charge when a specific dated and separately signed affirmative written indication of the consumer's desire for such insurance has not been obtained as required by Section 226.4(a)(5) of Regulation Z . . . ." (Complaint, ¶ Six)

Respondents also were charged with violating Section 226.4(a)(5) of Regulation Z because borrowers' signatures in the "insurance" section of the loan agreement ". . . [were] not specifically dated . . . ." (Complaint, ¶ Seven)

In their answer, respondents asserted the following defenses:

(1) The complaint, as a matter of law, did not charge either respondent with a violation of the Truth in Lending Act, the Federal Trade Commission Act, any other act within the jurisdiction of the

Commission, or any valid rule or regulation promulgated by or to be enforced by the Commission (Answer, FIRST DEFENSE, p. 1); [4]

(2) USLIFE is a holding company not engaged in the business of extending consumer credit to the public and does not formulate or control the policies, acts or practices of USLIFE Credit or any of its subsidiaries or branch offices regarding the manner in which credit life or disability insurance is sold. Participation in and knowledge by USLIFE of the policies, acts and practices of USLIFE Credit, as alleged in the complaint, were disclaimed. Consequently, it was contended that, as a matter of law, USLIFE could not be liable even if the charges in the complaint were proven as to USLIFE Credit and found to be violative of any law, valid rule or regulation (Answer, SECOND DEFENSE, p. 2).

As to the first defense, the "Memorandum And Order Respecting Respondents' Motion For Summary Decision," dated February 9, 1976, denying the motion, which was issued by Administrative Law Judge (ALJ) Needelman, to whom the case originally was assigned, details the refutation of the first defense. Suffice it to say here that a violation of the Truth in Lending and Federal Trade Commission Acts is alleged when a respondent is charged with acts and practices which negate written disclosures called for by the Truth in Lending Act. (See pp. 4–7 of ALJ Needelman's "Memorandum and Order . . ." and discussion *infra* under "Did Customers Know That Insurance Was Optional?" and "Reliance On A Truth In Lending Theory Vis-A-Vis Proving A Violation Of The FTC Act"). The second defense raised by respondents is discussed below under "Naming USLIFE As A Respondent."

Prehearing conferences were held by ALJ Needelman on January 5, 1976, and by the undersigned on September 8, 1976. On May 18, 1976, the Commission rejected a consent order profferred by respondents, but opposed by complaint counsel. Oral motions for summary decision and to dismiss as to USLIFE were made at the conclusion of the presentation of the case-in-chief (Tr. 832–37, 839). These were denied (Tr. 842).

The adjudicative hearings were held in Washington, D.C., on September 13–16, 1976, and in Atlanta, Georgia, on September 20–22, 1977. The official record consists of 917 pages of transcript, which includes 132 pages reporting the two prehearing conferences. There are approximately 725 exhibits. [5]

The Striking of Seven Witnesses' Testimony

At the final prehearing conference (PHC) on September 8, 1976, counsel for respondents renewed his earlier request (PHC Tr. 60, 85)

that he be furnished in advance of trial with Jencks Act (18 U.S.C. 3500) statements of witnesses which complaint counsel planned to call to testify in connection with his presentation of evidence as a part of the case-in-chief (PHC Tr. 119). Complaint counsel was ordered to hand over any Jencks-type statements by September 10, 1976 (PHC Tr. 123–24). Production on September 10th rather than at the conclusion of the direct examination of the witnesses was ordered since this approach would more fully apprise counsel for respondents of witnesses' expected testimony, and would make cross-examination possible without either a recess or requiring counsel for respondents to speed-read the statements of the witnesses or otherwise necessitating delay in defense counsel completing his questioning of complaint counsel's witnesses while such statements were reviewed.

Although *Inter-State Builders, Inc.*, 69 F.T.C. 1152, 1165–67 (1966), and *Basic Books, Inc.* v. *F.T.C.*, 276 F.2d 718, 722 (7th Cir. 1960) hold that Jencks statements may not be demanded and need not be produced until the end of a witness' direct testimony, these decisions were made prior to the Commission's 1967 amendment of its rules providing for detailed discovery procedures. See 3 CCH Trade Reg. Rep. ¶9625, at 17,195. My order is in harmony with the Commission's position in more recent years favoring maximum pretrial discovery, without prejudice to either side, in order to expedite hearings.

In accordance with the order, complaint counsel stated, prior to the start of the adjudicative hearings, that he had provided counsel for respondents with "all the Jencks Act materials which constituted interview reports that we conducted . . ." (Tr. 5). However, in the course of questioning complaint counsel's first "borrower" witness, Ms. Lillian B. Brooks (Tr. 267–302), it was disclosed that the consumer protection specialist who had interviewed her during the investigation had made substantially verbatim notes of what Ms. Brooks said but that such notes had not been turned over to respondents' counsel (Tr. 290). Ms. Brooks testified that she read the notes as they were being made by the investigator and was asked if what had been written was correct (Tr. 293). [6] She also said that she was asked if she would and that she did sign them (Tr. 289, 293–94). On the following day, the investigator testified that, in accordance with the investigator's customary practice, the notes taken were disposed of after a report of the interview was prepared (Tr. 389, 403). Testimony by the investigator to the effect that the witness did not sign the notes (Tr. 387–88, 390) was not persuasive. Following a request by counsel for respondents, I ordered that the testimony of Ms. Brooks be stricken (Tr. 297–301, 409).

It is worthy of specific mention that

unaware before Ms. Brooks testified that any signed statement was obtained (Tr. 291) or that any such statement had been disposed of (Tr. 291, 294–95). It also is clear that he made extensive efforts to locate the notes once he learned about them (Tr. 299, 379–80).

Because interview notes qualifying as Jencks-type statements relating to the testimony of Mr. William M. Curtin (Tr. 346–79), the third witness called by complaint counsel, were not produced, his testimony also was stricken (Tr. 379). Although Mr. Curtin testified that he did not sign the notes (Tr. 348), he said that he reviewed them and verified that what had been written by the investigator was accurate (Tr. 348, 355). In addition to the testimony of these two, the testimony of five other "borrower" witnesses—Stafford DeLoatch (Tr. 426–61), Mary Louise Knieser (Tr. 463–92), Robert Edward Garner (Tr. 493–518), Eziekiel Moore (Tr. 519–52), and Milton Dickerson (Tr. 792–829)—was stricken (Tr. 461, 492, 518, 553, 803) because the information elicited led me to conclude that Jencks statements had been obtained which complaint counsel was unable to furnish to counsel for respondents.

The Requirements of The Jencks Act

The Jencks Act, in pertinent part, calls for the government, after demand by defendants, to hand over, at the conclusion of the direct examination, statements and reports "in the possession of the United States" of witnesses it calls to testify against a defendant (18 U.S.C. 3500(a)) ". . . which relates to the subject matter as to which the witness has testified" (§ 3500(b)). Also see S. Rep. No. 981, 85th Cong., 1st Sess. 3 (1957). Section 3500(d) of the Act provides that if the government "elects not to comply . . ." the testimony is to be stricken or a "mistrial [is to] be declared." A Commission opinion to the effect that striking the testimony is appropriate in an administrative proceeding in such circumstance is *R. H. Macy & Co.*, 69 F.T.C. 1108 at 1109 (1966). [7]

Section 3500(e) of the Act provides that a "statement" is (1) a document which is written and signed or otherwise adopted or approved by the interviewee/witness, or; (2) "a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement" made by the interviewee/witness and "recorded contemporaneously with the making of such oral statement."

It is well established that Jencks Act procedures apply to administrative proceedings and that it is for the administrative law judge to determine whether a witness' own words were recorded or whether only a summarization of the witness' remarks was made. See *Inter-*

State, supra, 69 F.T.C. 1157–65, 1171. Also see *Ernest Mark High,* 56 F.T.C. 625, 633 (1959).

Since the witnesses' own words were recorded in the notes made by the investigator, those notes qualified as Jencks-type statements to which counsel for respondents was entitled on the basis of the decision of the Supreme Court in *Goldberg* v. *United States,* 44 U.S.L.W. 4424 (1976). In that decision the Supreme Court said that a Jencks statement is created when government investigators or trial lawyers (1) question the witness during an interview about what he ". . . just said to make sure that they got it down correctly," (2) "occasionally read back to see whether or not they correctly understood . . .," or (3) have the witness correct the notes (44 U.S.L.W. at 4426). Also see *Palermo* v. *United States,* 360 U.S. 343, 352–53 (1959); *Campbell* v. *United States,* 373 U.S. 487, 492–97 (1963).

There is language in a number of decisions in criminal cases to the effect that innocent, good faith destruction of an investigator's/attorney's notes not within the ambit of the Jencks Act in the course of routine administrative procedure is not the equivalent of noncompliance with an order to produce. See *United States* v. *Aviles,* 197 F. Supp. 536, 556 (S.D.N.Y. 1961), *aff'd,* 315 F.2d 186 (2d Cir. 1963), *remanded sub nomine, Evola* v. *United States,* 375 U.S. 32 (1963), *aff'd on remand,* 337 F.2d 552 (1964), *cert. denied,* 380 U.S. 906 (1965); also see 18 U.S.C.A. 3500 Part 2, Ch. 223, n.98. Cases having to do with destruction of notes which are within the ambit of the Jencks Act normally point out that the information in the notes was available in the reports provided to counsel for the defendant (*e.g., United States* v. *Covello,* 410 F.2d 536, 545 (2d Cir. 1969), *cert. denied,* 396 U.S. 879 (1969), *rehearing denied,* 397 U.S. 929 (1970)). How one could be certain that the reports, in fact, contained *all* notes qualifying as Jencks Act statements is not clear. [8] Due process considerations require that counsel for defendants/respondents should be provided with such statements and be given the opportunity to judge whether information they contain as to what the witness said prior to testifying, as reflected in the Jencks notes/statements, comports with what the witness says while testifying.

With regard to the innocent disposition of such notes, as happened here, in *United States* v. *Bryant,* 439 F.2d 642, 652 (D.C. Cir. 1971), the court said that sanctions for nondisclosure of Jencks statements based on loss of evidence will be invoked ". . . unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investiga-

showing." Also see *United States* v. *Perry*, 471 F.2d 1057, 1062–64 (D.C. Cir. 1972) and *United States* v. *Ferguson*, 498 F.2d 1001 n.3 at 1011 (D.C. Cir. 1974). No showing that either oral or written instructions were provided to the investigator or included in standard operating procedure manuals which detailed the handling of Jencks Act statements was offered at the hearing. Consequently, the sanction of striking the testimony of these seven borrower witnesses has been maintained.

Prior to closing the record the following question was certified to the Commission:

> Should the testimony of witnesses be stricken after the administrative law judge concludes that a Jencks statement was obtained and complaint counsel cannot comply with the order to provide it to counsel for respondents, even though complaint counsel was unaware that what constituted a Jencks statement had been obtained during the investigation and that it had been innocently destroyed? (Order dated October 8, 1976.)

The certification was rejected as not presenting the type of controlling question of law or policy which merits interlocutory consideration under Section 3.23(b) of the Commission's Rules of Practice; however the "Order Rejecting Certification" dated November 2, 1976, reflects that the matter might be considered on appeal. **[9]**

The testimony which was stricken remains a part of the record because the procedure followed at trial was to permit *voir dire* of each borrower witness by counsel for respondents, have the direct and cross-examination conducted, and then rule as to whether the testimony should be stricken. This testimony, however, has not been considered in connection with the preparation of the initial decision.

Complaint counsel's request to call six additional witnesses, which is mentioned in the "Order Re Briefing Schedule" dated November 12, 1976, was denied because complaint counsel advised that the ground to be covered would be substantially the same as that already in the record which had not been stricken and the undersigned was of the view that hearing the additional witnesses would serve no useful purpose. In that same order the record was closed and dates were set for submittal of proposed findings and orders with reasons therefor by December 10, 1976, and for any replies thereto by December 23, 1976.

Bases for the Findings of Fact; Abbreviations Used

The findings of fact following are based on a review of the allegations made in the complaint, respondents' answer, the documentary evidence, and consideration of the demeanor of the witnesses, including an eidetic recollection of several of them. In addition, the proposed findings of fact, conclusions and proposed orders, together

with reasons and briefs in support thereof filed by both sides have been given careful consideration. To the extent not adopted by this decision in the form proposed or in substance, they are rejected as not supported by the record or as immaterial.

For the convenience of the Commission and other readers of this initial decision, the findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used: **[10]**

Tr. – Transcript, preceded by the name of the witness and followed by the page number.

CX – Commission's Exhibit, followed by number of exhibit being referenced.

RX – Respondents' Exhibit, followed by number of exhibit being referenced.

CCPF – Complaint Counsel's Proposed Findings.

RPF – Respondents' Proposed Findings.

Findings of Fact

The Respondents

1. USLIFE was organized, exists and does business under and by virtue of the laws of the State of New York. Its principal office and place of business is located at 125 Maiden Lane, New York, New York (Admitted, Answer, ¶ 1(a), p. 2).

2. USLIFE Credit was organized, exists and does business under and by virtue of the laws of the State of Delaware (Admitted, Answer, ¶ 1(a), p. 2). It is engaged in the business of regularly extending consumer credit to the public directly or through its subsidiaries (Admitted, Answer, ¶ 2, p. 4 and ¶ 3, p. 5) and is in competition with nationally known finance companies such as Household Finance and Beneficial Finance Associates (Beckley, Tr. 145). The firm's principal office and place of business is located at 1300 North Meacham Road, Schaumberg, Illinois. USLIFE Credit is a wholly-owned subsidiary of USLIFE (Admitted, Answer, ¶ 1(a), p. 2).

3. USLIFE Credit, directly or though subsidiaries, operates approximately 220 branch offices in 20 states (Admitted, Answer, ¶ 1(b), p.3). Not all branch offices are operated under the name USLIFE Credit (Admitted, Answer, ¶ 1(b), p. 3). As of April 1, 1974, other names used were: Quality Finance Company, Midland Finance Company,

Company, North American Finance Company, Clermont Finance Company, Courtesy Finance Company, and USLIFE Credit Industrial (CX 5). The states in which operations were conducted as of April 1974 were Alabama, Arizona, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and West Virginia (CS 5). [11]

4. USLIFE Credit formulates and controls the policies, acts and practices of its subsidiaries and branch offices regarding the manner in which credit life and disability insurance is sold (Answer, ¶ 1(c), p. 3).

5. USLIFE has knowledge of the loan forms used by USLIFE Credit and could order discontinuance of the use of such forms (Giuliano, Tr. 203–04; First CCPF). USLIFE exercises approval authority over the annual budget of USLIFE Credit (Beckley, Tr. 62; Dunn, Tr. 175–76). USLIFE also must give its approval before USLIFE Credit may buy other companies and is notified when USLIFE Credit decides that a branch office is to be closed (Beckley, Tr. 59–61; Dunn, Tr. 177). USLIFE has the authority and power to overrule the decision to close a branch office (Dunn, Tr. 177).

6. USLIFE Credit has 16 officers and 5 directors. Two of the directors are officers of USLIFE. No officer of USLIFE Credit is an officer or director of USLIFE (RPF 6).

7. USLIFE has 27 officers and 15 directors. One officer/director of USLIFE is a director of USLIFE Credit and another director serves on both boards. No director/officer of USLIFE is also an officer of USLIFE Credit (RPF 5).

8. Mr. Gordon H. Crosby, JR., is the Chairman of the Board of both USLIFE and USLIFE Credit (RX 30a–b). The USLIFE Executive Vice-President of Financial Services, Mr. Samuel Giuliano, who is the liaison officer between respondents, also is a director of USLIFE Credit. Periodically he meets with the Chairman of the Board and chief executive officers to review the financial posture of USLIFE Credit in the light of predetermined, jointly-agreed-upon objectives of the credit company (Giuliano, Tr. 197–201).

9. The following table prepared from information in USLIFE's 1975 annual report indicates the level of its operations:

	1975 (000)	1974 (000)
Net Income	$49,317	$46,074
Total Assets	1,950,901	1,837,249
Total Liabilities	1,622,327	1,537,151

Life Insurance in Force	17,881,058	17,013,034
Consumer Credit Receivables	155,209	143,337

(RX 21, pp. 1 and 19.)

[12] *Sale Of Insurance*

10. The policy of USLIFE Credit has always been that credit life and credit disability insurance coverage is optional and that loan approvals are not contingent upon the customer's decision to accept or reject insurance (RPF 19). USLIFE Credit does, however, attempt to sell insurance to borrowers (Dunn, Tr. 181–83; Miles Tr. 862; RPF 46). When sales resistance was encountered, employees sometimes would say: "Well, the company's policy was we like to have insurance on every loan . . . that the insurance was a good thing for them . . . but there was nothing said to the customer if they didn't take the insurance they couldn't get the loan." (George, Tr. 252.) If successful in selling the insurance, the firm arranges for credit life and/or accident and health (disability) coverage (Admitted, Answer, ¶ 4(b), pp. 5–6). Eighty to ninety percent of USLIFE Credit borrowers purchased insurance to cover the amounts of their loans (Miles, Tr. 855).

11. The loan application form, which is filled in by employees of USLIFE Credit using information provided by prospective borrowers (Beckley, Tr. 116–17; Stricklen, Tr. 221–22; George, Tr. 247), does not have a space for entry of information as to whether insurance is or is not desired. It does have spaces for information as to the amounts of insurance premium refunds a borrower with a previous loan will have in taking out the new loan and for the premiums on insurance to cover the new loan (RX 7).

12. The loan agreement forms used disclose that the purchase of insurance to cover loans is optional (CXs 95, 98, 103, 106, 110, 116, 119–20, 122, 125, 135–414). Witnesses who are officers of the firms testified that insurance was and is optional and written instructions to the branch offices were to the same effect (Beckley, Tr. 84–87, 89, 94, 130–31, 143; Dunn, Tr. 185; RXs 2, 3).

13. In the body of the loan agreement forms there is a section which the borrower is to date and sign to indiciate whether he (1) does not want insurance, (2) wants credit life insurance, or (3) wants both credit life and disability insurance (CXs 95, 98, 103, 106, 110, 116, 119–20, 122, 125, 135–414). [13] Usually this section bears a caption such as "Optional Insurance Notice" or "Insurance Notice" (*e.g.*, CXs 95, 106, 116); however, some sections have no such caption (*e.g.*, CXs 148, 150).

not always enter the date in the space provided (*e.g., Dunn,* Tr. 186, CXs 135, 140, 163, 172). Pages 14a–b through 15a–h hereof are photo copies of typical loan application and loan agreement forms used by USLIFE Credit (RX 7, RX 32).

14. USLIFE Credit's emphasis was and is on encouraging borrowers to read the documents and to have employees provide explanations of the terms of the loan (Beckley, Tr. 93; Miles, Tr. 845, 860; Dionne, Tr. 791).

15. In view of the foregoing, it is established that the purchase of insurance was optional and that by their actions employees of respondents did not negate the written disclosures in the forms used.

Oral Quotes of Loan Costs

16. With regard to the charges that loan costs orally quoted included premiums for insurance (Complaint, ¶ Four, 1) and that such costs automatically were included in loan agreements unless the borrower specifically objected (Complaint, ¶ Four, 2), the evidence establishes that instructions to employees were that they should not include charges for credit life and/or credit accident and health (disability) insurance when monthly repayment figures were quoted (Beckley, Tr. 140–41). Employees told potential borrowers over the telephone what the charges for insurance on the loan might be (George, Tr. 253) and tried to persuade them to buy insurance (Beckley, Tr. 93; Miles, Tr. 862, 867). They also explained all of the loan terms when the potential borrower came to the office to execute the loan forms by "going over" each of the entries made (Beckley, Tr. 129; Stricklen, Tr. 242; George, Tr. 247; Dionne, Tr. 791, Miles, Tr. 860–61, 865). [14]

U-LIFE CREDIT CORPORATION

LOAN APPLICATION

BRANCH NO

DATE OF APPLICATION | APP TAKEN BY | APPL ED FOR $ | AMOUNT | SOURCE | CODE | DAY | REPT MT DATE | TIME

DATE OF LOAN | ACCOUNT NO | TYPE | DUE DATE | PREV ACCT NO | TYPE | DATE OF PREV ACCT | SOL CODE | HIGH CRED $

MR & MRS ☐ AIR ☐ MRS ☐ MISS (Check One) | APPLICANT'S LAST NAME | FIRST NAME | MI | DATE OF BIRTH Month Year | SPOUSE | MI | DATE OF BIRTH Month Year | C

PRESENT ADDRESS | CITY | STATE | ZIP | HOW LONG Years Months | TELEPHONE AREA | NO

MAILING ADDRESS (IF DIFFERENT FROM ABOVE) | CITY | STATE | ZIP | APPLICANT SOCIAL SECURITY NO — — | SPOUSE — —

SECTIONS TO RESIDENCE IF RURAL

PREVIOUS ADDRESS (SHOW ADDRESSES FOR 5 YEARS) | CITY | STATE | ZIP | HOW LONG Years Months | LANDLORD OR MORTGAGE HOLDER

PREVIOUS ADDRESS | CITY | STATE | ZIP | HOW LONG Years Months | LANDLORD OR MORTGAGE HOLDER

RENTING ☐ LANDLORD BUYING ☐ MORTGAGE HOLDER | NAME | ADDRESS | MO PAY $ | PURCH PRICE $ | MORTGAGE BAL $ | DUE DT

APPLICANT	SPOUSE
EMPLOYER	EMPLOYER
ADDRESS	ADDRESS
TEL NO. / DEPT. / BADGE NO	TEL NO / DEPT / BADGE NO
HOW LONG EMPLOYED Years Months / OCCUPATION / SALARY / PAYDAY	HOW LONG EMPLOYED Years Months / OCCUPATION / SALARY / PAYDAY
PREVIOUS EMPLOYER (SHOW EMPLOYMENT FOR 5 YEARS) / HOW LONG Years Months	PREVIOUS EMPLOYER (SHOW EMPLOYMENT FOR 5 YEARS) / HOW LONG Years Months
PREVIOUS EMPLOYER / HOW LONG Years Months	PREVIOUS EMPLOYER / HOW LONG Years Months
OTHER INCOME	OTHER INCOME
SOURCE / AMOUNT $	SOURCE / AMOUNT $

CREDIT INFORMATION

CREDITOR	EST AMT	OPEN DATE	HI CREDIT	TERMS	BAL DUE	SECURITY	DATE LAST PMT	HOW PD	PAYOFF
PREVIOUS ACCOUNT THIS OFFICE									

BANK WITH / TYPE ACCT ☐ CHECKING ☐ SAVINGS ☐ LOAN / AUTO MAKE / YEAR / ☐ CLR ☐ INC / BAL OWED TO / AUTO MAKE / YEAR / ☐ CLR ☐ INC / BAL OWED

PREVIOUS ACCOUNT INFORMATION

LATE FEES DUE $	INTEREST DUE $	INT. REFUND $	PYE CHG REFUND $	LOAN FEE REF. $	AUTO INS. REF. $	HHG FIRE INS. REF. $	DISABIL. INS. REF. $	CREDIT LIFE REF. SOL. COV. $	CRED LIFE REF JT COV. $

NEW LOAN INFORMATION

CHECK DISBURSEMENTS

AMOUNT	COMMENT	TO
$		
$		
$		
$		
$		
$		
$		

INTEREST $	1ST DO ENT CHG $	SERVICE CHARGE $		TOTAL OF PAYMENTS $
LOAN FEE $	LOAN FEE $	$	$	TOTAL FINANCED $
AUTO INS PREM $	HHG FIRE INS PREM. $	DISABIL INS PREM. $	$	AMOUNT PAID $
CRED CASU LIFE PREM. $	CRED CASU LIFE PREM. SOL. COV. $	CRED CASU LIFE PREM. JT. COV. $	$	TOTAL SALE PRICE $
AUTO TITLE FEE $	OFFICIAL FEES $	DOC. STAMPS $	$	TOTAL FEES $
SECURITY $	CODE	FIRST DUE DATE	MATURITY DATE	PAYOFF BALANCE ON PREVIOUS ACC $
DEFAULT CHG $	SCHEDULE OF PAYMENTS $ AND $			NET CASH ADVANCE $

APPROVAL AND COMMENTS

LOAN APPROVED FOR: $

LOAN APPROVED BY:

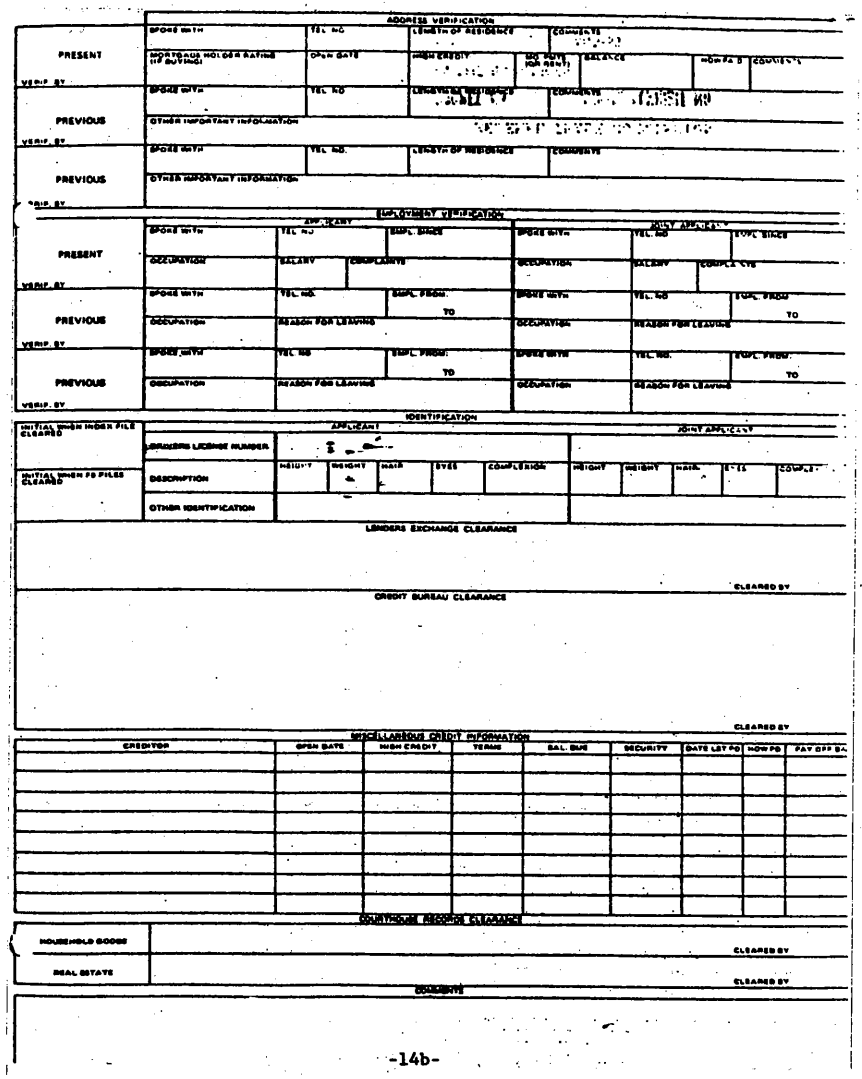
LOAN CLOSED BY:

LIEN TO BE RECORDED ☐ HHG ☐ AUTO ☐ REAL ESTATE

FRONT

-14a-

FEDERAL TRADE COMMISSION
DOCKET No 9147 COMMISSION'S / RESPONDENT'S EXHIBIT NO RX-7
IN THE MATTER OF U.S. Life Credit Corp., et al
DATE 5-3-71 WITNESS


ADDRESS VERIFICATION
PRESENT
PREVIOUS
PREVIOUS
EMPLOYMENT VERIFICATION
PRESENT
PREVIOUS
PREVIOUS
IDENTIFICATION
APPLICANT
JOINT APPLICANT
LENDERS EXCHANGE CLEARANCE
CREDIT BUREAU CLEARANCE
MISCELLANEOUS CREDIT INFORMATION
CREDITOR
COURTHOUSE RECORDS CLEARANCE
HOUSEHOLD GOODS
REAL ESTATE
COMMENTS

FORM 0 7320
NC-1 8/76

RX 32

FEDERAL TRADE COMMISSION
9057 Exhibit No. 32
US Life Credit Corp.
Reporter AF
9/20/76

ACCOUNT NUMBER / TYPE	DUE	DATE OF LOAN	PREVIOUS ACCOUNT NO. TYPE	DATE OF ...	... CODE	HIGH CREDIT		BRANCH NO. NAME ADDRESS AND PHONE NUMBER
SECURITY	CODE	PURPOSE			... CODE	F/N STATEMENT EXPIRATION DATE		
MR. & MRS. / MR. / MRS. / MISS	BORROWER'S LAST NAME	FIRST NAME	INIT.	DATE OF BIRTH MO YR	SPOUSE	INIT. / DATE OF BIRTH MO YR / DEP		
STREET ADDRESS	CITY	STATE	ZIP CODE	PHONE	RES. / W/C			
TOTAL OF PAYMENTS $								1
MR. / MRS. / MISS	CO-MAKER - LAST NAME	FIRST NAME	INIT.	PHONE	RES. / W/C	FINANCE CHARGE $		2
STREET ADDRESS	CITY	STATE	ZIP CODE					
ANNUAL PERCENTAGE RATE %						AMOUNT FINANCED $		3
... FIRE INS. PREM. $	DISABILITY INS. PREMIUM $	DECR. CREDIT LIFE INS. PREMIUM $	LEVEL CREDIT LIFE INS. PREMIUM $	JOINT CREDIT LIFE (BOR. & SPOUSE) $		TOTAL INS. PREMIUMS $		4
... FEES PREVIOUS ACCOUNT $	INTEREST PREVIOUS ACCOUNT $	RENEWAL BALANCE PER LEDGER CARD $	PREVIOUS ACCOUNT INFORMATION $	AUTO TITLE FEE	OFFICIAL FEES $	TOTAL FEES $		5
INTEREST REFUND		... FIRE INS. REFUND $	DISAB. INS. REFUND $	DECR. CR. LIFE INS. REFUND $	LEVEL CR. LIFE INS. REF. $	JOINT CR. LIFE INS. REF. $	PAYOFF BALANCE DUE ON PREVIOUS ACCOUNT $	6
		SCHEDULE OF PAYMENTS ×$		FIRST DUE DATE	MATURITY DATE	NET CASH ADVANCED $		7 BOX 3 LESS BOXES 4 5 & 6
EMPLOYER	OCCUPATION	YRS. MOS.	MO. SALARY	PAY DAY	BUS. PHONE			ISSUE CHECKS TO: CK NO. / AMOUNT / ...
SPOUSE EMPLOYER								
OTHER INCOME-SOURCE, AMOUNT		ORIGINAL AMOUNT OF NOTE		AMT. FIRE INS. COVERAGE				

DATE PAID	AMOUNT PAID	INTEREST	APPLIED TO PRINCIPAL	OLD BALANCE	NEW BALANCE	MEMO

CK. NO. / AMOUNT / TO BORROWER

TOTAL OF CHECKS MUST EQUAL BOX 7

SECURITY CODES
1. HOUSEHOLD GOODS
2. MOTOR VEHICLE
3. HOUSEHOLD GOODS & AUTO
4. REAL ESTATE
5. WAGE ASSIGNMENT
6. CO-MAKER/ENDORSER
7. UNCLASSIFIED
8. UNSECURED NOTE

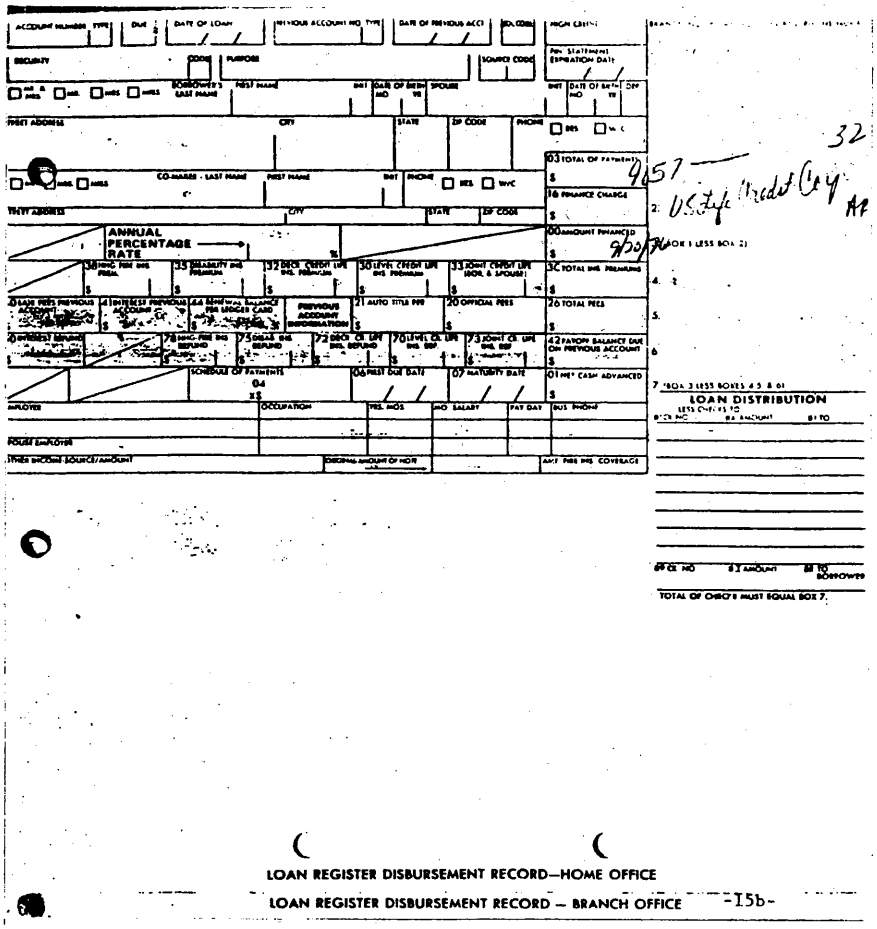
#1 SOURCE CODES	#2
1. PB W/INCREASE	1. HQ DIRECT MAIL
2. PB NO INCREASE	2. BO DIRECT MAIL
3. NEW BORROWER	3. TELEPHONE SOL
4. FORMER BOR.	4. COUNTER SOL
5. S/F CONV.	5. COLL. DEPT. REF.
6. INTER-CON. CONV.	6. DEALER REF.
7. S/F REFERRAL	7. RECOMMEND
	8. NEWSPAPER
	9. OTHER

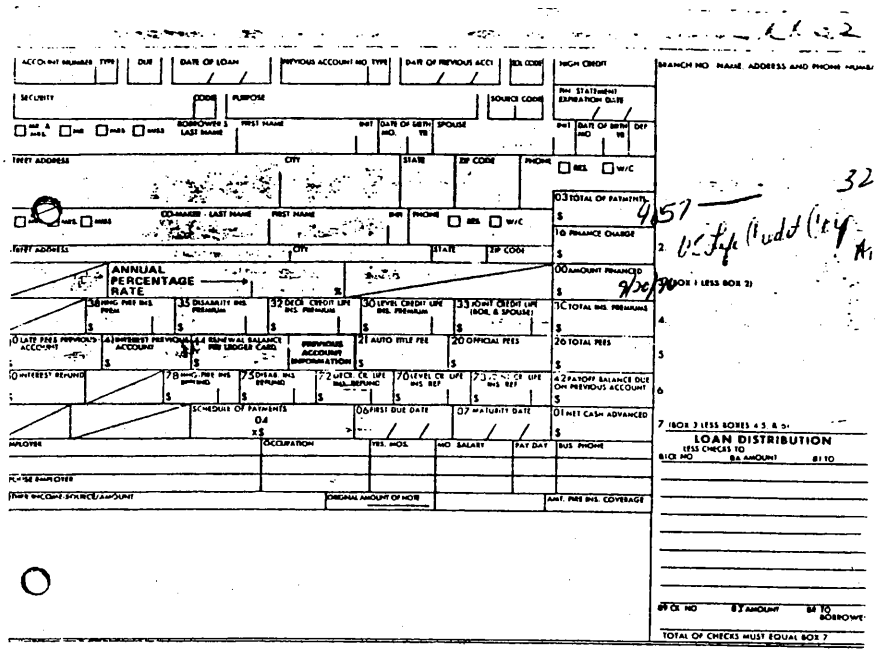
	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
COUNTER SOLICITATION AND INTRODUCTORY CARDS												
DIRECT MAIL SOLICITATION												

LOAN REGISTER DISBURSEMENT RECORD—HOME OFFICE

LOAN REGISTER DISBURSEMENT RECORD — BRANCH OFFICE

-15a-


ANNUAL PERCENTAGE RATE
LOAN DISTRIBUTION
LOAN REGISTER DISBURSEMENT RECORD—HOME OFFICE
LOAN REGISTER DISBURSEMENT RECORD — BRANCH OFFICE
-I5b-

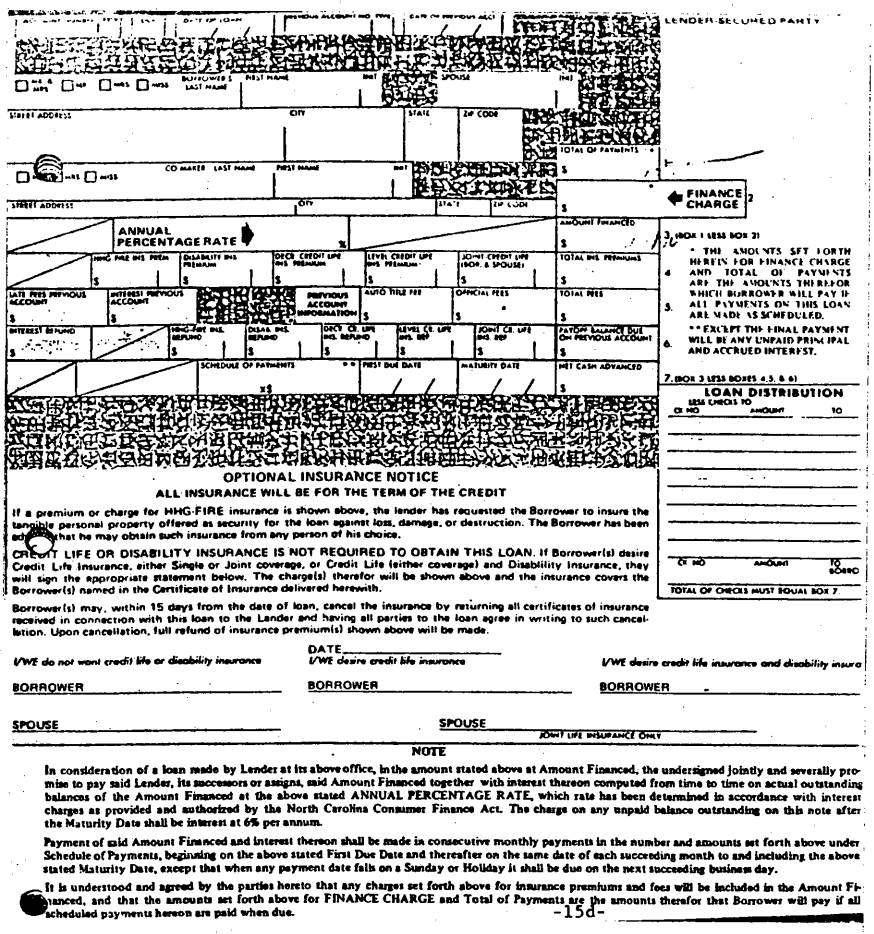


I (we) hereby authorize the disbursement of the proceeds of the loan as above set forth and acknowledge receipt of the amount shown as "Check to Borrower".

Borrower

Borrower

LOAN REGISTER DISBURSEMENT RECORD — BRANCH OFFICE -15c-


LENDER-SECURED PARTY

BORROWER'S LAST NAME FIRST NAME INIT SPOUSE INIT

STREET ADDRESS CITY STATE ZIP CODE TOTAL OF PAYMENTS *

CO-MAKER LAST NAME FIRST NAME INIT

STREET ADDRESS CITY STATE ZIP CODE

FINANCE CHARGE 2

ANNUAL PERCENTAGE RATE %

AMOUNT FINANCED

MHG PHY INS PREM | DISABILITY INS PREMIUM | DECR CREDIT LIFE INS PREMIUM | LEVEL CREDIT LIFE INS PREMIUM | JOINT CREDIT LIFE (BOR. & SPOUSE) | TOTAL INS PREMIUMS

LATE FEES PREVIOUS ACCOUNT | INTEREST PREVIOUS ACCOUNT | PREVIOUS ACCOUNT INFORMATION | AUTO TITLE FEE | OFFICIAL FEES | TOTAL FEES

INTEREST REFUND | MHG-FIRE INS. REFUND | DISAB. INS. REFUND | DECR. CR. LIFE INS. REFUND | LEVEL CR. LIFE INS. REF | JOINT CR. LIFE INS. REF | PAYOFF BALANCE DUE ON PREVIOUS ACCOUNT

SCHEDULE OF PAYMENTS ** FIRST DUE DATE MATURITY DATE NET CASH ADVANCED

3. (BOX 1 LESS BOX 2)

4 * THE AMOUNTS SET FORTH HEREIN FOR FINANCE CHARGE AND TOTAL OF PAYMENTS ARE THE AMOUNTS THEREFOR WHICH BORROWER WILL PAY IF ALL PAYMENTS ON THIS LOAN ARE MADE AS SCHEDULED.

5. ** EXCEPT THE FINAL PAYMENT

6. WILL BE ANY UNPAID PRINCIPAL AND ACCRUED INTEREST.

7. (BOX 3 LESS BOXES 4, 5, & 6)

LOAN DISTRIBUTION

LESS CHECKS TO

CK NO AMOUNT TO

CK NO AMOUNT TO BORR'D

TOTAL OF CHECKS MUST EQUAL BOX 7

OPTIONAL INSURANCE NOTICE

ALL INSURANCE WILL BE FOR THE TERM OF THE CREDIT

If a premium or charge for MHG-FIRE insurance is shown above, the lender has requested the Borrower to insure the tangible personal property offered as security for the loan against loss, damage, or destruction. The Borrower has been advised that he may obtain such insurance from any person of his choice.

CREDIT LIFE OR DISABILITY INSURANCE IS NOT REQUIRED TO OBTAIN THIS LOAN. If Borrower(s) desire Credit Life Insurance, either Single or Joint coverage, or Credit Life (either coverage) and Disability Insurance, they will sign the appropriate statement below. The charge(s) therefor will be shown above and the insurance covers the Borrower(s) named in the Certificate of Insurance delivered herewith.

Borrower(s) may, within 15 days from the date of loan, cancel the insurance by returning all certificates of insurance received in connection with this loan to the Lender and having all parties to the loan agree in writing to such cancellation. Upon cancellation, full refund of insurance premium(s) shown above will be made.

DATE

I/WE do not want credit life or disability insurance *I/WE desire credit life insurance* *I/WE desire credit life insurance and disability insura*

BORROWER BORROWER BORROWER

SPOUSE SPOUSE

JOINT LIFE INSURANCE ONLY

NOTE

In consideration of a loan made by Lender at its above office, in the amount stated above at Amount Financed, the undersigned jointly and severally promise to pay said Lender, its successors or assigns, said Amount Financed together with interest thereon computed from time to time on actual outstanding balances of the Amount Financed at the above stated ANNUAL PERCENTAGE RATE, which rate has been determined in accordance with interest charges as provided and authorized by the North Carolina Consumer Finance Act. The charge on any unpaid balance outstanding on this note after the Maturity Date shall be interest at 6% per annum.

Payment of said Amount Financed and interest thereon shall be made in consecutive monthly payments in the number and amounts set forth above under Schedule of Payments, beginning on the above stated First Due Date and thereafter on the same date of each succeeding month to and including the above stated Maturity Date, except that when any payment date falls on a Sunday or Holiday it shall be due on the next succeeding business day.

It is understood and agreed by the parties hereto that any charges set forth above for insurance premiums and fees will be included in the Amount Financed, and that the amounts set forth above for FINANCE CHARGE and Total of Payments are the amounts therefor that Borrower will pay if all scheduled payments hereon are paid when due.

-15d-

Every payment received hereon shall be applied first to interest to the actual date payment is received and the remainder thereof to the Amount Financed. Failure in making any scheduled or deferred payment hereon when due shall, at Lender's option and without notice or demand, render the entire unpaid balance of the Amount Financed and accrued interest at once due and payable.

DEFAULT CHARGE: If any payment hereon is not made when due, interest will continue to accrue on the unpaid Amount Financed at the above stated rate until such payment is made.

PREPAYMENT: If the unpaid balance of the Amount Financed of this loan is prepaid in full, by whatever means, before the Maturity Date hereof, interest at the above stated rate will be charged thereon only to the date of actual payment.

Cause of action shall arise hereon only with respect to the entire Amount Financed and accrued interest unpaid hereunder. The makers, sureties, endorsers and guarantors hereof severally waive demand for payment, notice of non-payment, protest and notice of protest of this note and consent to extensions of time of payment without notice.

The undersigned hereby jointly and severally authorize the Lender, its agents and assigns to communicate in any manner with any person, firm, corporation or governmental agency for any purpose in connection with the making or collection of the loan evidenced by this note and also waive the right to enforce any claim, action or cause of action which the undersigned may hereafter have for violation of right of privacy by reason of such communications.

The construction, validity, and effect hereof shall be governed by the laws of North Carolina, as modified by the Federal Consumer Credit Protection Act.

A statement of said loan has been delivered to the undersigned Debtor as required by Section 53-181, General Statutes of North Carolina.

SECURITY: If secured, this loan will be secured by a security interest in such of Borrowers' personal property as is described in the below Security Agreement, or in a "Schedule A" listing attached thereto.

SECURITY AGREEMENT

To secure the payment of the above described loan and any future advances to the undersigned, Debtor(s) grant(s) a security interest to the Secured Party in the personal property described below or in a "Schedule A" listing attached hereto.

☐ All furniture, appliances and other household goods and chattels now owned and located in or about Debtor(s) residence at the address shown above.

☐ Motor Vehicle:

	YEAR	MAKE	BODY TYPE	SERIAL NO		YEAR	MAKE	BODY TYPE	SERIAL NO
1					2				

☐ Other (describe):

and all accessions to, substitutions for, replacements of and proceeds from the described collateral.

If this Security Agreement includes a motor vehicle, Debtor(s) covenant(s) they will not remove it from the State of their present residence shown above and if this Security Agreement includes other personal property, Debtor(s) covenant(s) they will not remove such other personal property from their residence, without the written consent of the Secured Party.

If default shall occur in the payment of any debt secured hereby or any conditions of this Security Agreement, then the Secured Party may take immediate possession of the Collateral wherever found, with or without legal process, may require the Debtor(s) to assemble the Collateral and make it available to the Secured Party at a place reasonably convenient to both parties and may exercise any rights and remedies granted a Secured Party by the Uniform Commercial Code on default by the Debtor(s).

Borrower(s) hereby execute the above Note and, if applicable, the Security Agreement and acknowledge receipt of a copy of this document executed on the above "Date Of Loan".

Witness

_____ (DEBTOR/BORROWER) SEAL

_____ (DEBTOR/BORROWER) SEAL

_____ (DEBTOR/BORROWER) SEAL

_____ (DEBTOR/BORROWER) SEAL

RECEIPT – PREVIOUS ACCOUNT

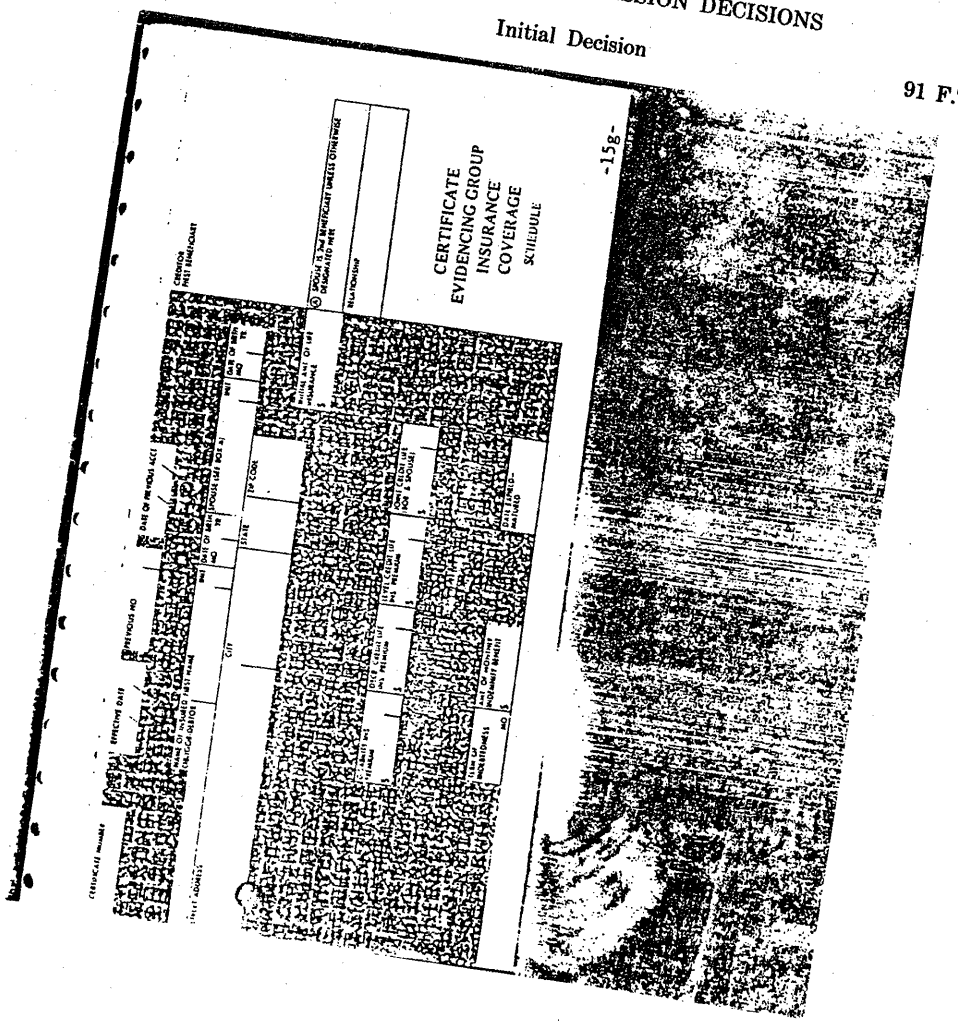
Borrower(s) hereby tender payment in full by renewal of the previous account identified above and acknowledge receipt by credit to said account of the unearned finance charge and all insurance premium refunds.

_____ Borrower _____ Borrower

SEE OTHER SIDE FOR IMPORTANT INFORMATION

ORIGINAL — OFFICE COPY

Agreed rate of Charge	3% per month on that part of the unpaid principal balance not exceeding $300 and 1½% per month on that part of the unpaid principal balance in excess of $300, but not exceeding $1500, provided however, that after maturity the rate shall be reduced to 6% simple interest per annum on any balance remaining unpaid.


CERTIFICATE
EVIDENCING GROUP
INSURANCE
COVERAGE
SCHEDULE
-15g-

984

)

CREDITOR'S MEMORANDUM

1. Policy No. .....
2. Initial Amount of Indebtedness ..... $
3. Amount Paid ..... $
4. Balance Due ..... $
5. Number of Monthly Payments in Default at Death .....

I hereby certify that the balance due on this account is the amount shown in Line 4.

NOT VALID UNLESS ACCOMPANIED BY CERTIFIED COPY OF DEATH CERTIFICATE

Date

Creditor

Title

USLIFE CREDIT LIFE INSURANCE COMPANY

Schaumburg, Illinois

LIFE CLAIM

CERTIFICATE
EVIDENCING GROUP
INSURANCE
COVERAGE
SCHEDULE

[16] 17. As to whether borrowers were apprised that insurance was optional, one witness who had had many loans with USLIFE Credit, his first in 1969, (Eller, Tr. 340) said that he was not informed that he need not have insurance on his loans (Eller, Tr. 334, 338). The testimony of this witness (Tr. 302–45), however, was so contradictory and confusing that little reliance has been placed on it in the face of the testimony of the other witnesses.

18. Insurance was not automatically included when the documents for the loan were prepared (Miles, Tr. 863). The evidence *is* clear that borrowers frequently did not take the time to read the loan papers before signing them (Richardson, Tr. 658, 663–64, 669, 677; Ferrari, Tr. 595). One explained that he was in a hurry (Grant, Tr. 755, 760, 765–66).

19. There also was testimony to the effect that employees did not pressure borrowers to sign any of the loan documents hastily (Miles, Tr. 865) or do anything else by word or act which would hinder or prevent a borrower from taking as much time as he chose to read the loan documents (Richardson, Tr. 658; Grant, Tr. 740, 742; Dionne, Tr. 791).

20. In view of the foregoing, it is established that costs of loans were properly quoted orally and that insurance was not automatically included in the loan terms.

Xs on the Loan Agreements To Show Locations for Signatures

21. The third charge in the complaint was that, without the borrower's permission or authority, Xs were placed on loan agreements on the lines calling for the borrower's signature to indicate he wanted to have insurance (Complaint, ¶ Four, 3). Rather than being used to induce the unwitting purchase of insurance, the evidence established that such marks were placed on the documents as a convenience to facilitate location of the places where the borrowers' signatures were to be affixed (Stricklen, Tr. 239; Richardson, Tr. 649; Grant, Tr. 726–27, 765). In the summer of 1973, employees were instructed to discontinue the practice because of criticism of the use of such check marks expressed at a convention of lenders (Dunn, Tr. 186–87; George, Tr. 256). The fact that employees were instructed to discontinue the practice, however, does not obviate the possibility of violation. See *Montgomery Ward & Co.* v. *F.T.C.*, 379 F.2d 666, 672 (7th Cir. 1967). **[17]**

22. The evidence is persuasive, in the light of the testimony to the effect that respondents' employees did nothing to pressure, rush, or deceive borrowers into signing anything, that the placing of marks such as Xs on the documents was a convenience rather than a deceptive or pressure tactic.

23. A complementary allegation was that, when loan agreements were presented to borrowers filled out by employees of USLIFE Credit with loan data and the Xs as indicated, the borrowers' signatures required to show that insurance was desired and to acknowledge receipt of the executed loan agreements were not explained (Complaint, ¶ Four, 4). Although the evidence shows that marks were used, it does not establish that it was done for any ulterior purpose or that presentation of the documents marked in this manner for execution by borrowers is a violation of the Truth in Lending Act. The evidence is persuasive that the terms of loans were "gone over" (Findings 14, 16) and that borrowers were given ample opportunity to read the documents (Findings 19, 22).

Computations of the Annual Percentage Rate

24. It was also alleged that since the premium costs of insurance were included in the "Record of Disbursement" section of the loan agreement, such costs became a part of the amount financed but were not included in the finance charge. Hence, the alleged result was that the "Annual Percentage Rate" was improperly computed (Complaint, ¶ Four, 5).

25. Section 226.2(g) of Regulation Z (12 C.F.R. 226) as amended October 28, 1975, provides that the " 'Annual Percentage Rate' means the annual percentage rate of finance charge determined in accordance with § 226.5." In pertinent part, section 226.5(b)(1) provides that "[t]he mathematical equation and technical instructions for determining the annual percentage rate . . . are set forth in Supplement I to Regulation Z which is incorporated in this Part by reference." Reference to Supplement I, however, is unnecessary in connection with this matter because 226.4(a)(5) "Determination of Finance Charge, General Rule" provides that charges for insurance written in connection with a credit transaction are to be included in arriving at the charge *unless:*

(i) the insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and
(ii) any customer desiring such insurance coverage gives specifically dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance.

[18] 26. Since the evidence shows that insurance was and is *not required* (Beckley, Tr. 84), that this fact is clearly and conspicuously disclosed in *writing* to the customer, and that the acts and practices of respondents' employees do not negate the written disclosure, the insurance premiums involved in this case need not be included in the

calculation of the finance charge. The documentary and testimoni evidence shows that customers execute, or always have presented t them for execution, a clearly marked and separately distinguishabl section of the loan agreement, which section has to do solely wit apprising the customer (1) that he or she need not purchase insuranc in order to take out the loan, (2) that he or she may decline to take ou insurance, and (3) that he or she has a choice of disability/health or lif insurance if any is wanted. (CXs 95, 98, 103, 106, 110, 116, 119–20, 12 125, 135–414.)

27. The insurance section of loan agreement forms used b respondents also calls for insertion of a date by the customer adjacen to his signature indicating his choice of insurance options (Dunn, T 185–86; CXs 95, 98, 106, 110, 116, 119–20, 122, 125, 135–414) as require by § 226.4(a)(5) in order to exclude insurance premiums fro computation of the finance charge. As noted previously, the recor indicates that a separate dating by the customer of this section of th loan agreement was not always done (Dunn, Tr. 186). The fact that th date has not been entered in the insurance-is-optional section o otherwise properly dated loan agreement forms, like those in evidenc here, has been held to be not violative of § 226.4(a)(5) of Regulation Z In *In Re Warren*, 387 F. Supp. 1395, 1404 (S.D. Ohio, E.D. 1975) th court explicitly stated:

> Whether the date is at the top of the page on the disclosure statement or separatel written next to the credit life request, the purpose of the Truth in Lending Act—t permit the debtor to make an informed credit choice—is equally well-fulfilled.

See also, *Porter* v. *Household Finance Corp. of Columbus*, 385 F. Supp 336, 345 (S.D. Ohio, E.D. 1974).

[19] 28. I do not agree with the proposal of complaint counsel that separate piece of paper should be required for insurance disclosures i order for a lender to be in compliance with § 226.4(a)(5) of Regulatio Z (Proposed Order, 2(a), (b); CCPF, pp. 38–40). The section merel requires that the election is to be separately signed after premiun costs are "disclosed in writing," as they are here (CXs 95, 98, 103, 106 110, 116, 119–20, 122, 125, 135–414; RXs 12,24), in order to indicate th borrower's choice regarding insurance. Further, complaint counse acknowledged that the insurance disclosure in respondents' presen loan documents is in full compliance with the law (PHC Tr. 13; CCPF p. 30).

Did Customers Know That Insurance Was Optional?

29. The practices discussed above serve as the basis for th allegations in the complaint to the effect that borrowers are induced t

incur charges for insurance in spite of the insurance-is-optional language and spaces for declining or requesting insurance which are contained in the loan agreement forms (Complaint, ¶ Five). There is no question that conduct which negates written procedures may be shown at trial to prove that, in fact, a requirement existed that insurance had to be purchased. *Fisher* v. *Beneficial Finance Company of Hoxsie*, 383 F. Supp. 895, 900 (D.C.R.I. 1974).

30. Contrary to the suggestion in the complaint that the actions of employees of USLIFE Credit nullified the insurance-is-optional language and that they used deceptive or pressure tactics to place insurance on loans, the evidence shows that borrowers, for the most part, either were aware specifically that insurance was optional or by their actions made it clear that such fact was of little or no interest to them (George, Tr. 253; Findings 15, 18). For example, Ms. Ferrari, signed the optional insurance section (Tr. 581) and testified that she both read and understood it (Tr. 592). Ms. Ferrari also testified that the insurance coverage was discussed but that she was told "If you do not want to take this loan with the insurance, that is one thing; but there is not a place in town that would give you this money without the insurance" (Tr. 572). The suggestion that the employee actions negated the insurance-is-optional language in the form, however, is tempered by the fact that Ms. Ferrari signed the optional insurance section and said that she read and understood it (*supra*). Further, the testimony of Ms. Ferrari makes it obvious that she was hostile toward respondents due to the fact that she felt she had been made to "look ridiculous"—"like a fool"—when she questioned the employee regarding insurance **[20]** (Tr. 594). Ms. Ferrari said that she did not want to ever see or talk to any USLIFE Credit employee again (Tr. 600) even though she knew later that a refund was being held for her to pick up at the local branch office (Tr. 599–600).

31. Borrower witness Mr. Richardson testified that he once collected on loan insurance (Tr. 656) and that for 8–10 years had always taken out insurance on his loans (Tr. 656–57, 673–74). He said he thought he had to have insurance but that he did not read the loan agreement papers (Tr. 658, 663–64, 669, 674, 677) although he could have (Tr. 658). He did not testify that an employee had led him to believe that insurance was required.

32. Borrower witness Mr. Martin at one point said that he had the impression that he had to have insurance (Tr. 696) and knew that he, in fact, did have it (Tr. 701). Mr. Martin also said he could have read the documents he was signing (Tr. 704, 706) but that he did not (Tr. 713) and that he learned the insurance was optional by reading the loan papers later (Tr. 696–98). Lastly, Mr. Martin testified that on a

subsequent loan he had with USLIFE Credit he decided against having insurance coverage (Tr. 708). He too did not testify that an employee had led him to believe that insurance was required.

33. Borrower witnesses Mrs. Grant and her husband testified that they did not read the loan papers (Tr. 740, 760–61), were not rushed (Tr. 741–42, 765) and were in a hurry to get the loan proceeds and leave the loan office (Tr. 755, 760, 765–66). They also did not testify that an employee had led them to believe that insurance was required.

34. To the same end, a former employee, Mr. Stricklen, who was called by complaint counsel, said that insurance was optional (Tr. 236) signed a statement which is in evidence to that effect (RX 22) and said that he explained the terms of loans to USLIFE Credit customers to the best of his ability (Tr. 242; RX 22). He also said that if a borrower refused insurance, he would refer the matter to his supervisor, a Mr Daniels (Tr. 242). Similarly, a former employee, Mr. George, who also was called by complaint counsel, testified that he explained the loan terms, including a discussion of insurance on *new* loans and that insurance was automatically included on a loan renewal *if* the previous loan had insurance coverage *and* the borrower indicated that "everything would be the same, the same length of contract, the same insurance . . ." (Tr. 263–64). He said that he asked new borrowers who they wanted as the beneficiary of the insurance (Tr. 252) and informed them that the insurance was not mandatory (Tr. 252–53). Another ex-employee called by complaint counsel, Mr. Dionne, testified that insurance was presented as an option by respondents but that he did not personally offer it as an option (Tr. 789–90), [21] that not all loans were covered by insurance (Tr. 790), that borrowers had time to read the contract (Tr. 791) and that its terms were "gone over" (Tr. 791).

35. The one employee called by counsel for respondents, Mr. Miles, testified that borrowers were asked whether they wanted insurance (Tr. 857, 861, 867–68), that the terms of the loan were gone over with the borrower in the course of telephone conversations (Tr. 860), that he would try to sell insurance on the loan to the borrower (Tr. 862), that the borrower was not rushed to sign the loan papers, although marks were sometimes used to indicate where signatures were to be affixed (Tr. 865), and that his employer's instructions to him were that borrowers were to be informed as to all the terms of their loans (Tr. 865).

36. In view of this testimony, plus documentary exhibits in the record, the evidence is convincing that neither devious nor deceptive tactics or practices were utilized by respondents to induce borrowers to incur insurance charges when loans were taken out. It is established that loan documents were sometimes prepared in advance of the

orrower's visit to the office (Stricklen, Tr. 224–25) on the basis of ıformation obtained over the telephone, but it is not established that his practice was improper or to the detriment of the borrowers. It is ndisputed that respondents have adequate written disclosures on heir loan agreements (CCPF, p. 30).

INTERSTATE COMMERCE NEED NOT BE PROVEN IN A TRUTH IN LENDING CASE

Section 108(c) "Administrative Enforcement" of the Truth in ending Act (15 U.S.C. 1601, *et seq.*) provides that a violation of that Act is also a violation of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*) "irrespective of whether that person [who is in violation] is engaged in commerce or meets any other jurisdictional test in the Federal Trade Commission Act." Consequently, in order for Commission jurisdiction to attach, it is not essential that USLIFE Credit and USLIFE be engaged in or that their acts or practices affect interstate commerce as is required by the Federal Trade Commission Act, as amended by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (15 U.S.C. 2301). The evidence adduced as to the character of the operations of USLIFE Credit and USLIFE in various states, however (Finding 3), establishes that they and the acts and practices called into question by the complaint, in fact, were in or affect interstate commerce. [22]

NAMING USLIFE AS A RESPONDENT

The evidence established that USLIFE, the parent corporation properly was named as a respondent. The chairman of the board of directors for USLIFE and its subsidiary, USLIFE Credit, was the same person (Finding 8). Proposed acquisitions by the subsidiary required and require approval by the parent (Finding 5). The parent also had/has veto authority over a decision by USLIFE Credit to close a branch office (Finding 5). Such involvement in the affairs of USLIFE Credit by USLIFE is sufficient evidence of control to warrant holding the parent liable for the acts and practices of the subsidiary. In *North American Co.* v. *S.E.C.*, 327 U.S. 686, 693 (1946), the Supreme Court said that:

> . . . ties and associations, combined with strategic holdings of stock, can on occasion serve as potent substitute for the more obvious modes of control. See *Southern Pacific Co.* v. *Bogert*, 250 U.S. 483, 491–492; *Natural Gas Co.* v. *Slattery*, 302 U.S. 300, 307–308. Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships.

To the same end, Commission precedents hold that in determini liability the "pattern and frame-work of the whole enterprise" is to examined. See *Art National Mfrs. Distr. Co.* v. *F.T.C.*, 298 F.2d 47 477 (2d Cir. 1962), *cert. denied*, 370 U.S. 939 (1962), citing *Goodman F.T.C.* 244 F.2d 584, 601 (9th Cir. 1957). The parent is vicariously liab for its subsidiaries' acts ". . . if the facts demonstrate even late control." See *In the Matter of Beneficial Corporation and Benefici Management Corporation*, CCH [1973–1976 Transfer Binder] Tra Reg. Rep. ¶ 20,959 at 20,812 (FTC 1975) [86 F.T.C. 119]. Previously, its decision in *P. F. Collier & Son Corp.* v. *F.T.C.*, 427 F.2d 266, 270 (6 Cir. 1970) the court in upholding a Commission decision said:

> . . . [W]here a parent possesses latent power, through interlocking directorates, f example, to direct the policy of its subsidiary, where it knows of and tacitly approves t use by its subsidiary of deceptive practices in commerce, and where it fails to exercise i influence to curb illegal trade practices, active participation by it in the affairs of t subsidiary need not be proved to hold the parent vicariously responsible. Under the circumstances, complicity will be presumed.

[23] In its more recent *Beneficial* opinion, *supra*, at 20,814, th Commission specifically rejected the common law rule that corporat identities are to be observed unless the subsidiary is the mere tool o the parent and its separate identity is a mere fiction.

Where the public interest is involved, as it is in the enforcement o the Truth in Lending Act, a strict adherence to common law principl is not required in the determination of whether a parent should be hel for the acts of its subsidiary when such adherence would enable th corporate device to be used to circumvent the policy of a statut *Goodman, supra*, 244 F.2d at 591; *Joseph A. Kaplan & Sons, Inc.* v *F.T.C.*, 347 F.2d 785, 787 n.4 (D.C. Dir. 1965).

Where the parent company is shown to be accountable for the act and practices of its subsidiaries because of the latent power to contro which is the situation here, it is unnecessary to demonstrate that th practices of the subsidiary alleged to be illegal were expressl authorized by the parent *or* that the parent actively participated i them. See *P. F. Collier & Son Corp.* v. *F.T.C.*, *supra*, 427 F.2d at 27(

Conduct within the actual or apparent scope of authority of loca managers and other employees subjects both the parent and th subsidiary to the jurisdiction of the Commission. See *Goodman, supra* 244 F.2d at 592; see also *Parke, Austin & Lipscomb, Inc.* v. *F.T.C.*, 14 F.2d 437, 440 (2d Cir. 1944). Lastly, it should be mentioned tha unsuccessful attempts to prevent misrepresentations by authorize agents will not put the principal beyond the reach of the Federal Trad Commission Act. *Goodman, supra*, 244 F.2d at 592. Thus the evidenc

tablishes and judicial precedents support the naming of USLIFE as a spondent.

RELIANCE ON A TRUTH IN LENDING THEORY VIS-A-VIS PROVING A VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

The complaint charges that the alleged violations of the Truth in ending Act by respondents constitute violations of the Federal Trade ommission Act (Complaint, ¶ One and ¶ Eight). Such charges are in cord with the provisions of Section 108(c) of the Truth in Lending ct that ". . . a violation of any requirement imposed under this title all be deemed a violation of a requirement imposed under that [the ederal Trade Commission] Act." [24]

The evidence establishes that in spite of respondents' compliance ith the written disclosure requirements of the Truth in Lending Act id employees "going over" loan terms with borrowers, some of the orrowers were still under the impression that insurance coverage was andatory (*e.g.*, Ferrari, Richardson, Martin; Findings 30–32). Conse- iently, it appears that the disclosure practice respondents use could e improved upon. For example, the loan application form (RX 7) does ot contain space for an entry to indicate the borrower's wish, or eference as to insurance coverage, although the loan agreement orm (*e.g.*, RX 32) does contain such spaces. (See pp. 14a-b, 15d hereof.)

Evidence as to the failure to make disclosures, as to impressions eated or as to the office setting in which a transaction is onsummated may be sufficient to serve as the basis for findings that espondents were not making adequate disclosures regarding the ptional nature of insurance, if proof of a violation was predicated on ie theory that Section 5 of the FTC Act had been violated. There is mple precedent for the proposition that a violation of the FTC Act iay be shown by evidence establishing that there has been inadequate isclosure of information which would enable consumers to make an iformed choice. See *Pfizer, Inc.*, 81 F.T.C. 23, 58 (1972), citing in n.2 nd n.3, *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965) and elhorn, "Proof of Consumer Deception Before the Federal Trade ommission," 17 Kansas L. Rev. 559 (1969).

The record reflects, however, that reliance on an FTC Act violation heory was specifically disclaimed on at least two occasions by omplaint counsel (PHC, Tr. 30–31, 95–98). Under these circumstances, ; would be a substantial deprivation of respondents' rights of due rocess to hold that the Federal Trade Commission Act had been iolated when a violation of the Truth in Lending Act has not been roven. It is well settled that a change in theories in midstream may ot be made without giving respondents reasonable notice of the

change. *Rodale Press, Inc.* v. *F.T.C.*, 407 F.2d 1252, 1256 (D.C. Cir 1968), citing *N.L.R.B.* v. *Johnson*, 332 F.2d 216, 219–20 (6th Cir. 1963) *N.L.R.B.* v. *Fletcher Co.*, 298 F.2d 594 (1st Cir. 1962).

The Administrative Procedure Act, Title 5 U.S.C. 554(b), provide that respondents must be informed of "the matters of fact and law asserted" and there are judicial precedents holding that, if the party proceeded against understood the issues and was given the opportunity to defend himself, he has been accorded due process. See *Golden Grain Macaroni Co.* v. *F.T.C.*, 472 F.2d 882, 885 (9th Cir. 1972). In *Golden Grain*, at 886, the appellate court held that ". . . all facts relevant to [25] the alleged unlawful acts were fully litigated." In contrast, the evidence presented in these proceedings in the course of the case-in chief and case-in-defense focused on, and was limited to, the requirements of the Truth in Lending Act. Complaint counsel said, in effect, that the Federal Trade Commission Act allegations hinged upon and were consequential to the Truth in Lending charges.

Counsel for respondents specifically raised the question as to whether the provisions of the Federal Trade Commission Act were being relied upon and complaint counsel made it clear that no such reliance was intended. In this context, since the evidence adduced did not establish that the Truth in Lending Act had been violated, either explicitly or implicity, that evidence is insufficient to establish that the Federal Trade Commission Act had been derivatively violated particularly in view of the evidence and agreement of counsel that the forms used by respondents *do* comply with the provisions of the Truth in Lending Act (Findings 28, 36).

As the case-in-chief was presented, the Truth in Lending predicate to the theory of the case was made clearer; respondents were apprised more specifically as to the acts and practices being challenged and had an opportunity to present their defense. Respondents did so successfully and may not now be held to have violated the Federal Trade Commission Act.

Conclusions of Law

The Federal Trade Commission has jurisdiction over the respondents and the subject matter of this proceeding.

These proceedings and the order issued hereby are in the public interest.

Respondents are in competition with other finance companies which lend money to the public.

Respondent USLIFE, the parent corporation, is vicariously responsible for the acts and practices of USLIFE Credit, one of its subsidiary

The evidence does not support the charges that respondents have or that they are violating the Truth in Lending Act. [26]

It would be a denial of due process to predicate a finding of violation of the Federal Trade Commission Act on this record.

Order of Dismissal

It is ordered, That the complaint in this matter be, and it is hereby, dismissed.

Opinion of the Commission

By Clanton, *Commissioner:*

I. BACKGROUND

On September 26, 1975, the Commission issued a complaint against respondents USLIFE Corporation (hereafter "USLIFE") and its subsidiary, USLIFE Credit Corporation (hereafter "USLIFE Credit") alleging violations of the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), Regulation Z (12 C.F.R. 226) and the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*). The issues at stake here concern the sale by USLIFE Credit of credit life and credit disability insurance in connection with its consumer loan business.

The complaint alleges that respondents violated Section 226.4(a)(5) of Regulation Z by engaging in acts and practices which operated "to defeat the elective language of the insurance authorization disclosures by obscuring from consumers knowledge about the [insurance] option." (Complaint para. 5). More specifically, the following practices were cited as illustrative of those which defeated the optional selection of insurance: [2]

(1) oral quotation of monthly repayment figures that include insurance charges;

(2) automatic inclusion of insurance charges in loan agreement papers;

(3) placement of an "X" at the appropriate signature line on the insurance authorization form prior to obtaining the customer's selection of insurance;

(4) failure to inform consumers as to the purposes of their signatures; and

(5) inclusion of charges for insurance in the "records of disbursements" section of the loan agreement without adjusting the finance charge and the annual percentage rate. (Complaint, para. 4)

The administrative law judge (ALJ) issued his decision dismissing

the complaint on January 27, 1977. Having found that respondents' official policy was not to require insurance (ID 10,15),[1] the ALJ concluded that the practices utilized by respondents did not run afoul of the credit statute or its implementing regulations. In particular, the law judge found that respondents' employees were instructed to explain loan terms to customers and to avoid oral quotations which included insurance. (ID 14,16) He determined further that insurance was not automatically included in loan forms prior to customer authorization, borrowers were not pressured into signing the forms, and respondents did not otherwise thwart consumers' opportunity to read over the relevant forms. (ID 18,19) Finally, the judge found that use of "Xs" and other similar marks on the signature lines served as a convenience to customers in finalizing the loan agreement, rather than creating the impression that insurance was obligatory. In sum, the ALJ found no basis for concluding that respondents' acts or practices were responsible for any impression prospective borrowers may have had that insurance was required. (ID 30) [3]

The ALJ reached this decision after striking the testimony of seven complaint counsel witnesses pursuant to his interpretation of the Jencks Act (18 U.S.C. 3500). (ID pp. 5–9) Relying on *voir dire* testimony of these witnesses, the judge noted that Jencks Act statements may have been made but a conclusive determination would require examination of the handwritten notes of the Commission's investigator which complaint counsel were unable to produce.

While finding no liability, the ALJ ruled that it would be proper to hold USLIFE responsible for the acts and practices of its subsidiary, USLIFE Credit, citing the fact that the same individual served as Board Chairman of the two corporations and the parent's authority to review and approve certain decisions of its subsidiary. (ID pp. 22–23)

Complaint counsel appeal from the law judge's determinations on liability and the Jencks Act while respondents cross appeal on the question of parent liability. For the reasons set forth below, we reverse the ALJ's rulings pertaining to the Truth in Lending Act violations and the Jencks Act and uphold his determination concerning the liability of USLIFE.

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[1] The following abbreviations will be used in this opinion:

ID — Initial Decision finding no.
ID p. — Initial Decision page no.
Tr. — Transcript page no.
CX — Complaint counsel's exhibit no.
RX — Respondent's exhibit no.
RAB — Respondent's appeal brief
CAB — Complaint Counsel's appeal brief
R.Ans — Respondent's answering brief
C.Ans — Complaint Counsel's answering brief

II. THE REQUIREMENTS OF THE TRUTH IN LENDING ACT

Section 226.4(a) of Regulation Z, which prescribes the manner for calculating the finance charge, specifies that it consists of all direct or indirect charges imposed by the creditor "as an incident to or as a condition of the extension of credit," including:

> 5) Charges or premiums for credit life . . . insurance, written in connection with any credit transaction unless:
>
> (i) the insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and [4]
>
> (ii) any customer desiring such insurance coverage gives specifically dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance.[2]

Respondents contend that since the general purpose of the Act and Regulation Z is to insure uniform disclosures, and not to serve as an "antifraud" statute, no violation will lie if the creditor's policy is to make insurance[3] coverage optional and the policy is disclosed in writing [5] to customers. (R.Ans at 5–8)[4] We reject such a restrictive interpretation of the statute.[5] The issue here relates not to respondents' official policy, or the adequacy of their written disclosures, but to whether certain practices utilized by respondents effectively prevented consumers from exercising a free and knowing choice as to their insurance option. That is, despite respondents' official policy, have they engaged in practices that serve to obscure or defeat this

[2] Section 226.4(a)(5) of Regulation Z implements the requirements of the Truth in Lending Act. Section 106(b) of the Consumer Credit Protection Act, 15 U.S.C. 1606(b) provides as follows:

> (b) Charges or premiums for credit life, accident, or health insurance written in connection with any consumer credit transaction shall be included in the finance charge unless
>
> (1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and
>
> (2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.

While the language of §106(b) of the Act and §226.4(a)(5) of the Regulation are slightly different, no issue is raised as to any possible inconsistency between the two provisions and we discern none. Accordingly, throughout the remainder of this opinion we will refer only to Regulation Z when discussing the alleged violation.

[3] Regulation Z, as it pertains here, encompasses several different types of insurance–credit life, accident, health, and loss of income. Since the legal and factual analysis is not altered by the particular type of insurance offered, we will merely make reference to "insurance" throughout this opinion without further specification of the particular type of insurance offered or selected.

[4] Of course, merely having an official policy that treats insurance coverage as optional will not suffice if the optional disclosure is itself so complex or confusing that the average consumer could not understand it. *Woods* v. *Beneficial Finance of Eugene*, 395 F. Supp. 9 (D. Ore. 1975); *Hall* v. *Sheraton Galleries of Atlanta*, 4 Cons. Cred. Guide (CCH) ¶ 98,737, (M.D. Ga. 1974). However, that issue is not before us here since no allegation has been made concerning the readability of respondents' written disclosures.

[5] The ALJ also rejected respondents' theory as well (ID 29), as did the original law judge assigned to this case (Judge Needelman) in his Memorandum and Order Respecting Respondents' Motion for Summary Decision, February 9, 1976.

policy, including the written disclosures contained in their loan agreements?

Legislative and judicial authorities alike convince us that, notwithstanding a creditor's official policy to the contrary, a further examination of the creditor's practices is in order to establish whether the insurance election has been undermined and the statute violated. The significance of the written disclosure of insurance costs is emphasized in the regulations and elaborated upon in the following excerpt from the Conference Report on the Truth in Lending Act:

> Under the conference substitute, such [insurance] charges may not be excluded [from the finance charge] unless the coverage of the debtor by the insurance is not a factor in the approval by the creditor of extension of credit, *and this is clearly disclosed to the debtor. The creditor must also disclose to the prospective debtor the cost of such insurance, and may not include it in the financing package unless the debtor gives specific affirmative written indication of his desire to have it.* If . . . insurance is written in connection with any consumer credit transaction, without complying with all of the foregoing requirements, then its cost must be included in the finance charge. . . .[6] (emphasis supplied)

[6] As the underscored language indicates, more than pro forma compliance with the statute is called for. Both the optional nature and cost of the insurance must be clearly disclosed and, *before* including insurance in the loan agreement, the creditor must obtain the consumer's written authorization. During debate in the House on the Conference Report, the floor manager of the bill, Congresswoman Lenore Sullivan, reinforced the importance of preserving consumer choice in deciding whether to purchase credit insurance:

> In the final bill, credit life insurance is included in the finance charge if the consumer does not have a free opportunity to decide whether he wants the coverage, or if the insurance is a factor in the extension of credit.[7]

Thus, even if insurance is not a factor in the creditor's decision to extend credit, insurance costs will be included in the finance charge provided the consumer does not have a "free opportunity" to exercise his or her choice. The result is the same whether the creditor officially requires insurance coverage or informally does so through practices which undermine the would-be borrower's voluntary election. Surely, a determination as to whether the choice was truly "free" contemplates an inquiry into the facts and circumstances surrounding the credit transaction.

The cases also support this view. In *F.T.C.* v. *Jorgensen*, 4 Cons. Cred. Guide (CCH) ¶98,594 (D.D.C. 1975), the court dismissed out of

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[6] Conf. Rep. No. 1397, 90th Cong., 2d Sess. 25 (1968).

hand a creditor's claim that a Commission inquiry into the practices surrounding the use of an insurance authorization form would amount to an ad hoc amendment to Regulation Z. The court held that "Regulation Z would be meaningless indeed if its requirements could be met in form and ignored or overridden in practice. An inquiry into actual practice is therefore appropriate." (*Id.* at 88,105.) Likewise, in *Fisher* v. *Beneficial Finance Co. of Hoxsie*, 383 F.Supp. 895 (D. RI 1974), the court observed that while a consumer's mere allegation that insurance was mandatory was insufficient to support a motion for summary judgment in her favor, she was free to introduce evidence at trial "that the defendant by its conduct did actually require . . . insurance to be purchased as a condition of [the] loan." (*Id.* at 900.) [7]

Finally, we take note of the Federal Reserve Board's own interpretations of Section 226.4(a)(5)[8] In addressing specific requests for advice on proper application of this provision, the Board's staff has advised, for example, that even where insurance is officially labeled "optional," the practice of including insurance costs in the loan papers prior to obtaining the consumer's approval would have "the practical effect of precluding the customer's free exercise of choice as to whether he wishes the insurance. Without that choice Congress specified that the premiums would have to appear in the finance charge."[9] [8] In fact, evidence of such a practice alone might be sufficient to establish liability. Clearly, other practices surrounding a credit transaction, in addition to those cited by the Federal Reserve Board, are also integral to a proper assessment of the voluntary nature of the insurance option and should be examined.[10]

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[8] An agency's interpretation of its own rules and regulations is entitled to great weight in determining the purpose and application of those rules and regulations. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434 (1971).

[9] FRB Letter No. 398 (August 26, 1970), [1969–1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 30,576. *See also* FRB Letter No. 408 (September 14, 1970), [1969–1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 30,586.

There is some hint in the court's decision in *Fisher* v. *Beneficial Finance*, *supra* at 900, that FRB Letter No. 408 supercedes the interpretation in FRB Letter No. 398. In fact, a close reading of the two letters shows them to be perfectly consistent. In Letter No. 398, the staff expressed its view that a "separate disclosure" of the cost of insurance prior to the consumer's election was the best method for insuring that the election was knowingly made. It was further noted that his "separate disclosure" should appear on the insurance authorization form itself.

Letter No. 408 reiterated this view but counseled the requester that the staff did not intend to imply that disclosure on the authorization form itself was the only method by which compliance could be achieved. The staff advised that if the creditor could prove that the disclosure was actually made before the consumer's election, §226.4(a)(5) would be satisfied. Significantly, though, the staff did not back away from its advice in Letter No. 398 and suggest that incorporation of the insurance charges within the terms of the loan agreement would be a permissible method of disclosure.

[10] To the extent that *Stanley* v. *Evan Motors*, 394 F.Supp. 859 (M.D. Fla. 1975), and *Mims* v. *Dixie Finance*, 426 F.Supp. 627 (N.D. Ga. 1976), two cases cited by respondents, indicate the contrary, we respectfully decline to follow them. In both cases, consumers alleged that insurance was required by the creditor but introduced no extrinsic evidence that would contradict the duly signed insurance authorization form. Although the facts in those cases are distinguishable from the one before us, both courts appear to have placed great reliance on the mere fact that the authorization form was signed. For example, the *Mims* court, in reaching its conclusion, stated that the "plaintiff must prove that the creditor specifically and unequivocally informed her that insurance is required in order to contradict the recital to the contrary." 426 F.Supp at 631. Should such a standard preclude proof of the type offered here, we believe it is inconsistent with the intent of Congress and contrary to judicial and administrative interpretations which contemplate inquiry beyond "unequivocal" statements by the creditor.

Even if our interpretation were not so clearly expressed in the language and legislative history of the specific provision at issue here, the broader purpose of the Truth in Lending Act supports the proposition that a consumer's insurance choice must be freely and knowingly exercised before the costs can be excluded from the finance charge and the annual percentage rate. There is no doubt, and the parties agree, that the Act was fashioned to enhance the accuracy of credit information available to consumers and to facilitate comparison shopping among the offerings of different creditors.[11] Congress recognized that consumers were woefully ignorant of the costs and consequences of their credit choices, a situation produced in large measure by divergent, and sometimes fraudulent, practices which obscured the differences and real costs of available credit terms.[12] In striving to promote uniformity and simplicity, Congress relied heavily upon the annual percentage rate. As Senator Proxmire, the bill's principal sponsor in the Senate, stated: [9]

> [T]he bill would require that in most forms of credit the creditor would disclose the annual percentage rate. This is the universal common denominator by which the cost of money is measured. It permits a consumer to readily compare the cost of credit among different lenders regardless of the length of the contract or the amount of the downpayment. In effect, the annual percentage rate is a price tag for the use of money.[13]

Moreover, Congress realized that the utility of this "price tag" indicator would be severely eroded if creditors were free to eliminate from the costs of extending credit a variety of charges and fees that were actually conditions and terms upon which the credit would be extended—a practice Congress found to have occurred with some frequency.[14] Accordingly, the Act specified the types of additional and extraordinary fees and charges, including insurance, that must be included in the finance charge and reflected in the annual percentage rate.

The scheme established by Congress, with its reliance on the annual percentage rate, demands careful adherence to the principle that insurance costs must be reflected in the annual percentage rate unless such costs are made wholly optional. Where insurance is required, it must be treated as a cost of the credit since it automatically becomes part of the credit transaction. Where it is optional, it can be eliminated from the cost of credit but only because the consumer has been

[11] One need go no further than Congress' statement of intent embodied in Section 102 of the Act (15 U.S.C. §1602) which states that the purpose of the Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. . . ." *See also* CAB at 16–17 and R.Ans at 8–14.

[12] H.R. Rep. No. 1040, 90th Cong., 1st Sess. 10–13 (1967); S. Rep. No. 392, 90th Cong., 1st Sess. 1–3 (1967).

[13] 113 Cong. Rec. 18400 (1967).

informed of its separate cost and has had full opportunity to accept or reject it. Were creditors free to manipulate their insurance costs, Congress' goal of preserving the comparability of credit offerings would be readily defeated. Given the sensitive nature of the annual percentage rate as a cost-of-credit barometer, it strikes us that the Congressional purpose can be achieved only if Section 226.4(a) is construed to require the inclusion of insurance costs in the finance charge whenever insurance is not truly voluntary. **[10]**

Given the remedial nature of the Truth in Lending Act, it is entitled to be liberally construed in order to assure that its objectives are met in form as well as in substance.[15] As such, it is entirely appropriate that the Commission inquire into the acts and practices surrounding the credit transactions at issue here to ascertain whether respondents' official policy with regard to insurance was implemented in fact as well as in theory. **[11]**

III. RESPONDENTS' PRACTICES

A. *Insurance Election*

There is no dispute that USLIFE Credit's official policy provides that insurance is optional (ID 10; RX 2,3) and that this policy was appropriately embodied in each credit contract by inclusion of a written notice disclosing the optional nature of the insurance. (ID 12, p.15d) Indeed, by operation of law in 19 of the 20 states in which USLIFE Credit does business, the company is prohibited from requiring insurance. (Tr.80–81) As we have previously noted, however, such a policy alone does not suffice to absolve respondents from liability under TILA. A further examination of respondents' practices, therefore, is in order to determine respondents' compliance with the statute.

In the typical loan transaction, the consumer would contact USLIFE Credit, either by phone or in person, to inquire about the possibility of obtaining a loan. Respondent's personnel would ascertain the purpose, amount needed, and other data necessary to determine credit worthiness. After appropriate credit checks, the loan office would call back to confirm whether the loan would be granted and, if so, to obtain further information for processing the required documents. Once approved, the consumer was invited to come into the appropriate USLIFE credit office to finalize the transaction. (Tr.860–63, TROA 27–

[15] *See e.g., Mirabel* v. *General Motors*, 537 F.2d 871,878 (7th Cir. 1976); *Rachbach* v. *Cogswell*, 547 F.2d 502,505 (10th Cir. 1976); *Johnson* v. *McCrackin-Sturman Ford*, 527 F.2d 257,262 (3d Cir. 1975); *Littlefield* v. *Flanagan & Co.*, 498 F.2d 1133,1136 (10th Cir. 1974); *Eby* v. *Reb Realty*, 495 F.2d 646,650 (9th Cir. 1974).

29) At this final visit the loan papers, including insurance authorization forms, were signed.

The complaint charges that respondents engaged in a variety of practices which had the effect of defeating the voluntary insurance election. Among others, these include: (1) quoting monthly repayment figures to consumers which include insurance, (2) automatically including insurance charges on the loan agreement and disclosure papers presented to consumers for signature, (3) marking an "X" by the signature line reserved for authorization of insurance without permission of the borrower, and (4) presenting pretyped loan agreements to consumers for signing without disclosing the purpose of the signatures.

Respondents do not dispute that repayment terms are quoted which include insurance, or that loan documents containing insurance charges are prepared in advance of presentation to borrowers for signature and before they have received written disclosure of the insurance option. [12] Rather, they contend that such actions are not taken without first informing customers that insurance is voluntary and obtaining their consent. Similarly, respondents argue, and the ALJ agreed, that showing customers where to sign by "X"s or otherwise is merely a convenience to assist them in signing on the proper line after exercising their option to purchase insurance. Respondents also assert that the terms of loans, including insurance charges, were explained to customers before signing.

Further, even if there were deficiencies in their practices, respondents emphasize that those problems were cleared up before they learned of the Commission's investigation in 1973. To support that contention, respondents point to a directive circulated to all branch offices on June 22, 1973, which established "policies and procedures that will insure full compliance with the letter and spirit of the Truth in Lending laws and regulations." (RX 2) Among other things, that directive instructed loan personnel to: (1) clearly indicate the voluntary nature of insurance when quoting loan repayment figures which include such charges, (2) explain the insurance options to the customer before typing up the loan papers, (3) avoid indicating by an "X" or other mark which insurance option the customer should sign, since "[t]he choice must be a free act on the customer's part," and (4) promptly retype the loan documents where the customer's "signed election" differs from "his initial election."

Turning to the first complaint allegation, the record indicates quite clearly that monthly repayment figures were quoted which include the cost of insurance. (Answer to Complaint, par. 5, 6) R

its potential for consumer deception is less obvious. More relevant to our inquiry is what, if anything, consumers were told about insurance *before* it was incorporated into loan agreements and *before* they received written disclosure of their insurance options.

In connection with the advance preparation of loan documents which include insurance, we are unable to agree with respondents and the ALJ that this practice was wholly innocuous. Although such action may at times have been preceded by oral disclosures that insurance was optional (Tr.863), there is considerable evidence that in many instances the disclosures were inadequate or non-existent.

For example, Mr. Dionne, former manager of respondents' Houston office, testified that he did not present insurance as an option on renewal loans. In elaborating on his response for the ALJ, Mr. Dionne stated: **[13]**

> Did I present [insurance] as an option, no sir, I did not, that's the thing . . . nor did any other individual who may have been closing a loan when the information would be taken over the phone or whatever . . . . (Tr.790)

Similarly, Mr. Basil George, another former branch office manager for USLIFE Credit, indicated that "[o]n a renewal loan [insurance] was automatic." (Tr.263) At most, the customer was asked whether everything would be the same, but it was "automatically assumed they would want the insurance." (Tr.264) Witness Stricklen provided further confirmation that in the case of renewal loans consumers were not generally informed about their insurance options before the charges were incorporated into the loan agreements. (Tr.221–24)

Even with respect to new loans, it appears that customers often were not informed about the insurance election before closing. On cross-examination, Mr. George observed that new customers were "[n]ot always" informed that insurance is not required. (Tr.253) According to him, those that called in to apply for a loan were told only what the insurance charges would be, while those who came into the office were urged to take insurance but informed that it wasn't necessary. (Id.) No reason is given for this different treatment.[16] **[14]**

[16] Respondents, in an attempt to undercut the testimony of Messrs. Stricklen and George, introduced statements signed by both which were obtained prior to trial. (RX 22,23) These statements, which were drafted by respondents' counsel, carefully sidestep whether the voluntary nature of insurance was explained to customers before preparation of the loan papers. The statement by Mr. George, for example, that in the case of renewal loans "it was more likely that the insurance would be taken for granted" is clearly consistent with his testimony. As for new loans, the statement merely notes that insurance was explained with each loan without describing exactly what was said. Only at the end does the statement suggest that USLIFE Credit's policy was to inform customers that the purchase of insurance was up to them, though they were advised to take it.

Similarly, the prepared statement signed by Mr. Stricklen indicates that insurance charges were explained to customers before closing, usually on the loan application itself. Yet, as the record reveals, nowhere on the loan application is there any mention that insurance is voluntary. (ID pp. 14a–b) As for telling customers at closing that insurance was not mandatory, Mr. Stricklen explained at trial that he did so by simply pointing to the insurance signature lines and asking the customer for his or her signature, a practice hardly calculated to overcome the effects of

(Continued)

Further, witnesses Stricklen and George, who were both supervised by the same regional manager, testified that they were under standing orders not to make loans without insurance. (Tr.220,264) Mr. George stated that if a customer refused insurance, he would have to call his supervisor and get approval. (Tr.264) To avoid telling customers that insurance was required, other tactics were used, such as advising them that "the company's policy was we like to have insurance on every loan. . . ." (Tr.252) Those efforts were apparently quite successful since Mr. George acknowledged that he could not recall any instance where insurance was not sold. (Tr.247,249–50)

Consumer testimony provides further corroboration that borrowers were not fully informed about their right to decline insurance before it was inserted in the loan agreement. (Tr. 648,69395, 72526) For example, consumer witness Rucille Grant, who had previously borrowed from respondents, testified that insurance was never mentioned, either during her initial call to arrange for the loan or when she went in to sign the papers and pick up the check. (Tr.725–26) Similarly, Mr. Richardson indicated that insurance was never discussed until closing when the loan officer went over the terms of the loan and read off that "the payment was so much and the insurance would be so much. . . ." (Tr.648) Mr. Martin was told only what the insurance was for and how much it cost. (Tr. 695)

Another witness, Laura Ferrary, testified that one of respondents' loan officials told her insurance was included in the loan agreement because it was required to get a loan (Tr. 572, 592–94). The ALJ chose to discount Mrs. Ferrary's testimony because she appeared "hostile toward respondents" for having made her feel foolish in asking whether the insurance was optional. (ID 30) There is also a conflicting account supplied by respondents' sole witness, Jeffrey Miles. But even if we credit his version, it only underscores the dangers in relying on oral disclosures to suffice as a basis for including insurance in the loan papers prior to closing. Mr. Miles, who was a manager-trainee in the branch office where Mrs. Ferrary's loan was handled, testified that when she initially came in to apply for the loan, she was told about the insurance and that it was optional. Yet when asked to explain why the insurance was inserted in the loan agreement, Mr. Miles responded as follows:

A. We tell her that she has $150 worth of life and accident and health and she didn't say that she didn't want it.

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preparing loan documents in advance of closing which include insurance within the terms of the loan.

In short, these statements do not detract from the overall thrust of the testimony that many would-be borrowers

Q. Would you answer my question? How did it come that insurance appeared on the loan agreement when she did not ask for the insurance, as you have testified?

[15] A. We asked her if she wanted the $150 with life and accident and health and she didn't say she didn't, so that's why we typed it on.

Q. Didn't you testify that she didn't ask for the insurance?

A. She didn't ask for it, but what I said is we told her that the loan was $150 — or I didn't tell her — Marty told her it was $150 with life and accident and health.

Such a conversation simply illustrates the shortcomings of oral disclosures and the likelihood that consumers will not be fully aware of their rights when agreeing to inclusion of insurance in the loan contract.[17] Moreover, once that initial decision has been made, subsequent written disclosures are much less likely to be effective.

This evidence, we believe, thoroughly substantiates the complaint's allegation that insurance was included in many loan documents prior to closing without the consumer's knowledge. At other times, insurance may have been discussed but borrowers were not aware that it was voluntary. In our view, such action is inherently inconsistent with the statutory scheme, which contemplates *written* disclosure of the insurance option and its cost *before* consumers make their choice. Even if consumers are informed at the outset that insurance is not required, oral disclosures are inherently unreliable, particularly where the lender, as here, has an economic stake in the sale of insurance. While there is obviously nothing improper in respondents engaging in the sale of credit insurance, such an interest only underscores the importance of assuring that the written disclosures are not undermined.[18]

[16] Respondents nevertheless contend that the practice involved here is merely a convenience to consumers who have already made their insurance selection orally during the first communication with respondents and that any potential for misunderstanding is cured by respondents' practice of "going over" the loan forms with the customer. (R.Ans 33–34) We concur, however, with the view expressed by the Federal Reserve Board that the prior preparation of forms with insurance included has the tendency to reduce, if not eliminate, the

[17] We also note that Mr. Miles' account was based on a conversation which he overheard from an adjacent office when Mrs. Ferrary came in to apply for a loan. (Tr. 847–53) Respondents chose not to call the loan officials directly involved in handling this loan.

[18] The conflicting pressures facing respondents' employees are reflected in the testimony of Mr. Beckley, USLIFE Credit's Vice President for Operations. In explaining the advice communicated to loan personnel about the proper handling of credit insurance (*see* respondents' instructional bulletin, RX2) Mr. Beckley pointed out:

> "We wanted to make sure that our branch people continue to sell, and that means not only that he [sic] tells them what the advantages are and . . . what the benefits are of the program we are selling. We didn't want to send out a memorandum that was negative in context because we hadn't changed our policy. The execution of the policy was that they had to sell the insurance. They had to also obey the law." (Tr. 90)

likelihood that consumers will truly appreciate the options available to them and understand that insurance is not a required part of the transaction. As stated in a staff advisory letter,

> to permit disclosure only in the completed series of calculations perpetuates the practice of preparing all documents with the insurance included. This has the practical effect of precluding the customer's free choice as to whether he wishes the insurance.[19]

Indeed, unlike the ALJ (ID 16), we believe that "going over" already completed loan papers (which include insurance) is not an obvious benefit to consumers from the point of view of insuring full understanding of their insurance options. The mere reiteration of the amount of the insurance costs may serve to reinforce the notion in consumers' minds that insurance is part of the deal. (Tr.648, 695–96)[20] While concluding that a law violation had not been established, the law judge conceded [17] that "in spite of respondents' compliance with the written disclosure requirements of the Truth in Lending Act and employees 'going over' loan terms with borrowers, some of the borrowers were still under the impression that insurance coverage was mandatory . . . ." (ID p.24) He went on to add "that the disclosure practice respondents use could be improved upon" by setting forth, for example, the borrower's insurance options on the loan application forms. (Id.)

There is no doubt that more, rather than less, disclosure is preferable. But the problem with respondents' practices is not the absence of written disclosures but the fact they were made in many instances only after the insurance had been incorporated in the loan agreement. Moreover, providing for written disclosure of the insurance election on the application form does not address the situation where the necessary credit information is taken over the phone.

The ALJ draws additional support for his finding that TILA was not violated from evidence that respondents did not rush consumers into signing the final loan papers. On those occasions when consumers signed quickly, he concluded it was due to their own wish to complete the transaction expeditiously. (ID 18,19) As desirable as it may be to give consumers ample time to review the loan documents, the record

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[19] *See* FRB Letter No. 398, *supra*. The Commission has recognized as much in a related case brought under Section 5 of the FTC Act. In *Peacock Buick*, 86 F.T.C. 1532, 1558 (1975), *appeal denied*, 553 F.2d 97 (4th Cir. 1977), the Commission condemned the practice of filling out loan papers with insurance included prior to proper disclosure to consumers. While the degree of affirmative misrepresentation may have been greater in that case, the routine filling-in of insurance coverage by respondent was viewed as part of a course of conduct which further reduced the likelihood that the customer's insurance choice was truly optional. Moreover, there are other practices here which contribute to the misimpression conveyed by the prior inclusion of insurance in the loan agreement.

[20] Although the issue is not squarely before us, respondents' practices might well run afoul of §226.6(c) of Regulation Z which prohibits the disclosure of "additional information" that may "mislead or confuse customer . . . or contradict, obscure, or detract attention from the information required . . . to be disclosed." Thus, to the extent that information communicated during the "going over" process, or otherwise, tends to contradict, obscure or detract from

reveals that such a practice, to the extent it was followed by respondents' employees, proved insufficient to negate the impression garnered by consumers that insurance was a factor in the loan transaction. That is not to say that all customers were misled by respondents' practices into believing that insurance was required. The record is clear that respondents were not able to sell insurance on every loan. Some customers obviously understood that insurance was voluntary and managed to resist respondent's inducement to purchase it. (CAB 40; Tr. 791) Nevertheless, in confronting completed loan papers which show that insurance coverage is included in the terms of the agreement, we believe it is not unreasonable for consumers to conclude that insurance is simply part of the transaction. In addition, as the record indicates, pointing out the insurance charges at closing may well strengthen that belief.[21] [18]

Respondents advance a further argument that no violation occurred because many of the loan transactions at issue here were "renewal" loans. (R.Ans 30) Since a customer has been through the routine before, he or she is already apprised of the optional nature of insurance and, presumably, immune to any misinterpretation caused by respondents' practices. Even assuming, however, that customers were aware of their options during the first loan transaction, it does not follow that consumers will inevitably want to extend insurance coverage to subsequent loans. Neither the Act nor Regulation Z makes any distinction between such loans and we see no compelling basis for applying less rigorous standards to renewal loans.[22] Indeed, given the fact that any deception or misunderstanding on an initial loan could readily carry over to renewal loans, there are sound policy reasons for treating each transaction in isolation.

In addition to the charge that insurance is included in loan documents before written notice is provided to customers, the complaint further alleges that respondents used marks ("X"s) to indicate where consumers were to sign for insurance. (Complaint para. 4(3)) A related allegation is that customers were asked to sign the insurance authorization portion of the loan agreement without disclosing the purpose of the signature. (Id. para. 4(4)) As the ALJ found, these practices occurred (ID 21,23) and respondents admit that marks were used, though they contend that such action merely served

[21] Nor can respondents derive any solace from their adoption in 1975 of a 15-day (25 days in Illinois) cooling-off period during which a consumer could cancel his or her insurance selection and receive a full refund. (R.Ans 34) Having failed to assure that consumers receive written notification of their rights before insurance is put into the loan papers, respondents cannot rely on this *ex post facto* remedy to avoid the consequences of the statute and Regulation Z. Moreover, a cooling-off period is not a cure for the injury caused by deceptive sales inducements, since many consumers who have been led to purchase by deception are unlikely to discover the deception in time to take advantage of their right to cancel.

[22] *See Ives* v. *W.T. Grant*, 4 Cons. Cred. Guide (CCH) ¶98,561 (2d Cir. 1975).

to assure that customers signed on the proper line after voluntarily deciding to purchase insurance. (R.Ans at 33)

While it is certainly appropriate, indeed desirable, for respondents to explain the loan documents to customers, it is quite another thing for respondents to suggest by marks or otherwise that the signature authorizing insurance is needed to complete the loan transaction. The record reveals that the practice of placing an "X" by the signature line or asking customers to "sign here" contributed to the belief of borrowers that insurance was a necessary part of the loan package. (Tr.698, 726) This practice, coupled with the prior preparation of loan papers containing insurance, prevented consumers from making a fully informed choice as to their insurance options.

Though obviously not dispositive of the liability issue, we note that respondents also have concluded that use of "X"s or other indicators may undermine a truly free selection by consumers. In a 1973 instructional bulletin to its own personnel, respondents condemned the practice and directed employees as follows: [19]

> Do not indicate by an "X" or any other mark, which of the insurance options the consumer is to sign. The choice must be a free act on the customer's part.[23]

Even if such practices might be harmless under other circumstances, they were not in this instance. As consumer testimony indicates, the signature markings or requests were initiated by respondents' loan officers rather than in response to a customer's expressed wish to purchase insurance. (Tr.726) Nor did "going over" the loan papers and charges, as we have already pointed out, prove effective as an antidote to cure previously established misconceptions.[24]

In sum, we believe there is ample evidence to conclude that respondents' conduct falls short of the requirements of the Truth in Lending Act and Regulation Z. Such a finding is warranted solely from respondents' inclusion of insurance in loan documents prior to giving consumers proper written disclosure of their options. Other practices, such as telling customers about credit insurance charges without disclosing that insurance is voluntary and asking customers to sign for insurance (through check marks or otherwise) before they have elected to purchase such coverage, contributed to borrower confusion about the voluntary nature of the insurance. These practices, independently

[23] RX 2. The record indicates that, despite respondents' instructions, some branch offices continued to place marks by the insurance signature lines. (CX356-381)

[24] We also disagree with the law judge's suggestion that the absence of an "ulterior" motive exonerates respondents here. (ID 23) The closest the Act comes to recognizing intent is to provide in §105(c) that creditors will have a defense if they can show "by a preponderance of evidence" that the violation was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid" the violation. The

and collectively, served to obscure and undermine the statutorily required disclosures. As a result, respondents' failure to include the cost of insurance in the calculation of the finance charge and annual percentage rate constitutes a violation of the credit statute and Section 5 of the FTC Act.[25] [20]

Obviously, by our holding here we do not imply that respondents must guarantee that consumers fully understand the import of the written disclosures concerning their insurance options. Further, even with adequate disclosures, it is certainly possible that the vast majority of consumers, as respondents suggest, will still elect to purchase insurance.[26] What we do emphasize is that respondents must scrupulously avoid actions which undercut the importance of the written disclosures and render them meaningless. Where insurance charges are included in the loan papers prepared for closing, the likelihood that consumers will receive the full benefit of the subsequent written disclosures is greatly reduced. That is particularly true given respondents' desire to sell insurance and the reluctance by all parties to incur the delay associated with the preparation of new papers (or a check reimbursing the premium). In our view, both the express language and policy of the Truth in Lending Act require more. [21]

B. *Dating of Insurance Election*

As the ALJ found, insurance authorization forms signed by respondents' customers were not always separately dated. (ID 27) The law judge concluded, however, that the requirements of Regulation Z[27] were satisfied because the insurance authorization appeared on the same page of the loan agreement as the TILA disclosure statement which was dated.[28]

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[25] Respondents also argue that they cleaned up any problems which might have existed before the Commission began its investigation. It is clear, however, that respondents have not discontinued their practice of including insurance in the loan papers prior to closing. In addition, all the consumer testimony involved transactions which occurred after respondents issued their June 1973 notice (RX 2) to branch offices describing the procedures to be followed in selling credit insurance. *See also* note 23 *supra*.

[26] Although the high rates of insurance coverage revealed here–as much as 97 percent for credit life insurance (CAB at 39–40)–do not establish that respondents used deceptive means to sell insurance, these figures are not inconsistent with the finding that law violations have occurred.

[27] Section 226.4(a)(5) requires that insurance be included in the finance charge unless it is not mandatory and:
"(ii) any customer desiring such insurance coverage gives *specifically dated* and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance." (emphasis supplied)

[28] The ALJ apparently assumed that the date at the top of the loan agreement was the same as the date which otherwise would have appeared next to the signature line on the insurance authorization portion of the agreement. (ID 27)

Although the violation alleged here may be relatively minor in nature, we believe that the ALJ erred in his determination.[29] Section 226.4(a)(5)(ii) of Regulation Z provides that a customer's request for insurance coverage must be "specifically dated and separately signed." On its face, that language leaves little doubt that the insurance authorization itself must be signed and dated. Moreover, the Federal Reserve Board has consistently maintained that this provision calls for the insurance authorization form to possess a date block separate from that which appears elsewhere on the loan agreement.[30] This policy is reflected [22] in the sample forms used by the Board to illustrate compliance with Regulation Z[31] and respondents' own forms contain a separate date block, although they were not uniformly filled in. (CX 135–414)

The cases cited by the law judge (ID 27) and respondents (R.Ans at 53) are not necessarily inconsistent. In these decisions, which were handed down by the same court, *Porter* v. *Household Finance Corp. of Columbus,* 385 F.Supp. 336 (S.D. Ohio, 1974) and *In Re Warren,* 387 F.Supp. 1395 (S.D. Ohio, 1975), it was recognized that failure to provide a separate date next to the customer's insurance selection signature could lead to confusion and deception. Though noting its preference for separate dating, the court in each instance found that no violation had occurred since the plaintiffs stipulated that the date they selected insurance was in fact the same date which appeared at the top of the loan agreement. (385 F.Supp. at 345; 387 F.Supp. at 1404) In essence, the court found that no actual controversy existed.

Even if such a result is appropriate where private litigation is concerned, in public proceedings such as this one we do not believe complaint counsel should bear the burden of establishing that the date shown elsewhere on the loan agreement differs from the actual data consumers signed the insurance authorization. As the court in *Warren* acknowledged (387 F.Supp. at 1404), separate dating affords a means

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[29] Respondents also contend that the absence of a date on copies of loan agreements introduced in the record does not establish that dates were missing from the originals. Since the loan papers introduced were obtained from respondents' files and no other questions as to their validity have been raised, we believe it reasonable to infer from the copies that the original documents were not properly dated.

[30] *See, e.g.,* FRB Letter No. 398, *supra* note 9. This policy has been reaffirmed in a recent FRB letter. In response to a request for advice on whether a credit union line of credit plan would comply with Regulation Z when the insurance disclosures and insurance authorization forms were delivered after approval of credit, the staff advised:

> Although the fact that insurance is not required is sufficiently disclosed, the other requirements of §226.4(a)(5)(ii) are not met because the customer has neither dated nor separately signed the insurance authorization. . . . Furthermore, in staff's view, the date on the front of the check and on the disclosure form do not constitute the specific date required by §226.4(a)(5)(ii). Staff believes that this would not suffice for two reasons. First, since the provision requires the authorization be *'specifically* dated,' the authorization itself must be dated. Additionally, since . . . the dates on the front of the check and disclosure statement are placed there by the creditor at the time of the mailing of the check, they will necessarily be different from the date on which the customer signs the authorization." (emphasis in original)

FRB letter No. 1103 (March 16, 1977), 5 CCH Cons. Cred. Guide ¶31556.

[31] *See* FRB Model Forms, Exhibits C & E, 1 CCH Cons. Cred. Guide ¶¶ 3853, 3855.

of ascertaining whether insurance was authorized before being included in the credit contracts. Allowing a date appearing on another part of the agreement to suffice as compliance with the provisions of Section 226.4(a)(5)(ii) would conflict with the very basis for the rule. The potential for confusion, should separate dating not be required, is highlighted by the fact that respondents' employees prepare the loan forms (and insert the date set for closing) some time prior to the consumer signing the insurance authorization. Given the specific language of Regulation Z and its interpretation by the Federal Reserve Board, we conclude that respondents have not fully complied with the requirement that the insurance election be separately signed *and* specifically dated by their customers. **[23]**

IV. LIABILITY OF USLIFE CORPORATION

Should a law violation be found, the ALJ concluded that it would be proper to hold USLIFE responsible for the acts and practices of its wholly-owned subsidiary, USLIFE Credit. In reaching his decision, the law judge looked to the following evidence:

> — USLIFE and USLIFE Credit share the same individual as Chairman of both boards of directors. Two directors of USLIFE Credit are officers of USLIFE. One director of USLIFE Credit is an officer of USLIFE. (ID 6,7,8);
> — USLIFE exercises control over the subsidiary's budget, has knowledge of USLIFE Credit's loan forms, and could order discontinuance of the forms (ID 5); and
> — USLIFE Credit cannot purchase other companies or close a branch office without the parent's approval. (ID 5)

It is well established that the Commission is not bound by common law standards respecting separate incorporation of legal entities where such action will help to assure effective relief or otherwise fulfill statutory policies. *E.g., Zale Corp. and Corrigan-Republic, Inc.* v. *FTC*, 473 F.2d 1317 (5th Cir. 1973); *P.F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970); *Beneficial Corp.*, 86 F.T.C. 119 (1975), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 611 (3d Cir. 1976), *cert. denied* 430 U.S. 983 (1977); *Jim Walter Corp.*, Dkt. 8986 (Dec. 20, 1977) [90 F.T.C. 671] That principle applies with equal force here even though USLIFE's relationship to its subsidiary and the acts and practices in question may be of a somewhat different order than existed in other cases.

The facts reveal that USLIFE, as a holding company, conducted its operations through a number of subsidiaries, including USLIFE

Credit, which ran its consumer credit business. (RX 21) USLIFE Credit was formed in 1970 to consolidate the operations of several consumer finance companies previously acquired by USLIFE. (Tr.209–10; RX 21) The credit subsidiary directs the affairs of approximately 220 branch loan offices in 20 states. (ID 3) [24]

Although there is nothing in the record to show that USLIFE participated in or had knowledge of the practices under challenge here, the parent plays a direct role in establishing and reviewing financial policies for its subsidiaries. Annual plans must be submitted by each chief executive officer (Tr.201) to USLIFE and specific objectives are then worked out jointly between the parent and subsidiary. (ID 8) Periodic reviews of USLIFE Credit's financial performance are conducted by Mr. Giuliano, who serves as both Executive Vice President of Financial Services for USLIFE and as director of the credit subsidiary. In addition, the policy coordination between the two firms is further reflected by the fact that Mr. Crosby is Chairman of the Board of both USLIFE and USLIFE Credit.

These circumstances convince us that it is appropriate to hold USLIFE responsible for the actions of its subsidiary. To be sure, as respondents argue on appeal (RAB at 18), virtually any parent-subsidiary relationship will evidence some of the indicia of ownership reflected in this record. While that may be true, we believe that where a parent has complete control over its subsidiary, even if such control is not fully exercised, there is a sound legal and policy basis for imposing accountability at a higher level in the corporate hierarchy. *See Beneficial Corp., supra*, 86 F.T.C. at 159. To the extent its subsidiary's unlawful conduct leads to increased sales of credit insurance, USLIFE reaps the benefits of enhanced profitability, a factor which in turn is reflected in the parent's financial statements. Thus, it hardly seems unfair to require USLIFE to exercise its unbridled power to control the conduct of its wholly-owned subsidiary.

Moreover, given the broad remedial purposes underlying the credit disclosure statute, it is especially important to ensure that compliance is achieved in a way which enhances self-enforcement and minimizes the need for repeated government intervention. That is particularly appropriate in situations like the present one where the corporate enterprise draws its sustenance from a multitude of subsidiary operations. That is not to suggest, as complaint counsel seem to imply (C.Ans at 3), that USLIFE has demonstrated a propensity for creating and dissolving corporations to avoid legal sanctions merely by acquiring several loan companies and merging them into USLIFE Credit. What it does suggest is that the reality of USLIFE's overall operations is such that future changes through acquisition, reorganiza-

tion or otherwise could unduly restrict the application of an order running only to the credit subsidiary. In short, from the standpoint of effectuating the objectives of the Truth in Lending Act as well as fairness to the parties, there is ample justification for holding USLIFE liable and bringing it within the scope of our order. [25]

V. THE JENCKS ACT

The ALJ struck the testimony of seven of complaint counsel's witnesses (after they had testified on direct and cross-examination) on the ground that, although reports of interviews of the witnesses conducted by a Commission consumer protection specialist had been turned over to respondents, the interviewer had not kept the rough notes of the interviews after using them to prepare the typed reports. Thus, the notes had not been turned over to respondents pursuant to their request for all witness statements. In striking this testimony, the ALJ was applying what he understood to be the requirements of the Commission's decisions endorsing the principles of the Jencks Act.

The Jencks Act provides that in a criminal case after a witness called by the government has testified, the court shall order the government to:

> produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. (18 U.S.C. 3500(b))

For purposes of §3500(b), a "statement" is defined to mean:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury. (18 U.S.C. 3500(e))

In finding that the seven witnesses made Jencks Act statements, the law judge specifically noted that one witness read and signed the investigator's notes and another reviewed and verified the accuracy of the notes. As to the other witnesses, the ALJ found that either §3500(e)(1) or (e)(2) statements were made. (ID pp. 5–6) Unlike the ALJ, however, we do not believe the issues are quite so clearcut. Indeed, after reviewing the evidence relating to the interviews and the manner in which they were conducted, we have concluded that the ALJ erred in striking the testimony of all seven of the consumer

witnesses. [26] Since this testimony is merely cumulative to and corroborative of the documentary evidence and testimony described previously, we have not relied upon it in finding that respondents failed to comply with the applicable provisions of the Truth in Lending Act and Regulation Z.[32] Nevertheless, to provide further guidance on this subject for future Commission proceedings, we believe it is appropriate to review the ALJ's rulings.

At the outset, it is important to reiterate the basis for our consideration of the Jencks Act, in order to dispel some misapprehensions that may exist about the subject.

The Act is by its terms plainly applicable only to criminal prosecutions brought by the United States, 18 U.S.C. 3500(a). It was intended by Congress to narrow the evidentiary ruling of the Supreme Court in *Jencks* v. *United States*, 353 U.S. 657 (1957), to the effect that defendants in federal criminal cases were entitled to inspect reports of FBI interviews of prosecution witnesses who had testified at trial, where the reports touched on the subject of their direct testimony. The legislation confined the reach of that decision by strictly defining the definition of "statement" and prescribing a method for trial judges to separate Jencks from non-Jencks materials. In interpreting the Jencks Act, the Supreme Court has stressed the reasons underlying passage of the legislation, namely Congress' desire to prevent (1) unwarranted disclosure of government files and (2) impeachment of a witness through use of prior statements "which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations." *Palermo* v. *United States*, 360 U.S. 343, 350 (1959). [27]

Although it may once have been thought otherwise,[33] it is now clear that the *Jencks* decision and the principle reflected in the Jencks Act do not reflect any requirement of due process, but are rather only evidentiary matters concerning federal court litigation—a subject over which the Supreme Court and the lower federal courts have special authority, subject to applicable statutes and rules. *See, e.g., United States* v. *Augenblick*, 393 U.S. 348, 356 (1969); *United States* v. *Nobles*, 422 U.S. 225 (1975). As *Nobles* indicates, the Jencks Act is essentially a specific example of a federal trial court's authority to require the

[32] The ALJ, while ultimately striking the testimony of the seven Jencks witnesses, permitted them to testify in full after *voir dire* examination on the Jencks question. (ID p.9) Their testimony fully corroborated the testimony of other witnesses and showed that loan papers with insurance included were prepared in advance of the customer's arrival at USLIFE Credit's office (Tr. 363; 479; 501–03; 827); customers were instructed where to sign for the loan and for insurance (Tr. 368–69; 443; 479; 505; 827); at least one borrower was told insurance was a prerequisite to obtaining the loan (Tr. 551–52); and, despite respondents' practice of going over the loan papers, all the witnesses assumed that insurance was a required part of the bargain. (Tr. 269–71, 275–76; 362–63, 369–70; 443; 479–81; 502–05; 538–39, 545–46; 811, 827)

[33] *See, e.g., Harvey Aluminum Inc.* v. *NLRB*, 335 F.2d 749, 753 (9th Cir. 1964); *Communist Party of the United States* v. *SACB*, 254 F.2d 314, 327–28 (D.C. Cir. 1958).

production of prior statements of a witness, whether a prosecution witness as in *Jencks*, or a defense witness as in *Nobles*.

These principles, however, have no direct application to Commission proceedings. It is well-settled that, subject to applicable statutes and constitutional privileges, independent agencies need not apply any particular evidentiary rules or procedures, and courts are not free to impose on agency proceedings the rules and privileges developed in the exercise of their supervisory power over federal court trials. *F.T.C.* v. *Cement Inst.*, 333 U.S. 683, 705–06 (1948); *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 155 (1941); *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *Giant Food, Inc.* v. *F.T.C.*, 322 F.2d 977, 984 (D.C. Cir. 1963); *Concrete Materials Corp.* v. *F.T.C.*, 189 F.2d 359, 362 (7th Cir. 1951). *See also Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 46 U.S.L.W. 4301, 4302, 4307 (U.S. April 3, 1978).

The upshot of these decisions, in our view, is that whether or to what extent the principle underlying the Jencks Act and cases construing it should be applied in Commission proceedings is entirely a matter of policy committed to the Commission's discretion. The Commission has previously decided to apply in its proceedings the Jencks Act principle requiring production of certain prior statements by witnesses after they have testified. *See, e.g., Interstate Builders, Inc.*, 69 F.T.C. 1152 (1966); *Ernest Mark High*, 56 F.T.C. 625, 633 (1959).[34] While we find court decisions interpreting the Jencks Act instructive in applying our own Jencks principle, we are, for reasons previously stated, not bound by those decisions.[35] In this context we turn now to a review of Jencks Act cases and the application of our Jencks principle in this case. [28]

The critical threshold issue here is whether a satisfactory showing has been made that the rough interview notes constituted Jencks-type statements to justify striking the testimony of the seven witnesses. Even in a Jencks Act case, the mere failure to produce the notes, without more, does not warrant such a severe sanction. That result is implicit in the Supreme Court's recent decision in *Goldberg* v. *United States*, 425 U.S. 94 (1976), where the Court concluded that the witness' testimony "raised a sufficient showing under the [Jencks] Act" to require the trial judge to conduct a further inquiry. *Id.* at 109. Of course, where the rough notes no longer exist, the inquiry becomes more difficult. If there is evidence that the notes were destroyed in bad

[34] Our prior cases, like this one, have dealt with requests by respondents for production of prior statements by complaint counsel's witnesses. We accordingly have had no occasion to apply the same principle to complaint counsel's request for production of prior statements by respondent's witnesses. *See Nobles, supra.*

[35] Unlike a criminal conviction, a Commission order is typically prospective in effect and cannot result in imprisonment; more pre-trial discovery is available in Commission proceedings than in criminal trials; and the absence of a jury makes inconsistencies between testimony and prior statements somewhat less important as a matter of trial tactics than in a criminal case.

faith, that alone may be sufficient cause for striking a witness' testimony. However, as the ALJ pointed out, it appears that the notes were disposed of innocently (ID p. 8), and respondents do not allege otherwise.

Before examining the facts of this case, a brief review of judicial decisions construing the Jencks Act provides useful guidance to the Commission in making its own determinations. The touchstone in evaluating the status under the Jencks Act of any arguably producible materials is whether they can fairly be said to constitute the witness' own words. *Palermo* v. *United States, supra,* 360 U.S. at 350. That analysis is especially critical in determining whether the witness has adopted or approved the writing made by another under subsection (e)(1) or the interviewer's notes reflect a "substantially verbatim recital of an oral statement" under subsection (e)(2). In either case, the statute contemplates that the product must be that of the witness and not the selections and ruminations of the interviewer.

While adoption may occur when the witness reads the interviewer's notes or has the substance of them read back to him, *Campbell* v. *United States,* 373 U.S. 487, 490–91 (1963); *United States* v. *Annunziato,* 293 F.2d 373, 382 (2d Cir. 1961), to qualify as an (e)(1) statement requires more than casual or selective review. Partial recitals by the interviewer, even verbatim, will not be sufficient to trigger subsection (e)(1). *United States* v. *Smaldone,* 484 F.2d 311, 318 (10th Cir. 1973); *United States* v. *Scaglione,* 446 F.2d 182, 184 (5th Cir. 1971). Nor will general inquiries to the witness concerning the overall veracity of his conversation be sufficient. *Matthews* v. *United States,* 407 F.2d 1371, 1376 (5th Cir. 1969).

Likewise, general give-and-take between the witness and interviewer and periodic requests for clarification will not, standing alone, constitute adoption or approval. As the Supreme Court stated in *Goldberg:* [29]

> Every witness interview will, of course, involve conversation between the [interviewer] and the witness, and the [interviewer] will necessarily inquire of the witness to be certain that he has correctly understood what the witness has said. Such discussions of the general substance of what the witness has said do not constitute adoption or approval of the [interviewer's] notes within § 3500(e)(1), which is satisfied only when the witness has "signed or otherwise adopted or approved" what the [interviewer] has written. This requirement clearly is not met when the [interviewer] does not read back, or the witness does not read, what the [interviewer] has written. (425 U.S. at 110–11, note 19)

In a concurring opinion, Justice Stevens elaborated on the kind of showing that would be necessary to constitute adoption or approval of an interviewer's notes. There must not only be "the kind of factual

narrative by the witness that is usable for impeachment" but also "a finding of unambiguous and specific approval by the witness." (*Id.* at 114–15) In describing what constitutes approval, Justice Stevens observed that:

> General testimony that some of the notes taken by the [interviewer] during a lengthy interrogation were read back to the witness, and that the witness sometimes assented to the [interviewer's] version of what he said, would not justify a finding of approval of any particular note. Fairness to the witness demands a much more strict test of approval before he may be confronted with assertedly prior inconsistent statements. (*Id.* at 115)

Fairly rigorous standards have also been applied in determining whether a "substantially verbatim recital" has been made of a witness' comments during the course of an interview. In *Palermo*, the Court looked to legislative history and concluded that "[i]t is clear from the continuous congressional emphasis on 'substantially verbatim recital,' and 'continuous, narrative statements made by the witness recorded verbatim, or nearly so' . . . that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital." (360 U.S. at 352) This standard has been characterized by the Second Circuit as "very restrictive." *United States* v. *Lamma*, 349 F.2d 338, 340 (2d Cir. 1965) **[30]**

Given this judicial backdrop pertaining to the Jencks Act, we believe that similar criteria should be employed in resolving these issues in Commission proceedings. More specifically, clear and explicit approval by a witness of an interviewer's notes will have to be shown before those notes must be produced as Jencks-type statements in Commission proceedings. Absent such approval, notes must be produced at trial only if they contain the oral narrative of a witness recorded verbatim or substantially verbatim. Within this context, we turn to consideration of the facts of this case.

As we stated earlier, the unavailability of the interview notes makes the task of deciding the Jencks issues somewhat more difficult. Nevertheless, in view of the rather extensive *voir dire* examination of the witnesses and former Commission employee who interviewed them, there is an adequate basis for determining the proper treatment to give this testimony.

The seven witnesses whose testimony was struck provided a variety of answers in describing the note-taking practices of the interviewer, ranging from the recollection of one witness that she signed the notes (Tr. 293) to the statement by another that he didn't sign or look at the notes and couldn't recall whether they were read back to him. (Tr. 522–23) Two other witnesses, Curtin and DeLoatch, testified that they didn't review or sign the notes and were only occasionally asked to

repeat their answers. (Tr. 350–52, 354–55; 428, 432) Similarly, in the case of Ms. Knieser, the notes were not read back or signed (Tr. 466), although the witness testified that her responses to the interviewer's questions were written down verbatim. (Tr. 466–67) As for witnesses Garner and Dickerson, the former recalled that he signed the paper containing the questions and answers after glancing over it (Tr. 495–96), but acknowledged that he did not see the questions and it is unclear whether he read the answers (Tr. 495). Mr. Dickerson did not believe he signed the notes but added that the interviewer would go over his responses to see if she had got it correctly and he would make any necessary corrections. (Tr. 795) Finally, the testimony of an eighth witness interviewed by Ms. Turian was not struck by the ALJ (Tr. 310) and respondents did not appeal that ruling. [31]

With the exception of the two witnesses who testified that they signed the notes, the pattern which emerges from the testimony of the other consumer witnesses is largely consistent with the account supplied by the Commission investigator, Ms. Turian. As she described, the interview format involved asking the witnesses a series of predetermined questions. (Tr. 401) Extensive follow-up was unnecessary, since "some of the questions were quite repetitious, and I was getting the same answers more than once. If there was any possibility I thought they did not understand what I was saying, I would say something like, 'in other words,' and I would repeat what they said and ask them if this is correct." (Tr. 402) She further stated that none of the witnesses was asked to review or sign her notes (Tr. 388, 395–96), adding that the only signature she obtained from any witness was in conjunction with the Privacy Act disclosure. (Tr. 398–88)

Respondents, for their part, contend that the testimony shows that the notes were either approved by the witnesses or constituted substantially verbatim recitals of what they said. They argue that the answers elicited here on *voir dire* are at least as compelling as those which the Court in *Goldberg* found to raise sufficient questions to warrant a further inquiry. But the *Goldberg* court did not conclude that a Jencks Act statement had been made; rather it recognized the need for additional hearings on this issue in view of the trial court's erroneous ruling on the "work product" question. (425 U.S. at 108) To the extent there are similarities between this case and *Goldberg*, it seems doubtful whether the testimony in that case, standing alone, would have persuaded the Court that Jencks Act statements were given.[36]

The more extensive evidence available in this case indicates that the

[36] We note the concurring statement of Justice Stevens, in which he observed that "I do not understand these

majority of the witnesses did not give the kind of specific approval that would justify requiring rough notes to be turned over to respondents. At most, the testimony of Ms. Brooks and possibly witnesses Garner and Knieser reveal either approval or verbatim transcription of a statement. As to the others, we are convinced that the ALJ should have permitted their testimony to stand. [32]

Complaint counsel also advance an alternative basis for not striking the testimony of any of these witnesses, even assuming some of them made Jencks statements, contending that the notes were disposed of in good faith after being incorporated into interview reports. (CAB at 12–16) It is true that some courts have not invoked Jencks Act sanctions where rough notes were destroyed in good faith according to customary procedures and the contents of the notes were preserved in interview reports. *E.g., United States* v. *Pacheo,* 489 F.2d 554, 565–66 (5th Cir. 1974), *cert. denied,* 421 U.S. 909 (1975); *United States* v. *Covello,* 410 F.2d 536, 545 (2d Cir. 1969), *cert. denied,* 396 U.S. 879 (1969); *United States* v. *Lonardo,* 350 F.2d 523, 529 (6th Cir. 1965). *But see, e.g., United States* v. *Carrasco,* 537 F.2d 372 (9th Cir. 1976); *United States* v. *Harrison,* 524 F.2d 421 (D.C. Cir. 1975) (requiring retention of notes). But the record here is inadequate to determine whether the interview reports sufficiently reflect the substance of the notes to serve as an appropriate evidentiary substitute.

We would note, however, that the failure to preserve notes containing Jencks-type statements should not inevitably result in the testimony being struck. Without condoning the withholding of such evidence, we fail to see the need for automatically imposing such a severe sanction irrespective of the circumstances surrounding non-production. Though courts may take a different posture in criminal cases involving the Jencks Act, a less rigid standard is called for in administrative proceedings such as this one. *See* note 35 *supra.* In our view, the administrative law judges may properly exercise discretion in deciding what kind of sanction, if any, is warranted.[37] Nevertheless, given our disposition of this case, we find it unnecessary to disturb the ALJ's choice of remedies here, except insofar as we conclude that no Jencks-type statements were made. [33]

[37] Such discretion seems particularly appropriate in cases like the one here where the failure to produce materials was not deliberate. Indeed, even under the Jencks Act, district court judges may have more discretion to fashion an appropriate remedy where the government does not consciously elect to withhold otherwise producible documents. As the Sixth Circuit Court of Appeals ruled recently, "subsection (d) [of the Jencks Act, 18 U.S.C. 3500(d)] was not designed to extinguish the normal exercise of judicial discretion by the trial judge where the Act may have been violated by oversight or negligent conduct not amounting to a conscious election." *United States* v. *Pope,* 574 F.2d 320, 325 (6th Cir. 1978).

VI. RELIEF

Complaint counsel have asked the Commission to impose an order similar to the proposed notice order accompanying the complaint. (CAB at 49–51) There is no doubt that the Commission has ample authority to enter an order that not only prohibits the specific practices which formed the basis of the complaint but also fences in respondents as to related conduct. *FTC* v. *Mandel Bros.*, 359 U.S. 385, 392 (1959); *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611 (1946). As long as the remedy is reasonably related to the practices found to be unlawful, the Commission may "frame its order broadly enough to prevent respondents from engaging in similarly illegal practices" in the future. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965). *See also Nat'l Soc'y of Professional Engineers* v. *United States,* 98 S.Ct. 1355 (1978).

To this end we have incorporated in our order many of the provisions contained in the notice order. Consistent with our finding that respondents violated the law through use of signature indicators and preparation of loan forms with insurance included prior to written authorization, these practices will be proscribed by the order. By requiring respondents to obtain written approval before insurance charges are inserted in the loan agreement, much of the confusion experienced by consumers should be dispelled. Moreover, such a procedure should serve as an inducement for respondents' loan officials to describe the insurance options more fully, since the loan papers cannot be filled out completely until the decision on insurance has been made.[38]

To further ensure that respondents' loan customers will receive meaningful disclosure of their insurance rights, the order requires the disclosures to be provided on a separate document containing no other information. A proposed disclosure statement is attached to the order indicating the type of format which would comply with the terms of our order. We have simplified this form by eliminating, for example, the requirement that [34] separate monthly payment figures be shown for each insurance option. Since monthly payment rates may be set independently of whether insurance is included in the loan contract, the disclosure scheme contemplated by the notice order would be complex and possibly confusing to borrowers. For similar reasons, we have modified paragraph 1 of the order to require disclosure that insurance is voluntary whenever representations are made about

[38] We reject respondents' contention that this requirement will unduly delay the transaction. To be sure, a few computations will have to be done at closing rather than earlier, but that seems essential if consumers are to be afforded a meaningful opportunity to accept or reject insurance. We have, however, eliminated the notice order provision requiring respondents' loan personnel to read the insurance notice to consumers and obtain a written

insurance coverage (prior to written authorization), rather than in instances where respondents quote monthly payment terms which may include insurance.[39]

The final order also contains several provisions designed to close off other avenues which might be employed to defeat the borrower's voluntary insurance election. These include prohibitions on (1) discouraging by misrepresentation the declination of insurance, (2) representing that a customer's failure to purchase insurance will delay processing of the loan and (3) failing to disclose the purpose of signatures requested by respondents' loan personnel. In addition, the order specifies that respondents must comply with other applicable requirements of Regulation Z. Such a fencing-in provision is appropriate in view of the fact that the finance charge and annual percentage rate serve as a common link to all disclosure requirements of the regulation.

Finally, we have retained the order provision requiring respondents to maintain records of the percentage of loans made which include insurance. These records are to be kept for each branch office (similar, but informal, records are presently being maintained) on an annual basis and forwarded to the Commission for each of the next five years. Such information will assist the Commission in ascertaining whether the incidence of insurance coverage may warrant further examination. Commission review of respondents' compliance [35] with the order will also be facilitated by requiring submission of a detailed compliance report within 60 days after issuance of the order and annually for five years.[40]

FINAL ORDER

This matter having been heard by the Commission upon the appeals of complaint counsel and respondent USLIFE Corporation from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted the appeal of complaint counsel and denied the appeal of respondent:

[39] Our order, of course, does not prevent respondents from discussing insurance on the phone or in person with would-be borrowers. Such discussions are necessary to respond to customer inquiries and facilitate processing of the loan by enabling the lender to ascertain the borrower's needs and the amount of credit that can be extended. However, since insurance charges cannot be included in the loan papers before written authorization is received, there should be a stronger incentive for respondents to provide more accurate oral disclosures to customers in an effort to avoid delay at closing. Thus, the order is fashioned in a manner that enhances the utility of the written disclosures, discourages efforts to circumvent those disclosures through contradictory oral representations, and yet recognizes the practical realities of the lending business.

[40] We have also deleted from the notice order a provision requiring respondents to give all current borrowers an opportunity to cancel their insurance coverage and get a pro rata refund. While such relief, limited as it would be to those borrowers who have not yet paid off their loans, may be appropriate in other instances, we are not persuaded that the circumstances here warrant such action.

It is ordered, That the initial decision and order of the administrative law judge be, and they hereby are, vacated, except to the extent that the initial decision is consistent with the accompanying opinion of the Commission, and the findings of fact and conclusions of law contained in the opinion be, and they hereby are, adopted as the findings and conclusions of the Commission in this matter.

Accordingly, the following cease and desist order is hereby entered. [2]

ORDER

It is ordered, That respondents USLIFE Credit Corporation, a corporation, and USLIFE Corporation, a corporation, their successors and assigns, and their officers, and respondents' 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. Law 90–321, 15 U.S.C. 1601, *et. seq.*) do forthwith cease and desist from:

1. Failing, when the charges for credit life insurance and/or credit accident and health (disability) insurance are not included in the finance charge, to quote the costs of any credit insurance coverage or to refer in any way to the availability of such coverage, either orally or in writing, without clearly disclosing that:

(a) credit life insurance and/or credit accident and health (disability) insurance are optional; and

(b) the consumer's choice regarding insurance coverage will not be considered in respondents' decision to approve credit for such consumer,

Respondent's obligation under this paragraph shall end concurrently with the customer's execution of the separate, voluntary insurance election form required by paragraph 2.

2. Failing, when the charges for credit life insurance and/or credit accident and health (disability) insurance are not included in the finance charge:

(a) to present to the borrower as the first document at the time of closing, a separate, voluntary insurance election form which sets forth clearly and conspicuously the following information:

(i) the purchase of credit insurance is not required by USLIFE Credit Corporation [or other business extending consumer credit] in

(ii) the borrower's decision with regard to the insurance available through respondents is not considered in granting the credit; [3]

(iii) the amount of the total premium for credit life insurance and/or the total premium for credit accident and health (disability) insurance;

(iv) the borrower authorizes respondents on behalf of the borrower to pay the insurance premiums to the insurance company for such credit insurance as has been chosen;

(v) each option available to the borrower; and

(vi) a signature and date line for each option set forth in (v) above for the consumer to indicate his/her election.

(b) Failing to make the disclosures required by subparagraph (a) on a separate document which contains no other printed or written material. The disclosures required by subparagraphs (i), (ii), and (iii) shall not be smaller than 12 point type. A form substantially in conformance with Attachment A herein will be considered as in compliance with the provisions of subparagraphs (a) and (b). Respondents shall maintain the original form for two years following its execution and provide the customer with an executed copy thereof.

(c) Failing to leave the Truth in Lending disclosure statement blank as to the cost of credit life insurance and/or credit accident and health (disability) insurance and all other information or amounts which are affected by the election or declination of insurance until the borrower has signed the written disclosure required by subparagraph (a).

(d) Making any marks or otherwise instructing a consumer where to sign or date the separate voluntary insurance election form required by subparagraph (a) in advance of the consumer's free and independent choice for such insurance.

(e) Misrepresenting, orally or otherwise, directly or by implication, that credit life and/or credit accident and health (disability) insurance are required as a condition of obtaining credit from respondents. [4]

(f) Discouraging, by misrepresentation, oral or otherwise, directly or by implication, the declination of credit life and/or credit accident and health (disability) insurance.

(g) Representing, orally or otherwise, directly or indirectly, that the consumer's failure to elect credit insurance will result in delay in processing the loan or distributing the proceeds.

3. Failing to tell every customer the purpose(s) of each signature requested by respondents on any document directly related to the consummation of the credit transaction.

4. Failing to compute and disclose accurately the finance charge, as required by Sections 226.4(a)(5) and 226.8(d) of Regulation Z.

5. Failing to compute and disclose accurately the annual percent-

age rate to the nearest quarter of one percent as required by Sections 226.5(b) and 226.8(b) of Regulation Z.

6. Failing, in any consumer loan transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

It is further ordered:

(a) That respondents maintain records on an annual basis for each branch office of the penetration rate of:

(1) credit life insurance, stating the rate separately for both direct loans and installment sales contracts; and

(2) credit accident and health (disability) insurance, stating the rate separately for both direct loans and installment sales contracts. Such records shall be submitted to the Commission each year for a period of five years following the effective date of this order and thereafter upon request.

For purposes of this subparagraph, the term "penetration rate" means the percentage of all contracts eligible for credit insurance on which charges for such insurance are made. In reporting penetration rates the respondents must state the total number and dollar amount of loans and installment contracts entered into which were eligible for credit insurance, stated separately for credit life and credit accident and health (disability) insurance. **[5]**

(b) That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents at their home and regional offices and in each of their subsidiary loan offices which are engaged in the extension of consumer loans, and that respondents secure a signed statement acknowledging receipt of said copy of this order from each such person.

(c) That respondents notify the Commission within thirty (30) days of any change in the corporate respondents which may affect compliance obligations with regard to the extension of consumer loans arising out of this order, 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 corporations with regard to the extension of consumer loans which may affect compliance obligations arising out of this order.

(d) Respondents herein shall, within sixty (60) days after service of this order, and annually for five (5) years thereafter, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order. The expiration of the obligation to file such reports shall not affect any other obligation

Commissioner Pitofsky did not participate.

ATTACHMENT A

VOLUNTARY INSURANCE ELECTION

YOU ARE *NOT* REQUIRED TO PURCHASE CREDIT LIFE OR DISABILITY INSURANCE TO OBTAIN THIS LOAN. YOUR DECISION ABOUT INSURANCE DOES *NOT* AFFECT THE AMOUNT OF CREDIT APPROVED FOR YOU.

Insurance Premiums (if desired)

Credit Life	$_____
Credit Disability (accident & health)	$_____
Combined Life and Disability	$_____

YOUR CHOICES ARE SHOWN BELOW. IF YOU ELECT TO PURCHASE CREDIT INSURANCE, THE PREMIUM(S) WILL BE PAID FROM THE PROCEEDS OF THE LOAN ON YOUR BEHALF BY THE LENDER. I/WE HAVE CHOSEN THE FOLLOWING OPTION:

I/We Do *NOT* Want Credit Insurance	I/We Want Credit Life Only	I/We Want Credit Disability Only	I/We Want Credit Life & Disability
(Borrower)	(Borrower)	(Borrower)	(Borrower)
(Co-Signer)	(Co-Signer)	(Co-Signer)	(Co-Signer)
Date	Date	Date	Date

IN THE MATTER OF

CAPAX, INC. FORMERLY CONTINENTAL CREDIT CORPORATION, INC., ET AL.

Docket 9058. Complaint, Sept. 30, 1975—Final Order, May 25, 1978

This order, among other things, requires a Willingboro, N.J. debt collection company to cease misrepresenting its status, activities or actions; the affect of nonpayment on credit ratings; and the imminency of legal action. The firm is further prohibited from using, or placing in the hands of others, forms and materials which simulate telegrams, or which otherwise misrepresent the nature, urgency and import of communication, to induce payment of delinquent debts.

Appearances

For the Commission: *Alan D. Reffkin, Carthon E. Aldhizer* and *John F. LeFevre.*

For the respondents: *Robert Field Stockton, David Lyle Segal* and *Steven A. Segal, Segal & Stockton,* Philadelphia, Pa. for Capax, Inc., Continental Credit Corporation, Inc., Joseph V. DeFelice and Arnold Goodman and *Barbara Van Horn Colsey,* Delanco, N.J. for Norman Bricker.

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 Capax, Inc., a corporation, formerly Continental Credit Corporation, Inc., a corporation, and Joseph V. DeFelice and Arnold Goodman, individually and as officers of said corporation, and Norman Bricker, individually and as a former officer of said corporation, hereinafter sometimes referred to as respondents, have 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 Capax, Inc., formerly Continental Credit Corporation, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Route 130 and Beverly-Rancocas Road, Willingboro, New Jersey.

Respondents Joseph V. DeFelice and Arnold Goodman are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent

including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent. [2]

Norman Bricker is an individual and, up to March 1975, was an officer of corporate respondent. Until his resignation, he formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is 504 Route 130 N., Cinnaminson, New Jersey and P.O. Box 123, Delanco, New Jersey.

PAR. 2. Respondents are now, and for some time in the past have been, engaged in advertising, offering for sale and sale of a service to assist in the collection of alleged delinquent debts. This service consists of preparation by respondents of a series of form notices and letters to be mailed to alleged delinquent debtors at regular intervals. Two styles of forms are or have been used in the series: (1) that which is titled LETEGRAM; (2) that which bears the letterhead styled Continental Credit Corporation . . . . . Credit Control and Collection.

PAR. 3. In the course and conduct of their business, respondents are now, and for some time in the past have been, engaged in sending to and receiving from persons, firms, and corporations located in various States of the United States, by means of the United States mail, letters, notices, forms and other material for use in the collection of alleged delinquent debts. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the payment of alleged delinquent debts, the respondents have mailed or caused to be mailed to alleged delinquent debtors various printed forms, letters and other printed material.

Typical and illustrative, but not necessarily all inclusive of said forms and material, are the following:

(1) a window envelope on which a return address is printed, with no name. The word LETEGRAM is printed in large red type in one location and in large white type in two locations on the face of and the rear side of the envelope.

(2) a printed form styled LETEGRAM, designed to be inserted in the envelope described in subparagraph 1 of this paragraph. [3]

PAR. 5. By and through the use of the envelopes and forms described in subparagraphs 1 and 2 of Paragraph Four, respondents have represented, directly or by implication, that they are telegraphic or other similarly urgent communications.

PAR. 6. In truth and in fact, the envelopes and forms referred to in Paragraphs Four and Five are not telegraphic or other similarly

urgent communications. Rather, they are printed form letters, mailed to alleged delinquent debtors, which forms by their overall appearance, styling, printing and format simulate telegraphic or other similarly urgent communications. By virtue of said simulation, these envelopes and forms mislead the recipient as to their nature, import, purpose and urgency.

Therefore, the use by respondents of said envelopes and forms as set forth in Paragraph Four was and is false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and for the purpose of inducing the payment of alleged delinquent debts, respondents have mailed, or caused to be mailed to alleged delinquent debtors various printed forms, letters and other printed material containing certain statements in either the English or Spanish language.

Among and typical, but not all inclusive, of such statements are the following:

CONTINENTAL CREDIT CORP. . . . .CREDIT CONTROL AND COLLECTION

* * * * * * *

COLLECTION DEPARTMENT

* * * * * * *

YOUR DELINQUENT ACCOUNT WITH [CREDITOR'S NAME] HAS BEEN REFERRED TO CONTINENTAL CREDIT CORPORATION FOR ACTION. . .YOUR CREDITOR HAS REQUESTED THAT YOU BE GIVEN SEVEN DAYS TO SETTLE THIS ACCOUNT. . .

PAID IN FULL WITHIN SEVEN DAYS, THIS ACCOUNT WILL NOT BE SHOWN ON OUR CREDIT RECORDS. . .

* * * * * * *

UP TO NOW YOUR CREDIT STANDING WITH [CREDITOR'S NAME] HAS BEEN SATISFACTORY. CREDIT IS A PRIVILEGE, NOT A RIGHT. [4] IT IS ALMOST IMPOSSIBLE TO REPLACE. LIKE MOST OTHER PRIVILEGES, YOU ONLY MISS IT WHEN YOU NEED IT. . .LET'S NOT PERMIT THE WORST TO HAPPEN.

* * * * * * *

STRONG ACTION IS OFTEN NECESSARY TO COLLECT AN ACCOUNT. . . IF YOU CONTINUE TO IGNORE REQUESTS FOR A FRIENDLY DISPOSITION OF THIS CLAIM YOU MUST ACCEPT THE RESPONSIBILITY FOR FUTURE ACTION.

* * * * * * *

. . .IT IS THE INTENTION OF OUR CLIENT TO EXHAUST EVERY LEGAL

AVENUE AT THEIR DISPOSAL IN ORDER TO COLLECT THIS CLAIM. IF YOU PERSIST IN NOT FOLLOWING THROUGH YOUR OBLIGATION, WE WILL HAVE TO RECOMMEND A MORE DRASTIC ACTION THAT IN THE END WILL BE MUCH MORE COSTLY TO YOU. IF THIS IS YOUR INTENTION I WOULD RECOMMEND THAT YOU CONTACT YOUR ATTORNEY SO HE MAY ADVISE YOU ON THE LEGAL RAMIFICATIONS YOU MAY BE EXPOSED TO.

* * * * * * *

IMPERATIVE THAT SATISFACTORY ARRANGEMENTS BE MADE TO AVOID FURTHER ACTION AVAILABLE TO CLAIMANT UNDER PROVISIONS OF STATE STATUTES. . .IF SETTLEMENT IS NOT MADE WITHIN 48 HOURS UPON RECEIPT OF THIS LETEGRAM, WE SUGGEST YOU CONTACT YOUR ATTORNEY TO DETERMINE YOUR LEGAL LIABILITY.

* * * * * * *

YOUR REFUSAL OR NEGLECT TO SATISFY THE ABOVE LIABILITY COMPELS US TO NOTIFY YOU TO PRESENT ANY DEFENSE AGAINST THE VALIDITY OF THIS CLAIM ON FILE. YOU MAY PROTEST SAID CLAIM OR LIST PROPERTY WHICH YOU FEEL MAY BE EXEMPT, IF [CREDITOR'S NAME] OBTAINS A JUDGMENT. . .

* * * * * * *

[CREDITOR'S NAME] HAS TURNED OVER TO US THEIR CLAIM AGAINST YOU. . .

* * * * * * *

WE ARE WRITING THIS LETTER TO INFORM YOU OF THE SERIOUSNESS OF YOUR DELINQUENCY AND THE FACT THAT, SHOULD IT CONTINUE ALL POSSIBLE LEGAL MEANS WILL BE TAKEN TO COLLECT IT. [5]

* * * * * * *

. . .CONTINENTAL CREDIT CORPORATION CAN TAKE NO OTHER POSITION BUT TO RECOMMEND A STRONGER COURSE OF ACTION TO OUR CLIENT. . .IF THIS IS DONE THERE MAY BE ADDITIONAL COSTS TO YOU AND YOUR CREDIT STANDING MAY SUFFER.

* * * * * * *

[CREDITOR'S NAME] IS ABLY REPRESENTED BY LEGAL COUNSEL WHO, IF CALLED UPON WILL PURSUE THE APPROPRIATE LEGAL MEANS TO LIQUIDATE THIS OUTSTANDING DEBT. . .SHOULD JUDGMENT BE TAKEN AGAINST YOU, THE COURT MAY CHARGE YOU FOR LEGAL COSTS AND FEES.

YOU ARE HEREBY REQUESTED TO APPEAR BETWEEN THE HOURS OF 10 AM AND 4 PM AT THE CLAIMANTS OFFICE AS SET OUT ABOVE WITHIN THREE DAYS AFTER DELIVERY HEREOF TO PROTEST LIABILITY OF CLAIM ON FILE. . .FAILURE TO COMPLY AND APPEAR EITHER IN PERSON OR HAVE LEGAL REPRESENTATIVE ATTEND ON YOUR BEHALF MAY RESULT IN START OF LEGAL ACTION.

PAR. 8. By and through the use of the aforesaid statements, and others of similar import and meaning not expressly set forth herein, including the use of the word "collection" in the corporate letterhead, letters, and envelopes, respondents have represented, directly or by implication, that:

1. Delinquent debtors' accounts have been referred to respondents as an independent debt collection agency which will engage in typical debt collection activities such as making personal demands for payment and/or filing suit.

2. Unless payment is received, steps will be taken to initiate legal action against the alleged debtor.

3. Unless payment is received, respondents will take action to adversely affect the debtor's credit record with a consumer reporting agency.

4. Unless payment is received within the time specified by respondents, immediate action will be taken to collect the debt, such as the filing of suit.

PAR. 9. In truth and in fact:

1. Delinquent debtors' accounts had not been referred to respondents as an independent debt collection [6] agency which would engage in typical debt collection activities such as making personal demands for payment and/or filing suit. In fact, no such action was taken during the course of respondents' form letter service.

2. If payment was not received, steps were not taken to initiate legal action against the alleged debtor; in fact, no action was taken during the form letter series except to send additional form letters to the alleged debtor or to return the uncollected account to the creditor.

3. If payment was not received, respondents took no action to adversely affect the debtor's credit record with a consumer reporting agency.

4. If payment was not received during the time specified by respondents, immediate action was not taken to collect the debt; in fact, the only subsequent action was either the sending of additional form letters to the alleged debtor or returning the uncollected account to the creditor.

Therefore, the statements and representations set forth in Paragraphs Seven and Eight were and are false, misleading and deceptive.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals engaged in providing services of the same general kind and nature as those provided by respondents.

PAR. 11. The use by respondents of the [illegible]

forth in Paragraph Four hereof, has had the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that the said envelopes and forms are telegraphic or other similarly urgent communications. Furthermore, the use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had the tendency and capacity to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and to induce the payment of substantial sums of money by reason of said erroneous and mistaken belief. [7]

PAR. 12. 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 and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY PAUL R. TEETOR, ADMINISTRATIVE LAW JUDGE

APRIL 22, 1977

[2] I

HISTORY OF THE CASE

A. COMPLAINT

On September 30, 1975, this Commission issued its complaint and notice of proposed order against a New Jersey-based commercial debt dunner, Capax, Inc., (hereafter "Capax"), and certain allegedly dominant figures therein. It recited reason to believe that respondents had been using unfair and deceptive acts and practices in their debt dunning business, in violation of Section 5 of the Federal Trade Commission Act, and reciting further that a proceeding with respect to such possible violation appeared to be in the public interest. There followed the usual allegations concerning the respondents' identities, and responsibilities, engagement in interstate commerce, etc. (Pars. 1–3)

The gist of the complaint is that for a flat fee Capax has been sending the debtors of its clients various series of standardized dunning letters which have tended to deceive these debtors into paying their bills. By using the word "collection" in Capax' corporate letterhead, letters and envelopes and by making or implying various statements in its dunning letters (many illustrated in Complaint Par. 7)

Capax' statements allegedly tended to deceive these delinquent debtors in four ways:

(1) By saying or implying that such debtors were being pursued by an "independent debt collection agency"[1] which would "engage in typical debt collection activities such as making personal demands for payment and/or filing suit." In fact, the complaint alleges no such action was taken while the dunning series took its course. (Complaint Pars. 8.1 and 9.1). [3]

(2) By saying or implying that unless payment were received, steps would be taken [by whom is not specified] to "initiate legal action" against the debtor. In fact, the complaint alleges, the only action taken was to send more dunning letters or return the uncollected account to the creditor. (Complaint Pars. 8.2 and 9.2.)

(3) By saying or implying that unless payment were received, respondents would take action to "adversely affect the debtor's credit record" with a "consumer reporting agency." In fact, the complaint alleges, no such action was ever taken by respondents. (Complaint Pars. 8.3 and 9.3.)

(4) By saying or implying that unless payment were received "within the time specified by respondents" "immediate action" to collect the debt, such as filing suit, would be taken. In fact, the complaint alleges, the only action taken was to send more dunning letters or return the uncollected account to the creditor.

The complaint also charges that Capax sometimes uses for its dunning letters and/or envelopes a so-called LETEGRAM, which in overall appearance, styling, printing and format "simulates telegraphic or other similarly urgent communications," so that "by said simulation" recipients are deceived and misled as to the "nature, import, purpose and urgency" of such dunning messages. (Complaint, Par. 4, 5, 6.)

The texts of Capax' dunning letters collected in Complaint Par. 7 and making the above alleged misrepresentations, whether in LETEGRAM or other form, are claimed to have a tendency and capacity to make debtors pay substantial sums they might not otherwise pay, thus constituting such dunning letters unfair and deceptive commercial practices,[2] to the prejudice and injury of the public. (Pars. 11 and 12.) [4]

The notice-order would make respondents cease and desist from:

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[1] Complaint counsel would define an "independent debt collection agency" as "one which takes an *assignment* of a claim of debt for collection on a *commission basis* and engages in such debt collection activities as making personal demands for payment and/or *filing suit*" [CX 60(e)] (emphasis added) but respondents strenuously denied a request to admit this [CX 61(h)]. The complaint itself attempts no definition.

[2] The complaint also charges (in Par. 10 and again in Par. 12) that the same practices constitute unfair methods of competition, presumably with other dunners, but this aspect of the complaint was never pursued and we disregard it

(1) misrepresenting its dunning letters as telegrams;

(2) misrepresenting "the nature, import, purpose or urgency" of any communication, except in the case of a truthful and non-conspicuous reference to or implication of urgency;

(3) misrepresenting itself to debtors as an "independent debt collection agency" engaged in "typical debt collection activities;" misrepresenting that steps "may or will" be taken to initiate legal action, unless payment is received; misrepresentating that respondents will take action to adversely affect the debtor's credit record with a consumer reporting agency or any third party or "otherwise misrepresent the impact or effect of non-payment upon the debtor's credit record "unless payment be received; misrepresenting that immediate collection action such as filing suit will be taken unless payment be received within the time specified by respondents, or "otherwise misrepresent the imminency of any action that respondents "may or will" take *provided, however,* that factual correctness of a misrepresentation shall be a defense to any charge of violating any of the prohibitions of (3);

(4) failing to state clearly and conspicuously in any dunning letter that:

> *This communication is a reminder of creditor's claim. Capax, Inc. does not take any legal or other action against the debtor during this letter writing series.*[3] (emphasis added) [5]

(5) undermining the affirmative disclosure provision of (4) above by including any negative or inconsistent statement in dunning letters;

(6) placing in others' hands the means to make any of the representations forbidden in (3) above or to defeat (4) or (5) above;

The proposed order also contains routine provisions for circulation of the order; notification of structural corporate changes by respondent; and notification of changes in individual respondents' employment or business affiliations.

B. JOINT ANSWER

The joint answer of Capax and Messrs. Goodman and DeFelice (hereafter "the joint answer") was filed on 12/18/75, pursuant to two extensions of time beyond the normal 30 days within which to answer. The joint answer admitted most formal matters pleaded in the complaint but took absolute or qualified issue with most of the allegations of substance, including those regarding the LETEGRAM

[3] A long and complex proposed proviso would avoid operation of the second sentence of the above disclaimer where suit or other action actually follows threat, in certain circumstances.

(Pars. 4, 5, 6) and the dunning misrepresentations alleged in Pars. 8 and 9, although we note that it admitted the "literal truth" of Par. 7's illustrative excerpts from Capax' dunning letters.

In specific response to the four key charges of Complaint Pars. 8 and 9 and the LETEGRAM allegations of Pars. 4–6, the joint answer elaborated respondents' position as follows.

(1) *"Collection Agency" Image* (re Complaint Pars. 8.1 and 9.1)

It is admitted that Capax is an "independent debt collection agency" in the sense that it is "neither owned nor controlled by any of [its] clients" (which is not, however, the way complaint counsel use the term[4]). It further pleads that it now engages in such "typical debt collection activities" as "making personal demands for payment and/or filing suit." It is only said to **[6]** have done so, however, since about 5/1/75, when, in response to the Commission's proposed complaint (received 12/31/74), Capax is alleged to have started a "hard core" "collection department" which now makes phone calls and arranges with attorneys to commence litigation in the absence of contrary instructions from the creditor, in order for Capax to become a "full service" collection agency.

(2) *Threats of Suit* (re Complaint Pars. 8.2 and 9.2)

Capax denies representing to delinquent debtors that legal action "will" be taken but pleads that in fact respondents do take steps to see that legal action is initiated, if the debt remains unsatisfied, in the absence of contrary instructions from the creditor. [The actual taking of such steps, however, apparently refers only to the period since about 5/1/75, as explained in the previous paragraph.]

(3) *Threats to Credit Standing* (re Complaint Pars. 8.3 and 9.3)

The joint answer flatly denies ever having referred to any "consumer reporting agency," directly or by implication, in any of its dunning activities, although pleading that it has sometimes mentioned the effect of non-payment on debtors' credit standing" with their own creditor(s)."

(4) *Threats to Enforce Immediate Action* (re Complaint Pars. 8.4 and 9.4)

The joint answer denies that respondents have ever specified periods within which suit "will" be filed.

(5) *Alleged Deceptive Appearance* (Complaint Pars. 4–6)

The joint answer admits mailing various printed materials to delinquent debtors to induce payment of their debts but describes the type of envelope and form labeled LETEGRAM as magenta and gray rather than red and white (the complaint's description). [7] (Par. 4 and Exhibits D–3 and D–4 to joint answer.).[5] It denies any representation, express or implied, that LETEGRAMS are "telegraphic communications" or are "of an urgency on a par with that of a telegram" but pleads that such envelopes and forms "are used to imply urgency" (and, indeed, sometimes say so, as in Exhibit D–4 to the joint answer). The word "urgency" is said to refer to the creditor's need to maintain his working capital and retain his debtor's patronage; the debtor's need to keep up his standing with the creditor; the country's interest in promoting interstate commerce; and the interest of all consumers who pay their bills in not being saddled with the inevitable expense to them when other consumers fail to pay for what they get. (Par. 5). Accordingly the joint answer denies that recipients of Capax' LETEGRAMS are misled as to their "nature, import, purpose and urgency" (Par. 6).

(6) *Deceptiveness and Unfairness* (Complaint Pars. 11–12)

The joint answer flatly denies having taken any action or made any statement with a tendency or capacity to deceive or mislead anyone and asserts that any monies paid by debtors whom Capax may have dunned were paid "because a valid debt was overdue to the named creditor by the recipient of the letter, phone call or legal action." (Par. 11) Finally, it denies: (1) *engagement* in the alleged deceptive acts and practices; (2) *prejudice or injury* resulting from such acts and practices; and (3) *deceptiveness or unfairness* of such acts and practices under Section 5 of the Federal Trade Commission Act. (Par. 12)

C. RESPONDENT BRICKER'S ANSWER

On 12/23/75 individual respondent Norman Bricker filed his own answer to the complaint pursuant to extensions of time granted

[5] In Par. 6 of the joint answer respondents allege, with details, that the LETEGRAM was "specifically designed so as not to be confused with a telegram."

therefor. Its allegations generally follow those of the joint answer, with minor differences, except for two matters. He consistently denied knowledge of Capax' affairs after 3/18/75, when [8] he left the company, and even as to the period prior thereto he denied that, as charged in Complaint Par. 1, he "formulated, directed and controlled the acts and practices set forth in the complaint." (Bricker's Answer, Par. 1).

D. PRE-TRIAL PROCEEDINGS

(1) *Administrative Law Judge*

This matter was originally assigned on 9/30/75 to Hon. Thomas F. Howder, Administrative Law Judge, for hearing and decision. In view, however, of Judge Howder's opinion that he was disqualified to sit in this matter, it was reassigned on 10/31/75 to Paul R. Teetor, another administrative law judge, who has taken all testimony, received all evidence and performed all other duties provided by law for the hearing and decision of such a matter.

(2) *Service and Appearance of Parties*

Service of the complaint was made on respondents by delivery via registered mail on the following dates:

Capax, Inc.	10/31/75
Joseph DeFelice	10/31/75
Arnold Goodman	10/31/75
Norman Bricker	11/13/75[6]

By letter dated 11/11/75, Robert Field Stockton, Esq., renewed an earlier entry of appearance during pre-complaint proceedings by the firm of Segal & Stockton of Philadelphia, Pennsylvania for respondents Capax, Inc., Joseph V. DeFelice and Arnold Goodman in this matter. Other members of that firm who have since appeared with Mr. Stockton are David Lyle Segal, Esq. and Steven A. Segal, Esq. At the same time he (Stockton) withdrew his earlier appearance for respondent Norman Bricker, who thereafter, on 11/21/75 appeared by a different attorney, Barbara Van Horn Colsey, Esq., of Delanco, New Jersey. [9]

Counsel who have appeared in support of the complaint in this matter are Alan D. Reffkin, Esq., Carthon E. Aldhizer, Esq. and John

[6] Secondary service was made on respondent Bricker because the original service may have been defective.

r. LeFevre, Esq. all of the Commission's Bureau of Consumer rotection.

(3) *Prehearing Conference (12/23/75)*

Following the filing of respondents' Answers on 12/18/75 as noted ıbove, a prehearing conference was convened in Washington, D.C. on 12/23/75 for opening statements by counsel to familiarize the ıdministrative law judge with the parties' positions and for scheduling of further prehearing procedures, both of which were accomplished. For details of discovery schedule see Prehearing Order No. 1, 12/24/75.)

At the conference a motion which had been filed on 12/5/75 by respondents to sever the trial of respondent Norman Bricker from the trial of all other respondents was denied from the bench on the authority of Rule 20(b) of the Federal Rules of Civil Procedure for failure to show likelihood of sufficient delay or prejudice to justify severance.

(4) *Pre-trial Briefs*

Pre-trial briefs for early sharpening of the issues were filed by complaint counsel on 1/9/76, by respondent Bricker on 2/2/76 and by other respondents on 2/3/76.

(5) *Motion for Protective Order*

On 3/15/76 respondents Capax, DeFelice and Goodman moved for a "protective order" appointing an "independent canvassing agent" to determine in advance whether any debtor that complaint counsel wanted to interview really remembered anything about Capax and its activities before being interviewed by counsel. Complaint counsel filed an opposition on 3/17/76 and the motion was denied on 3/22/76.

(6) *Discovery and Turnover Schedule*

By May of 1976 the original schedule for pretrial preparation had fallen badly behind without fault on **[10]** anyone's part, largely because of a massive canvass by complaint counsel of some two thousand debtors whom Capax had dunned. The schedule for discovery of evidence and turnover of each party's case was accordingly revised in Prehearing Order No. 3 (5/25/76) with the aim of having the case ready for trial by Fall and trial was tentatively set to begin 9/13/76.

(7) *Complaint Counsel's Requests for Admissions*

Complaint counsel on 6/11/76, at the time of turning over their case to respondents, filed requests for both factual and documentary admissions by Capax which requests were answered on 7/13/76 by respondents Capax, Inc., DeFelice and Goodman, who made many of the requested admissions but qualified some and denied others. See CX 60(a)–(r) and CX 61(a)–(i). The substantive admissions were later reviewed and approved individually (with only minor modifications) in open court. See Tr. 225–245. Documentary admissions were generally referred to when the relevant document was offered into evidence. Respondent Bricker's counsel received the same requests, although without illustrative attachments. (Tr. 92.) Although absent when these admissions were reviewed and generally approved in open court on 10/27/76, she assured the court that she felt her client (Bricker) was adequately represented by Capax' attorneys, Messrs. Stockton and Segal, for that session. (Tr. 301.)

(8) *Re-scheduling of Hearings*

On 9/10/76 the hearing originally scheduled for 9/13/76 was rescheduled to begin 10/26/76, in order to extend respondents' time to turnover their case to complaint counsel from 8/20/76 to 9/28/76 and a preclusion order was entered with respect to any such evidence not in complaint counsel's hands by the 28th.

(9) *Respondents' Requests for Admissions*

On 10/4/76 respondents Capax, Inc., DeFelice and Goodman, with the turnover of their case, filed requests for both factual and documentary admissions, which [11] requests were answered on 10/13/76 by complaint counsel, who on 10/13/76 made some admissions but objected to many others. Their answer was never made an exhibit during the later hearing but is on file with the Secretary.

(10) *Motion to Change Venue*

Also on 10/4/76 respondents Capax, Inc., DeFelice and Goodman[7] filed a motion for a "change of venue" to move the up-coming hearing from Washington, D.C. to Philadelphia, Penn. on the ground that that would be a more convenient location for everyone but complaint counsel. Opposition by complaint counsel was filed on 10/8/76 and on 10/15/76 the motion was denied.

[7] On 10/12/76 Ms. Colsey filed a "supporting affidavit" for respondent Bricker.

(11) *Motion for Appointment of Expert Witnesses*

Also on 10/4/76 respondents Capax, Inc., DeFelice and Goodman[8] filed a motion for appointment of expert witnesses for respondents at Commission expense (estimated at about $5000) and asked incidentally for *in camera* treatment of this and all other pending motions. On 10/6/76 the administrative law judge denied the request for *in camera* treatment, but certified the motion for appointment of expert witnesses to the Commission without recommendation, as a matter of administrative discretion. The Commission did not act on this certification until after the hearings had been held. At the close of the hearings on 11/4/76, respondents voluntarily withdrew this motion, despite an offer by the administrative law judge to hold the record open in case the Commission should decide the motion in favor of said respondents (Tr. 1009, 1014, 1020). On 11/5/76 the Commission was formally notified of said respondents' withdrawal of their motion and on 1/24/77 the Commission, "being satisfied that respondents voluntarily relinquished their request for appointment of expert witnesses," denied the motion as "moot." **[12]**

(12) *Motion To Disqualify Administrative Law Judge*

Also on 10/4/76 respondents Capax, Inc., DeFelice and Goodman filed a motion asking the administrative law judge to disqualify himself from presiding in this case, on authority of 16 C.F.R. 4.7, on the ground that in July complaint counsel had written one letter to the judge (with carbon copy to opposing counsel) alleging "intimidation" of complaint counsel's witnesses by respondents counsel and in September had written another letter to the Judge (again with carbon copy to respondents' counsel) charging "intimidation and threats to witnesses" in an anonymous phone call which complaint counsel suspected must be attributed to "a representative of Capax." Complaint counsel's opposition was filed on 10/8/76. On 10/14/76 the administrative law judge, having elected not to disqualify himself within 10 days, certified the motion to the Commission as required by Rule 3.42(g)(2), explaining that the communications in question were not *ex parte* and the judge's mind had not been poisoned in any way. On 10/20/76 the Commission affirmed the judge's decision not to disqualify himself, holding that the sending of carbon copies prevented the communications from being *ex parte* and that no showing had been made that the judge's ability to conduct a fair trial had been prejudiced in any way.

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[8] On 10/12/76 Ms. Colsey filed a "supporting affidavit" for respondent Bricker.

E. TRIAL

(1) *Witnesses*

Evidentiary hearings in this matter were held in Room 332 of the Federal Trade Commission Building in Washington, D.C. on October 26, 27, 28 and 29 and in Room 7314 of the Old Star Building in Washington, D.C. on November 3 and 4, 1976. Witnesses called by complaint counsel, the dates of their testimony and references to the relevant transcript pages are as follows:

Date	*Transcript Start*	*Name*	*Home Address*
Witnesses called by complaint counsel were as follows:			
10/26/76	p. 116	Peggy Jean Thom	Mill Lane Columbus, N.J.
	p. 146	Charlene Nield	2745 29th St., N.W. Washington, D.C. [13]
10/27/76	p. 245	Rufus Hallett Gardner III	1041 St. Paul St. Baltimore, Md.
	p. 307	Melinda Riegler Gravatt	230 Conwell St. Seaforth, Del.
	p. 351	Jackie Dean Gordon	10351 S.W. 5th St. Miami, Fla.
10/28/76	p. 410	Lawrence Vineburgh	4201 Cathedral Ave. N.W. Washington, D.C.
	p. 447	Rossana Nardizi	Federal Trade Commission Dallas, Texas
	p. 490	Concepcion Viera	1012 W. 24th St. Hialeah, Fla.
	p. 505–A	Virginia Cook	Box 142 Delmar, N.Y.
10/29/76	p. 501	Arnold Goodman	41 Crestview Dr. Willingboro, N.J.
11/3/76	p. 654	Lillian K. Zuccarelli	22 Lenmar Dr. Trenton, N.J.
Witnesses called by respondents were as follows:			
11/3/76	p. 742	Arnold Goodman	41 Crestview Dr. Willingboro, N.J.
11/4/76	p. 895	Andrea Absalom	1306 Cooper St. Beverly, N.J.
	p. 962	Anthony V. Pavlovich	413 Stonington Rd. Silver Spring, Md.
	p. 998	Norman Bricker	Millside Manor Delran, N.J.

(2) *Evidentiary Rulings*

Most objections to proposed exhibits and testimony were ruled on as soon as made but in one instance the ruling was taken under advisement and must be made now.[9]

Debtor Witness Gordon retained counsel in connection with the underlying dispute which led to his being dunned by Capax and again in connection with Capax' dunning letters. The incident is developed at Tr. 356–372. After receiving Capax' initial mailing Gordon and his lawyer agreed that the lawyer would write Capax a letter warning that this was a disputed claim and that any credit information released by Capax should bear such a notation. See CX 62(b) ident. and Tr. 355, 357–8, 361. The trouble was that complaint counsel had no better copy of the letter than CX 62(b) ident., which was Gordon's unsigned carbon copy of an assumed original letter from the lawyer (one Nelson) to Capax, and they did not want to bring the lawyer all the way from Miami to identify this piece of paper.

CX 62(b) ident. was offered for the twin purposes of corroborating witness Gordon's reaction (fear for his credit standing) when he received Capax' first dunning letter [CX 62(a)] and to show Capax' inaction in response to the lawyer's letter (Tr. 370–371). Respondents objected vigorously that it was hearsay evidence, that a search of their own files led them to doubt that they had ever received the assumed "original" and that they had had inadequate notice of complaint counsel's intent to offer this copy if respondents would not or could not produce an original.

We are satisfied that the circumstances provided good cause for the timing of complaint counsel's offer but we have concluded that in the absence of testimony by Gordon's lawyer as to his actually sending off the letter to Capax, CX 62(b) ident. should be received only for the limited purpose of corroborating the feeling of fear for his credit standing to which Gordon testified on the stand. With that limitation, CX 62(b) is received in evidence *nunc pro tunc* as of 10/27/76. [15]

(3) *Motion for Direct Verdict*

At the close of complaint counsel's case in chief on 11/3/76 respondents moved for a directed verdict, which we treat here as a motion to dismiss the complaint for failure to make a *prima facie* case.

[9] A recent brief denominated a "motion" opposing admission of CX 62(b) ident. submitted by respondents under date of 4/13/77 has received due consideration, as has complaint counsel's "Response, etc." dated 4/20/77.

Respondents filed a brief thereon and both sides argued the motion orally (Tr. 682–701). By virtue of Rule 3.22(c), we deferred acting on this motion until after the close of the case for the reception of evidence. (Tr. 740.) In view of our disposition of this case, said motion is now dismissed as moot.

F. POST-TRIAL MATTERS

There was some delay in the receipt of transcripts of the hearings and corrections required additional time. On 12/28/76 undersigned issued a formal order closing the record as of 12/13/76 in accordance with earlier informal discussions. On 1/24/77 both complaint counsel and counsel for respondents Capax, Inc., DeFelice and Goodman filed their proposed findings of fact, conclusions of law and order, with supporting briefs. Replies by respondents and complaint counsel were filed on 2/3/77 and 2/4/77 respectively. Counsel for respondent Bricker on 1/4/77 wrote the Commission, adopting his co-respondents' proposed findings with one exception and one addition and we have treated this letter as properly filed. On 3/8/77 the Commission granted the administrative law judge an extension of time until 4/13/77 within which to file this initial decision and on 4/13/77 extended said filing date to 4/22/77.

II

FINDINGS OF FACT

Respondent Capax

1. Respondent Capax, Inc. (hereafter sometimes "Capax"), until 1/21/75 known as Continental Credit Corp. [CX 30(b)], is a corporation organized on 2/2/72 [CX 60(n); CX 61(h)] which is still existent and doing business under and by virtue of the laws of the State of New Jersey, with principal office and **[16]** place of business at the intersection of Route 130 and Beverly-Rancocas Road, Willingboro, New Jersey. [Complaint ¶ 1; Answers, ¶ 1.] In these findings the name "Capax" is used to denote this corporation at any time of its existence, including the period when it was known as Continental Credit Corp.

Respondent DeFelice

2. Individual respondent Joseph V. DeFelice was a major shareholder of Capax, owning about 31 percent of its shares, [CX 5] until he sold his interest in Capax to respondent Arnold Goodman in July 1976.

from February 1972 to July 19, 1976 [Tr. 502]. From the start of the corporation in February 1972 until said DeFelice's resignation in July 1976 as an officer and director [Tr. 220] he was a principal owner and officer of Capax, who formulated, directed and controlled its acts and practices, including those set forth in this complaint. [Complaint, ¶ 1 and Answers, ¶ 1.] His present association with Capax is that of a vendor of data processing services (Tr. 504).

Respondent Goodman

3. Individual respondent Arnold Goodman has been a major shareholder of Capax since it was organized in February 1972, owning about 31 percent of its shares [CX 5] until he purchased respondent DeFelice's interest in July 1976, thus raising his (Goodman's) holdings to about 62 percent of the corporation's total shares. [Tr. 503–504]. Respondent Goodman has been President of Capax since February 1974 [CX 61(h)]. As a principal owner and officer of Capax he has formulated, directed and controlled its acts and practices, including those set forth in this complaint. [Complaint ¶ 1 and Answers ¶ 1.]

Respondent Bricker

4. Individual respondent Norman Bricker was a major owner of stock (31 percent) [CX 5 and Tr. 1003] and [17] Executive Vice President of Capax from the time of its organization in February 1972 until March 19, 1975, when he terminated his connection with the corporation [CX 6(a) and Tr. 1000]. As a principal owner and officer of Capax he generally participated in the formulation, direction and control of its acts and practices. [Letter of Bricker's counsel to Secretary of Commission, filed 2/4/77, in lieu of formal proposal of findings.]

5. Despite respondent Bricker's denial that he participated in formulating the language used in any of Capax' dunning letters (Tr. 999, 1004) and assertion that he was in charge of selling a service, not letters, except as part of the service (Tr. 1003–1004), there was contrary testimony by respondent Goodman that Bricker was instrumental, with his two "partners" in putting together at least dunning series CX 10 and CX 11 [Tr. 507, 607, 640, 644, 648–9]. We now find that in addition to his overall responsibility as a major owner, Executive Vice President and Sales Manager, respondent Bricker actually participated with other respondents in many of the acts and practices set forth in this complaint.

Capax' Business

6. Since the inception of Capax' business, it has been engaged in

advertising, offering for sale and selling a service to assist creditors in the collection of alleged delinquent debts. [Complaint ¶ 2 and Answer ¶ 2.] This service has consisted primarily (and until about 3/18/7 solely) of a "flat rate" arrangement for mailing by Capax of a series o dunning notices to alleged delinquent debtors at regular interval [Complaint ¶ 2 and Answers ¶ 2; Tr. 506–7]. The parties hav stipulated that a "flat rate debt collection service" involves "a sale at specified fee (flat rate), non-commission basis of a service constitutin (constituted?) in part of the preparation and sequential mailing of series of notices. There is no legal assignment of the claim of debt b the creditor to the seller of the service during the course of th service." (Tr. 243–4). [18]

7. Capax' authority to act for creditors is not unlimited [Tr. 528]. I is derived from an "Authorization To Start Service" (CX 27) and "Receipt" (CX 33). It offers clients several different kinds of dunnin service. It has long and short versions of a "strong" series, "diplomatic" series, a "bad check" series and a Spanish language series See the following series:

CX 10(a) - "Diplomatic" (long and short)
CX 11(a) - "Strong" (long and short)
CX 12(a) - "Spanish Language, Diplomatic" (long and short)
CX 13(a) - "Spanish Language, Strong" (long and short)
CX 14(a) - "Special" (bad check; reinstate) (strong and diplomatic)
CX 15(a) - "Special" (bad check, reinstate) (strong and diplomatic)
CX 16(a) - "Special" (bad check, reinstate) (strong and diplomatic)
CX 17(a) - "Diplomatic" (for reinstatement after default)
CX 18(a) - "Strong" (for reinstatement after default)
CX 19(a) - "Spanish Language, Diplomatic" (for reinstatement after default)
CX 20(a) - "Spanish Language, Strong" (for reinstatement after default)
CX 21(a) - "Bad Check"

Capax' charges were about $3.84 per series when the business started and later about $4.25 [Tr. 512, 794–796].

8. Capax sells its dunning service as part of a more comprehensive "credit control system consisting of sending out the letters, generating reports and advice and helping to control the receivables for the individual company" [Tr. 504, *et seq.*]. It advises the creditor concerning the taking of further stronger actions when it returns a list of debtors unsuccessfully dunned. (Tr. 562, 603, 766–8, 798–800, CX 4.) Its "prime function" is to get the money paid to the creditor, not

selling letters." [Tr. 513]. **[19]** Complaint Counsel's Reply Findings [Par. # 6] stress the "self-serving" nature of Capax' testimony about analyzing delinquent accounts receivable and advising creditors how to minimize their losses, etc. However, complaint counsel offered no contrary testimony by creditor-clients or others and we see nothing inherently improbable about the testimony of Mr. Goodman, the principal witness on this subject [Tr. 504–516].

9. Capax is licensed to receive payments in the five or six states where it can do so [Tr. 761] but debtors are always requested, at least in flat-rate dunning, to make payment directly to their creditors [See CX 10 series, *et seq.*] Despite this caution, however, about 2 percent of all collections (about $20,000 in the 1973 period) (Tr. 241) are usually sent to Capax, which immediately forwards such monies to the creditor-client [Tr. 881–882]. Clients have never objected to getting their money this way [Tr. 529].

10. Since about 5/1/75 Capax has offered an additional and more forceful collection service, which it calls its "second phase" for those "hard core" cases where the flat rate letter writing service has been unsuccessful in effecting collection of a debt. [Tr. 555–578, 790, *et seq.*] As part of "Phase II" dunning, phone calls may be made to the debtor [Tr. 553] and the claim may even be turned over to an attorney for suit, unless the creditor gives Capax specific orders to the contrary [Tr. 555, 802]. "Phase II" also differs from flat-rate dunning in that there is a more expensive, percentage fee for this supplementary service [Tr. 796] and the debtor is asked to pay Capax rather than the creditor [Tr. 556].

11. Even now, however, Capax' contractual arrangements with its creditor-clients do not provide for it to bring suit, either in its own name or the creditor's name [Tr. 530] It has, in fact, never brought such a suit against anyone [CX 60(q)–CX 61(j)]. It is not authorized by law to bring such suits [Tr. 556, 793, 794]. State laws allow only the creditor to sue the debtor [Tr. 793–794] and Capax does not ordinarily take assignments of the debts referred to it [Tr. 824]. **[20]**

Interstate Commerce

12. All Capax' forms of notices sent to debtors in connection with its flat-rate debt collection service have been mailed from its home office in Willingboro, New Jersey. [CX 60(p) and CX 61(i)]

13. Capax sells and at least since February 1974 has sold its flat rate debt collection service thru its salesmen, all of whom sell on commission (Tr. 779–800), in the States of New Jersey, New York, Pennsylvania, Massachusetts, Vermont, Maryland, Florida, Louisiana, Rhode Island, Michigan, New Hampshire, North Carolina and the

District of Columbia [CX 60(o) and CX 61(i)] and thru so-called "charter agents"[10] in the same states plus Ohio less New Hampshire and Rhode Island [CX 60(p) and CX 61(i)].

14. The approximate dollar volume of sales of Capax' flat rate debt collection service between 2/2/72 and 1/25/75 was not insubstantial [CX 60(p) and CX 61(i)] nor was its dollar volume of sales from 1/26/73 to 6/30/75 [CX 60(p) and CX 61(i)]. Between 1/1/73 and 5/6/74, for example, its dollar volume of sales was about $700,000 [CX 1(e); CX 3(b)]. Collections realized by creditor-clients were of a higher order: *e.g.* approximately $10,000,000 during the 12 months ended October 1973 (Tr. 881–882).

15. Capax' dunning of alleged debtors in many states from its headquarters in New Jersey by use of the U.S. mail constitutes and has constituted at all relevant times a course of trade in and affecting commerce, as "commerce" is defined in the Federal Trade Commission Act [Complaint ¶ 3, Answers ¶ 3].

Alleged Deceptive Appearance

16. From the inception of the business in February 1972 until October 1973 (a little more than three months before receiving notice of the investigation that preceded issuance of this complaint) when an **[21]** "impact" dunning message seemed called for, Capax used something that looked a great deal like and, indeed was actually captioned a TELEGRAM. This will readily appear from inspection of the initial and certain other letters in each of the CX 17, CX 18, CX 19, CX 20 and CX 21 series as well as from inspection of CX 22(b), a sample of the envelopes in which such letters were sent. All are admitted to be representative samples of forms and envelopes sent to debtors by Capax via the U.S. mail prior to 10/10/73, about which time the use of this TELEGRAM form was abandoned by Capax on advice of counsel as a result of the proposed consent order (later rejected) in the Commission's still pending proceeding in the matter of *Trans American Collections* [CX 60(q) and CX 61(j)].

17. Although none are, in fact, telegraphic communications [CX 60(r) and CX 61(j)] the administrative law judge has little doubt that the word TELEGRAM in large, standout type on a yellow paper (with brown bar across the top), of the size and shape of a Western Union message form, and printed in similar type, would be hard for many people to distinguish from a real telegram. This complaint, however, makes no charge of deception with respect to these "TELEGRAMS," presumably because of the abandonment of their use in October 1973.

18. Since then Capax has used a different appearing form called a LETEGRAM for its "impact" dunning letters. Representative samples of letters sent out by Capax to debtors via the U.S. mail in the course of its flat-rate service since 10/10/73 are found in the initial and other letters of the CX 10, CX 11, CX 12, CX 13, CX 14, CX 15 and CX 16 series of exhibits [CX 60(q) and CX 61(i)] and CX 22(c) is a sample LETEGRAM envelope. [Ibid.]

19. As will readily be seen from visual inspection, the LETEGRAM format constitutes a major change, not only in its very prominent caption — now LETEGRAM instead of TELEGRAM— but in its color scheme: a gray paper with a striking reddish purple bar across the top, which we find would be most unlikely ever to be mistaken for a Western Union telegram. [22]

20. Complaint counsel contend that this LETEGRAM on gray paper with a reddish purple bar is still confusingly similar to a real telegram, because, they claim [CPF 11], 3 of their 9 debtor witnesses testified that they were thus confused and a Massachusetts state official has refused to authorize use of LETEGRAMS in that state as "potentially deceptive" [CX 31(a)]. We start, however, with a contrary view from our own inspection of the documents, fortified by the adverse inference we must draw from Complaint Counsels' failure to ask 6 of their 9 witnesses — sifted from some 2000 prospects [Prehearing Order # 3] — whether they really believed the LETEGRAMS they received from Capax were telegrams.

21. As for complaint counsel's three alleged supporters among the witnesses, the first, Ms. Gravatt, was neither shown nor questioned about a LETEGRAM and, indeed, affirmatively testified that she received a yellow paper captioned TELEGRAM, identifying CX 21(b) and CX 22(b) (both with TELEGRAM format) as similar to what she received [Tr. 310–311]. Of the two other witnesses relied on to establish that some people may confuse LETEGRAMS with TELEGRAMS, one, Ms. Cook, had for 16 years been the manager of a collection agency in Albany [Tr. 505–A] where Capax, too, maintains an office [CX 11(r)] and she stressed her humiliation at getting her first dunning letter from a collection agency [Tr. 513–A], a background we cannot disregard in weighing her testimony that she was "not in the habit of getting telegrams," "didn't notice it said LETEGRAM" and "thought it was a telegram." [Tr. 508–A and 509–A]. The only other supporting witness, Ms. Nield, a student of consumer economics [Tr. 165], testified for the prosecution that she had gotten an "initial impression" that her LETEGRAM "appeared to be a telegram or a Western Union letter or gram or whatever" [Tr. 148–149]. Whether her "initial impression" was more than momentary was not brought out.

22. We find that Capax' LETEGRAM, as distinguished from its earlier TELEGRAM, is unlikely to deceive ordinary debtors into believing they have received a real telegram. Moreover it is unlikely to deceive any [23] debtor more than momentarily and certainly not long enough to affect any action. That the use of LETEGRAMS is viewed as deceptive by a Maine official [CX 31(a)] — although not in any of the dozen other states where Capax operates — cannot control our finding here.

23. Our finding that the ordinary debtor is not likely to be deceived by a LETEGRAM into thinking he has received a real telegraphic message disposes also of the second-step charge of this complaint that an appearance simulating telegraphic or other similarly urgent communications, *"by virtue of said simulation"* tends to mislead the recipient as to its "nature, import, purpose and urgency" (Complaint, ¶ 6). Even though the appearance of a dunning letter may be made similar enough to a telegram to stimulate a conditioned emotional response of urgency and importance, as long as the recipient is mentally aware that he got a gimmick, not a telegram, there is not the deception which turns a Harvard Business School market research problem into a Federal Trade Commission unfair trade practice case. In the absence of a finding of capacity or tendency to deceive, why one method of persuasion is more effective psychologically than another is not a concern of this Commission. Accordingly, we find that the appearance of Capax' LETEGRAM did not tend to *deceive* debtors as to the "nature, import, purpose or urgency" of the message therein.

The "Collection Agency" Image

24. Complaint Pars. 9.1 and 9.2 allege that by styling itself a "collection agency" Capax, a mere dunner, tries to deceive debtors into believing Capax is a full-line[11] collection agency which may file [24] collection suits and take other actions Capax does not (or did not) take before 5/75. It is charged, in short, that Capax is a sheep in wolf's clothing.

25. The extracts from its dunning letters alleged to prove that it represents itself as a "collection agency" are found in CPF # 50. Complaint counsel point to the use of the phrase "CREDIT CONTROL AND COLLECTION" in most of Capax' non-TELEGRAM letterheads (See CX 10 series thru CX 21 series) plus use of the words "Collection Dept." under

[11] Complaint Par. 8.1 does not use the word "full-line" but seems to use the word "independent" in that sense. Both sides do use the word "independent" but use the word in different senses. The normal meaning, we would think, is respondents' meaning: that Capax is not owned or operated by any creditor, as was the case in *Wm. H. Wise Co., Inc.*, 53 F.T.C. 408 (1956); *affd. per curiam, Wm. H. Wise Co., Inc.* v. *F.T.C.*, 246 F.2d 702 (D.C. Cir., 1957), *cert. den.*, 355 U.S. 856 (1957). By "independent," however, complaint counsel apparently mean an agency to whom a creditor has delegated the maximum possible authority to collect its debts. There was no evidence of industry terminology in this

the signature in various communications [CX 19(g)–(l), CX 11(h)–(j), CX 16(b)–(c), CX 17(g)–(j), CX 18(f)–(h)]. We find these examples clearly establish that Capax represents itself as a "collection agency."

26. On the other hand, we are not convinced that such a representation is false. It all depends on how one defines the word "collection" and the Commission's own definition [16 C.F.R. 237.0(f)] really begs the question. Defined literally, it might include only businesses that receive payments from debtors but Capax would pass that test. Although its dunning letters regularly ask the debtor to make payment directly to the creditor, there are always some debtors who channel payment thru Capax. These receipts amounted to about $20,000 or .2 percent of all collections in a period of a year. [Tr. 881–882] Capax is officially licensed to receive such payments wherever it can lawfully do so. [Tr. 761] [25]

27. If "collection" must include the bringing of collection suits, then it would have to be acknowledged that Capax has never been a "collection" agency, for it has never brought suits, either for its clients or in its own name [Tr. 530, CX 60(e)–CX 61(j)]. But complaint counsel, on whom always rests the burden of proof, offered none that the bringing of "collection suits" is viewed in the industry or elsewhere as a *sine qua non* for a "collection agency."

28. The significant fact is that Capax' principal activity, dunning debtors (by mail during its entire existence and by telephone since early 1975) is a very important element of the overall "collection process," as it is called by a Maine official in one of complaint counsel's exhibits [CX 31(h)]. Indeed, complaint counsel themselves find it natural enough to refer to Capax' "flat rate debt *collection* service" (emphasis added). [See CPF, p. 7 (heading) and CPF # 24 (last full line).] One of their witnesses, a 16–year veteran of the collection business, called Capax "a collection agency or whatever" (Tr. 513–A). It seems to us that a dunning agency is as much a part of the "collection process" as a collection attorney or others who may perform other of the various functions which make up the whole collection process. Accordingly, we find that simply by styling itself a "collection" agency on letterheads or under signatures Capax did *not* misrepresent the true state of things and therefore deceived no one.

29. Complaint counsel do not, however, rely entirely on Capax' *expressly* styling itself a "collection" agency. In their proposed findings (CPF # 50, 53) they cite extracts from Capax dunning letters which they assert would *imply* to debtor recipients that the alleged debt in each case had been referred to respondent as a third party, totally "independent" of the creditor, which would engage in any action necessary to induce payment of the alleged debt (CPF # 51) or as an

assignee of the account (CPF # 53). We find, however, that the language of the extracts cited in support of this argument was simply a natural introduction and/or explanation of why Capax had to get in touch with the debtor and we find further that it did *not*, in fact, operate to deceive debtors, as Complaint Counsel assert. Indeed, the cited extracts **[26]** of debtor testimony on which complaint counsel rely to show actual deception (in order to establish a capacity to deceive) affirmatively establish that it was *other* language in the dunning letters than these introductory explanations which allegedly led them to believe they would be sued, etc. Concrete examples will help to make this clear.

30. The testimony of Ms. Thom (Tr. 136) that she was led to fear suit by Capax is cited in support of the deceptive nature of three introductory explanatory passages quoted in CPF # 51:

CX 18(b) et al.: [Creditor] has turned over to us their claim against you for $9999.99. . .

CX 18(c) et al.: You have failed to discharge the debt submitted to us for action by [Creditor]. . .

CX 18(d) et al.: [Creditor] has charged us with the responsibility of assisting the liquidation of their past due accounts. . .

It is complaint counsel's theory that such introductory explanatory language misled Ms. Thom and other debtors into believing they were being attacked by a full-line collection agency which could bring suit and do other frightening things that Capax could not do. On the witness stand Ms. Thom did, indeed, insist that despite absence of the word "suit" in any of the three dunning letters she somehow got the idea she was going to be sued.

31. When shown such letters, however, the language in which Ms. Thom took refuge was no statement that the claim had been turned over to Capax but that Capax was going to do certain things. In CX 18(b), for example, the language to which she looked was: "If not paid within one week, to liquidate this matter we will be forced to recommend action." (Tr. 128) In CX 18(c) she pointed to the language "It is the intention of our client to exhaust every legal means at their disposal." (Tr. 128) In **[27]** CX 19(d) she referred to the language: "And of the fact that should it continue, all possible legal means will be taken to collect it," etc. (Tr. 130). Plainly it was the mention of the creditor's turning the claim over to Capax which led Ms. Thom to believe she was going to be sued.

32. The case of debtor witness Nield is similarly cited. She was shown CX 14(b), which reads in part:

And your account has now been turned over to us for action.

Asked what this meant to her when she received it, Ms. Nield replied: "Just that, that [Capax] was now collecting from me, that Sears had. . . contacted Capax to obtain payment" (Tr. 171). Yet when asked: "Did anything in the communication [CX 14(b)] indicate suit or (adverse effect on) credit which you felt might happen?" (Tr. 150), Ms. Nield did *not* refer to the language about her account now being turned over to Capax for action, but to other language, all in a different paragraph, about "legal ramifications and the exercising of the legal means to recover the loss." (Tr. 151 and 154).

33. Debtor Witness Zuccarrelli received from Capax, a dunning letter [CX 11(c)] with the usual introductory explanation: "[Creditor] has turned over to us their claim against you for $9999.99. . . ." It went on to say that if this account be not paid within one week Capax would be forced to recommend action, which might mean added costs, etc. Although CX 11(c) refers to the creditor's turning over his claim against Ms. Zuccarrelli to Capax, it was not to that statement but to an entirely different one that Ms. Zuccarrelli twice referred when asked what part of the letter led her to think she was about to be sued:

Q. . . . (W)hat language in that particular letter [CX 11(c)] made you believe you would be sued? [28]

A. "Recommend action which may mean added costs to you." Action, court action, is what I took it for" (Tr. 679)

34. Debtor Gravatt is another witness cited on this point in CPF # 51 and # 54. She had received CX 21(b), a dunning letter which included the words "and your account has now been turned over to us for action." When first questioned about her reaction to the letter on direct examination she testified to feeling that "someone was either going to come to my door and ask me for the money or I would have to go to Court to pay for the (bad) check." (Tr. 311). She gave as her reason for believing she would be taken to court that "it [CX 21(b)] said they had turned (the) account, or whatever, over to [Capax]" (Tr. 311). This testimony, untested, might conceivably support complaint counsel's theory that merely believing Capax to be a full-line collection agency would lead a debtor to expect to be sued, hounded, discredited, etc.

35. Persistent cross-examination, however, obtained a significant reversal of the testimony which young Ms. Gravatt had given in the hands of complaint counsel. She first decided that she would have to say it was "the whole thing" [*i.e.* all of CX 21(b)] that led her to expect either suit or a personal visit from a collector (Tr. 322). Next she conceded that her fear of a visit by someone from Capax was really

related to different words in CX 21(b), to wit, "Our client can exercise all legal means to recover the loss."[12] (Tr. 323). Finally she tied the same passage ("exercise all legal means") to her fear that if she didn't pay, she would have to go to court." (Tr. 346). The truth which emerged on cross-examination, supports the same conclusion as that of the debtor witnesses just reviewed: what concerned these debtors was not the fact of turnover but specific actions thereafter threatened. **[29]**

36. Witness Gardner assumed that "any action" brought would be instituted, at least, by Capax because Capax had indicated throughout that the claim had been referred to it for action. However, that is quite different from complaint counsel's argument that the recital of referral to Capax would lead a debtor to expect suit. (Tr. 263). Gardner came as close as any witness to adopting complaint counsel's theory when he said "I felt that this letter [CX 29(d)] after all, this letter coming to me from an agency is itself a threat," "Take some kind of action." However, he went on to concede that it was the document's mention of "credit" which led him to assume the threat was going to focus initially on his credit (Tr. 287). Moreover, Gardner's righteous zest for battle with his creditor [Tr. 295–296] had to color all his retrospective analyses of how he felt about Capax' tactics. We find him to be no ordinary debtor.

37. Careful study of the testimony of the few other debtor witnesses cited in CPF # 51 and CPF # 53 reveals mostly confusion, such as witness Gordon's confession that after reading CX 62(a) he was "not sure" what action was going to be taken (Tr. 355). Ms. Cook's conviction, as a professional debt collector that nobody would actually sue her over a $20 claim [Tr. 516–A] makes her testimony as to whether she might otherwise have expected a law suit pure speculation. [CX 514A, 516A, 517A] In any event the others fail to make the convincing showing which complaint counsel's burden of proof requires.

38. We are satisfied from these illustrations as well as from simple common sense that a mere introductory explanation in Capax' dunning letters that the creditor involved had turned his claim over to Capax for its action in itself had no significant tendency to make debtor recipients assume they must be going to get the full treatment. If such debtors concluded — rightly or wrongly — that they were going to be sued and/or that their credit would be ruined, it was rather on the basis of much more pointed representations in Capax' dunning letters concerning what was going to happen to the debtor and to those more significant representations we now turn. **[30]**

[12] We quote the witness' version of what CX 21(b) said. The correct wording of the quoted sentence was really:

Accordingly, we think it more profitable to forego further discussion of complaint counsel's exercise in scholastic logic and proceed directly to consideration of those representations which complaint counsel's own debtor witnesses say led them to believe that they would be sued or that their credit would be ruined.

Threats of Suit

39. In proof of complaint Pars. 8.2 and 9.2, which are really the crux of this litigation, complaint counsel first point to 11 examples of texts taken from Capax dunning letters. These, they believe, would give debtors an impression that if payment were not received, suit definitely *would* be filed or some other legal action definitely *would* be taken against the debtor (by whom is not alleged). (CPF, p. 15) Our own inspection of the face of these selected texts indicates that some do and some do not support complaint counsel's assertion.

40. We find that the first half of these extracts, fairly read, made a definite threat of suit (sooner or later), conditional only on non-payment of the debt. These extracts are as follows:

. . . IT IS THE INTENTION OF OUR CLIENT TO EXHAUST EVERY LEGAL AVENUE AT THEIR DISPOSAL IN ORDER TO COLLECT THIS CLAIM. (sixth, second, eighth and second contacts), respectively, Diplomatic and Strong series, CX 10(i); CX 11(d); CX 17(h); CX 18(c); Spanish series, CX 12(j); CX 13(d);

IF YOU PERSIST IN NOT FOLLOWING THROUGH YOUR OBLIGATION, WE WILL HAVE TO RECOMMEND A MORE DRASTIC ACTION THAT IN THE END WILL BE MUCH MORE COSTLY TO YOU. IF THIS IS YOUR INTENTION, I WOULD RECOMMEND THAT YOU CONTACT YOUR ATTORNEY, SO HE MAY ADVISE YOU ON THE LEGAL RAMIFICATIONS YOU MAY BE EXPOSED TO. (sixth and eighth contacts), Diplomatic series, CX 10(i); CX 17(h); Spanish series, CX 12(j); CX 19(h); [31]

IT IS IMPERATIVE THAT YOU CONTACT YOUR CREDITOR TODAY TO AVOID FURTHER ACTIONS. . . (fifth, sixth and second contacts), respectively, Diplomatic and Strong series, CX 10(g)–(h); CX 17(g); CX 18(c); Spanish series, CX 12(h)–(i); CX 13(d);

. . . IMPERATIVE THAT SATISFACTORY ARRANGEMENTS BE MADE TO AVOID FURTHER ACTION, AVAILABLE TO CLAIMANT UNDER PROVISIONS OF STATE STATUTES. . . (seventh contact, Diplomatic series, sixth contact, Strong series), respectively, CX 10(j)–(k); CX 11(i)–(j); CX 18(h); Spanish series, CX 12(k)–(l); CX 13(k); CX 19(i); CX 20(h);

. . . IF YOU WANT TO AVOID UNPLEASANT AND COSTLY ACTION, MAKE IMMEDIATE PAYMENT DIRECTLY TO A–B–C– SUPPLY COMPANY

* * * * * * *

IT WOULD BE MOST UNFORTUNATE FOR YOU TO MAKE IT NECESSARY FOR

A–B–C– SUPPLY COMPANY TO TAKE MORE FORMAL ACTION, FOR YOU MA BE OBLIGED TO PAY LEGAL COSTS AND INTEREST CHARGES IN ADDITIO TO THE $9999.99 YOU OWE. . . (eight contact, Diplomatic series, sixth contact, Stron series), respectively, CX 10(l); CX 18(g); Spanish series, CX 13(i); CX 19(j); CX 20(g

YOUR REFUSAL OR NEGLECT TO SATISFY THE ABOVE LIABILITY COMPEL US TO NOTIFY YOU TO PRESENT ANY DEFENSE AGAINST THE VALIDITY O THIS CLAIM ON FILE. YOU MAY PROTEST SAID CLAIM OR LIST PROPERT WHICH YOU FEEL MAY BE EXEMPT, IF A–B–C– SUPPLY COMPANY OBTAIN A JUDGMENT. (ninth contact, Diplomatic and Strong series, tenth contact, Diplomati and Strong series), respectively, CX 10(m); CX 11(n); CX 17(k); CX 18(k); Spanish serie CX 12(n); CX 13(m)–(n); CX 19(k); CX 20(j); [32]

WE ARE WRITING THIS LETTER TO INFORM YOU OF THE SERIOUSNESS O YOUR DELINQUENCY AND OF THE FACT THAT, SHOULD IT CONTINUE AL POSSIBLE LEGAL MEANS WILL BE TAKEN TO COLLECT IT. (third contac Strong series), CX 11(e); CX 18(d); Spanish series, CX 13(e); CX 20(d);

41. We find, however, that the last half of the extracts, fairly reac make no such threat of suit but are only a fair reminder that th creditor *may* have to initiate legal action if payment is not forthcom ing. These extracts are as follows:

IF THIS IS NOT DONE CONTINENTAL CREDIT CORPORATION CAN TAKE N OTHER POSITION BUT TO RECOMMEND A STRONGER COURSE OF ACTION T OUR CLIENT. . . IF THIS IS DONE THERE MAY BE ADDITIONAL COSTS T YOU. . . (fourth contact, Strong series), CX 11(f)–(g); CX 18(e); Spanish series, C 13(f)–(g); CX 20(e);

. . . YOU LEAVE NO OTHER AVENUE OPEN TO US. A-B-C- SUPPLY COMPA NY IS ABLY REPRESENTED BY LEGAL COUNSEL WHO, IF CALLED UPO WILL PURSUE THE APPROPRIATE LEGAL MEANS TO LIQUIDATE THI OUTSTANDING DEBT. . . SHOULD JUDGMENT BE TAKEN AGAINST YOU, TH COURT MAY CHARGE YOU FOR LEGAL COSTS AND FEES. . . (fifth contac Strong series), CX 11(h); CX 18(f); Spanish series, CX 13(h); CX 20(f);

. . . IF PAYMENT IS NOT RECEIVED IN THE ALLOWED TIME, AND COUNSE COMMENCES LITIGATION, YOUR CREDITOR MAY ALSO BE AWARDE EXPENSES AND LEGAL COSTS BY THE COURT. (seventh and eighth contact) respectively, Strong series, CX 11(k); CX 18(i); Spanish series, CX 13(l); CX 20(i); [33

. . . FAILURE TO COMPLY AND APPEAR EITHER IN PERSON OR HAV LEGAL REPRESENTATIVE ATTEND ON YOUR BEHALF MAY RESULT I START OF LEGAL ACTION BY A–B–C– SUPPLY COMPANY. . . (eighth and nint contacts), respectively, Strong series, CX 11(l)–(m); CX 18(j);

IT IS IMPORTANT THAT YOU MAKE YOURSELF AWARE OF THE LEGA RAMIFICATIONS OF THIS TYPE OF PRACTICE. . . . IF YOU DO NOT CORREC THIS MATTER QUICKLY, WE WILL HAVE TO RECOMMEND THAT OU CLIENT EXERCISE ALL LEGAL MEANS TO RECOVER THIS LOSS. . . (firs contact, Bad check series), CX 14(b)–(c); CX 21(b); Spanish series, CX 14(d)–(e);

42. In addition to examining these texts on their face, we must

onsider the testimony of five debtor witnesses presented by complaint ounsel concerning their reactions to the same or similar texts. All five laimed that the texts they received definitely threatened suit in the vent of non-payment, notwithstanding our reading of four of these exts to warn only of a possibility of suit [Gravatt, Tr. 321–2, re CX 1(b); Nield, Tr. 151, 154, re CX 14(b); Gardner, Tr. 263, re CX 29(q), see equivalent CX 10(m)); Vineburgh, Tr. 437, re CX 11(b)]. In the ase of one debtor witness the debtor's reaction was the same as ours from the face of the documents) that there was a definite threat of uit in the event of non-payment. [Thom, Tr. 128–130, re CX 18(c) and X 18(d).] Although examination of the face of these dunning letters upports the debtor-witness testimony in only one out of five instances, here is no escaping the fact that half of the texts must be read on heir face as definitely threatening suit, unless payment be made.

43. Complaint counsel have thus established a *representation* that apax' creditor-clients would bring suit if necessary to get their money — but was it a *misrepresentation?* Complaint Par. 9.2 pleads [34] that, n truth and in fact, "if payment was not received, steps were not taken to initiate legal action against the alleged debtor (and) in fact, no action was taken during the form letter series except to send additional form letters to the alleged debtor or to return the uncollected account to the creditor." The joint answer *denied*[13] that Capax does *not* "take steps to see that legal action is initiated, provided that the debt remains unsatisfied and no instructions are received from the creditor not to do so at that time." The *burden of proof* was thus on complaint counsel to establish a negative proposition, to wit, that Capax does *not* take steps to see that legal action is initiated, etc. before Capax' representation could become a misrepresentation.

44. Complaint counsel sought to carry their burden in the following way. Firstly they asserted (CPF # 25) — and we now find — that Capax has never had either right or authority to bring suit against any debtor, either in its own name or in behalf of any other person or corporation, even after 5/75 when it went beyond letter-writing to add a more vigorous "second phase," which, however, still omits suit. [See Finding # 11.] Respondents do not claim otherwise [RPF # 8]. It is thus clear that Capax itself did not, in fact, bring suits against debtors but there is nothing wrong with that unless there had earlier been a representation that Capax *would* bring such suits.

45. Most of the extracts from dunning letters on which complaint counsel rely to show threats of suit (see above) are plain on their face that they refer to a suit by the creditor, not a suit by Capax. They refer

[13] The denial is confusingly worded: "admit they do. . . . take steps, etc."; but it is clear that a denial of a negative is intended.

explicitly to the creditor or to the fact that Capax will be making "recommendation" or to some other clear indication that Capax woul not be the plaintiff in such a suit. Those rare dunning **[35]** letters, lik CX 11(e), which are silent on who will sue, must be read in light of th rest of the series and the complete absence therein of *any* reference t suit by Capax. While there was a little testimony by a few debtc witnesses as to some kind of impression that the dunning letters sai they would be sued by Capax, we find no ambiguity in th comprehensive documentary evidence which would permit us to refe to such plainly erroneous debtor testimony. A witness cannot mak black white just by becoming a debtor. We find that Capax neve threatened in its dunning letters that it (as distinguished from it clients) would bring suit to collect a debt. Since it never threatened t bring suit itself, its lack of authority to bring suit becomes academi and the real issue finally emerges: Did Capax in any way misrepresen the likelihood that its *client* would bring suit to collect such debt?

46. Complaint counsel make a simple argument that it has to b misrepresentation for Capax to tell debtors they will definitely be sue in the event of non-payment, because Capax cannot know in advanc what a particular client will ultimately do about bringing suit. (CPF # 57.) Indeed, complaint counsel several times extracted an admissio from Capax' President Goodman that at the time a dunning letter goe out with a warning that Capax would sue the debtor if payment were not forthcoming Capax could not really say *"for a fact"* that this *particular* creditor would bring suit if the debt went unpaid [Tr. 543, 588, 590].

47. Goodman, on the other hand, claimed that Capax had a reasonable basis for sending such warnings in its broad experience with creditors and debtors generally and the involved creditor in particular. The following extracts from his testimony explain Capax' position.

Q. Now you state [in CX 10(i)] that "It is the intention of our client to exhaust every legal avenue". How did you know at the time you wrote that letter that it was your client's intention to exhaust every legal avenue? **[36]**

A. I have conversed with, talked with many of our clients as well as our people have (done so too) and *I have yet to find any of our clients that will not or do not want to get the money in and will not pursue it as far as they can to get it in.* Normally, if they would not want to, we would eliminate something like this from their contacts.

Q. But you don't (didn't) know at the time you wrote that [CX 10(i)] what their intent really was, do you? Is it possible for you to know?

A. *Normally we assume they want the money in and will follow through with all of the*

ans they have to do it or they would not be asking us to do it. (Tr. 567) (emphasis ded)

nd similarly with reference to CX 11(e):

. . . How do you know all possible legal means will be taken?

. As I stated before, due to the knowledge and contacts of our (creditor) clients, *it is e intention of most of them to take all of the means at their disposal* to receive and get in e money owed to them.

. You are very specific when you use the words 'will be taken' and again the question , at the time you wrote the letter, did you really know that in fact that will be done?

. *This is normally implied to us by the creditor,* yes, sir. (Tr. 587-588) (emphasis added)

gain with reference to the same dunning letter [CX (11)(e)]: [37]

. . . . (Y)ou really don't know whether the *particular* creditor. . . will in fact take very legal means available to him to collect the debt, including suit?

. *We are under the impression given to us by our (creditor) clients that they would do is when financially feasible to do so.*

. What information do you have upon which to base this assertion?

.. Our contacts with our clients.

. I just asked you if you had records to indicate that all creditors sue all debtors after xpiration of the service?

* * * * * * *

. No.

. Again let me ask the question: When you write this letter you do not know whether n fact the *particular* creditor will take all possible legal means against the debtor to ollect the alleged debt; do you?

. *Normally this is implied to us that where it is financially feasible they will do that. This is their intention at the time.*[14] (Tr. 589–590) (emphasis added)

48. Mr. Goodman's qualification as to "financial feasibility" makes finding as to the operative facts somewhat more difficult, because he record is bereft of testimony as to whether and, if so, under what 38] conditions costs of suit may make it unprofitable to bring a ollection suit. CX 4, a sample "done" sheet for an "Elaine Powers Salon," reveals 15 bills ranging from $26.00 to $57.00 but there is no

[14] Thereafter complaint counsel again obtained an admission that Goodman did not "know" this about a particular reditor.

way of knowing how typical they are. Of the 9 debtor witnesses wh testified here, 5 were dunned for much larger sums,[15] while 4 wer dunned for sums comparable to those found in CX 4 or even smaller.[1 In any event the other data needed to estimate what debts, if any, ar too small to make suit worthwhile is completely missing from th record. Since the burden of proof is always on complaint counsel, w feel compelled to hold that in the absence of proof as to the magnitud and effect of the "financial feasibility" factor, it must be assumed t be of negligible significance for present purposes.

49. Accordingly, we now find that while Capax did not regularl make inquiry of or obtain knowledge from particular creditors as t their intentions to bring suit against particular debtors if the latte should fail to respond to Capax' dunning letters and while in that sens Capax did not "know" what such creditors would do, it did have a *reasonable basis* for warning debtors to expect suit if they did not pay up, in its knowledge from experience that creditors generally and Capax' clients in particular, almost without exception, want to sue for their money if necessary, assuming a negligible economic feasibility factor. **[39]**

Threats To Credit Standing

50. In proof of complaint Pars. 8.3 and 9.3, which allege that Capax falsely threatened to adversely affect debtors' credit ratings with consumer reporting agencies, complaint counsel rely on three extracts from Capax dunning letters (See CPF # 58):

PAID IN FULL WITHIN SEVEN DAYS, THIS ACCOUNT WILL NOT BE SHOWN ON OUR CREDIT RECORDS. . . . FORWARD YOUR PAYMENT NOW DIRECTLY TO A–B–C– SUPPLY COMPANY IN ORDER TO RECEIVE PROPER CREDIT. . . (first contact), Diplomatic series, CX 10(b)–(c); CX 17(b); Spanish series, CX 12(b)–(c); CX 19(b);

UP TO NOW YOUR CREDIT STANDING WITH A–B–C– SUPPLY COMPANY HAS BEEN SATISFACTORY. CREDIT IS A PRIVILEGE, NOT A RIGHT. IT IS IMPORTANT TO PROTECT THIS PRIVILEGE, BECAUSE ONCE IT IS LOST IT IS ALMOST IMPOSSIBLE TO REPLACE. LIKE MOST OTHER PRIVILEGES, YOU ONLY MISS IT WHEN YOU NEED IT. (third contact, Diplomatic series, fifth contact, Diplomatic series, second contact, Bad check series), respectively, CX 10(e); CX 17(f); CX 21(c); Spanish series, CX 12(g); CX 19(f);

. . . YOUR CREDIT STANDING MAY SUFFER. . . (fourth contact), Strong series, CX 11(f)–(g); CX 18(e); Spanish series, CX 13(g); CX 20(e);

51. None of these extracts makes any reference to consumer

[15] Vineburgh, $989.06 (CX 47); Gordon, $467.50 (CX 43); Zuccarrelli, $354.18 (CX 44); $135.00 (CX 46); Gardner, $129.30 (CX 29(d))

eporting agencies or the credit ratings they dispense. Moreover, the irst letter [CX 10(b) et al.] expressly refers to the debtor's account not et shown on *Capax' own credit records.* The second letter [CX 10(e) et l.] expressly refers to the debtor's credit standing with the *particular reditor involved.* Moreover, subsequent reference therein to **[40]** the nportance of not losing the privilege of credit plainly relates back to he debtor's credit standing with this particular debtor. As for the hird letter [CX 11(f) et al.], reference to the full paragraph of which it s a part[17] reveals that the situation contemplated is an adverse effect n the debtor's credit standing *incidental to a lawsuit.*

52. The first two examples plainly do not relate to the debtor's *eneral* credit standing and the third, which *may* be read to relate to he debtor's general credit standing (Tr. 595–596), nevertheless does ıot threaten an active effort to affect the debtor's credit adversely. It s only a proper reminder that, *if* a lawsuit be brought — as is clearly ıny creditor's right — one of the *incidental* results may be — as clearly t may — that the debtors' credit rating *may* suffer. We find that proof ıf such a warning has no logical tendency to support the allegation of Complaint Par 8.3 that Capax threatened to adversely affect debtors' :redit ratings with consumer reporting agencies.

53. Complaint counsel's further contention that 4 of the 9 debtor witnesses presented by complaint counsel were led to believe their :redit records would be adversely affected if they did not pay up is not supported by the evidence. Whether these 4 witnesses even weighed :he warning in the balance is really quite unsure because none of them paid up. Two promptly hired lawyers for a good fight on the merits of :heir disputes with the creditors involved. (Gardner, Tr. 282, 295; Gordon, Tr. 377) A third, an experienced bill collector, always doubted that she would really be sued for $19.95 (Tr. 516–A). The **[41]** fourth was assured from the start by her creditor that Capax had made a mistake which she could disregard. (Cook, Tr. 492, 496) Since the whole point of deception evidence is to prove a tendency to deceive, debtors who were not *really* deceived add nothing to the proof of a *tendency* to deceive.

54. Even, however, if all of them had taken Capax' warning to heart — to the exclusion of all other considerations — and had all immediately paid the debts in question, it is hard to see any deception in Capax' persuading them to do so by reciting such a simple truth as that a credit rating *may* suffer *if* a lawsuit has to be brought to collect a debt. Accordingly, we find that even if the warning proved had

[17] "If this (i.e. a satisfactory arrangement for payment) is not done, [Capax] can take no other position but to recommend a stronger course of action to our client. . . If this is done there may be additional costs to you and your credit standing may suffer."

corresponded more closely to the warning *pleaded*, and even if such warning had had some effect on these debtors' *actions*, there was no tendency for the simple truth stated in these letters to deceive anyone.

Threats To Enforce Prompt Payment

55. In proof of complaint Pars. 8.4 and 9.4, which allege that respondents have falsely represented the immediacy of action, such as suit, to be taken to collect a debt, unless payment be received within a time specified by respondents. Complaint counsel direct our attention to thirteen extracts from Capax' dunning letters (CPF # 60).

56. However, most of these extracts are not relevant to complaint Pars. 8.4 and 9.4. They are simple demands to pay an already overdue debt within a specified time such as "48 hours" [*e.g.* CX 10(m)] or "five days" [*e.g.* CX 10(l)] or "at once" [*e.g.* CX 11(f)] without specifying what would happen if the debtor did not pay within the specified time. The purpose, as Capax' President testified, was simply to fix "a time frame" to get the debtor "off his rump" (Tr. 605–5) and pay up as quickly as possible (Tr. 535). The debtor may or may not meet the demand but the demand, by its very nature, is not a representation capable of being found true or false. Significantly none of complaint counsel's debtor witnesses alleged **[42]** deception by any of the eight sanctionless demands irrelevantly included in CPF # 60. Accordingly, we now limit our consideration to those 6 of the extracts cited in CPF # 60 which warn the debtor that some sanction, such as suit, will be invoked against him if he does not meet a specific new deadline.

57. The extract of this kind most commonly testified to by debtor witnesses here (Thom, Tr. 128; Gordon, Tr. 355; and Zuccarrelli, Tr. 661–2), reads as follows:

> If not paid within one week, to liquidate this matter we will be forced to recommend action which may mean added costs to you. . . Prompt action in this matter is imperative. Make immediate payment directly to [the creditor]. . . [See CX 11(c); CX 18(b) and CX 62(a), *inter alia*]

58. Debtor witness Zuccarrelli, apparently attaching no significance to the word "recommend" testified simply: "Well, from the letter I thought it (suit) would be instituted immediately." (Tr. 662) It does not appear, however, that she was sufficiently concerned to pay the bill. A second recipient (Thom) agreed that "suit" is nowhere mentioned in this letter but thought the statement that "we will be forced to recommend action" was "imperative." (Tr. 128) Nevertheless, she, too, apparently never paid the bill for which Capax dunned her. The third recipient, Gordon, was left unsure about what action was

credit — how soon, however, he did not testify. (Tr. 355) In any event he apparently never paid the bill.

59. Another debtor witness (Gravatt, Tr. 311) received a different extract:

. . . If you do not correct this matter quickly, we will have to recommend that our client exercise all legal means to recover the loss. [CX 14(b)] [43]

Although this includes no definite deadline and, like the others, speaks only of a recommendation, not a suit, young Ms. Gravatt testified that on receipt of this letter in TELEGRAM format "all I thought was really soon, very soon afterwards." (Tr. 311) Her mother quickly made good the bad check in question at the young witness' request. (Tr. 325)

60. Another debtor witness (Viera, Tr. 492–6) received a Spanish language dunning letter [CX 12(c)], an extract from which she translated as follows:

Pay this account completely within 7 days. This account won't show or appear in your[18] credit register.

Ms. Viera recited this language as explaining her concern about possible injury to her credit record[19] but no mention was made of any reaction to the "7 days" language. (Tr. 492–496) In any event, she was not led to make payment.

61. The last of the 6 debtor witnesses who are cited in CPF # 61 [Gardner, Tr. 250–252] received the CX 29 series of dunning letters, one of which [CX 29(o)] is cited in this connection by complaint counsel. CX 29(o), the next to the last of the series, was stamped "NOTICE" and contained the following extract:

If you want to avoid unpleasant and costly action, make immediate payment. . . . We can wait no more than 5 days to hear from [the creditor] on settlement. Your immediate response is imperative. [CX 29(o)] [44]

62. The last of the series [CX 29(q)] was stamped "FINAL NOTICE" and contained the following extract:

You may immediately register your defense in writing within 48 hours after receipt of this notice. [CX 29(q)]

According to Gardner's own testimony it was the stamp "FINAL NOTICE" on the last letter [CX 29(q)] — rather than the deadline set in CX 29(o) — which led Gardner to "assume that it (suit) would happen some time in the immediate future." (Tr. 263)

[18] Although not corrected during the witness' examination, reference to a Spanish-English dictionary indicates either that Ms. Viera erroneously translated "su" to mean "your" instead of "our" or that the report of the testimony is wrong. 494–5.

[19] Obviously a proper translation would have much lessened even this concern.

63. In summary, of the nine debtor witnesses selected from some 2000 candidates, only six are cited on this point. Of the six only three (Zuccarrelli, Viera and Gravatt) claimed to have been led to believe suit was imminent and of those three debtor witnesses only one (Gravatt) was, in fact, sufficiently concerned to pay the debt (or, in her case, to have her mother pay it.)[20] The claim of one young girl to have taken Capax' warnings of immediate action seriously enough to act on them is too slender a reed on which to find that such warnings had a real capacity to deceive the ordinary debtors who received them.

64. We find, rather, that these traditional warnings by creditors or their agents to debtors were recognized as mere bluff or bluster, analogous to "puffing" in merchandising. As Capax' President **[45]** testified, the failure of a debtor to meet a Capax deadline would normally result only in his getting the next letter of the series [Tr. 562, 579]. The debtor here — like debtors generally — learn that such threats are commonly harmless and may commonly be disregarded — for a long time, at least — with impunity.

65. The evidence here shows clearly how this comes about. Take as an example witness Gardner (drama critic for the Baltimore Sunpapers), who received the CX 29 dunning series. The sequence of this series is as follows. The first [CX 29(d)], dated 1/10/75, tells the debtor that he can keep this claim out of Capax' credit records by settling the account in question within 7 days. The next [CX 29(h)] dated 1/27/75 (or more than 2 weeks later) suggests an "oversight" and advises that payment will still be accepted. The next [CX 29(f)], dated 2/5/75 warns that "little time remains" but "the worst" can still be avoided by reaching an arrangement with the creditor. The next [CX 29(i)], dated 2/19/75, warns that "strong action" is often necessary but "there is still time to avoid the unnecessary consequences of your neglect."

66. The next [CX 29(k)], dated 2/28/75 lays down the law: "It is imperative that you contact your creditor *today* to avoid further action." (emphasis added). Yet two weeks later, on 3/14/75, comes another [CX 29(m)], again asserting that it is "urgent" and "imperative" that satisfactory arrangements be made and "if settlement is not made *within 48 hours* upon receipt of this LETEGRAM, we suggest you contact your attorney to determine your legal liability. . ." (emphasis added) A week later the dunning starts again. On 3/21/75 CX 29(o) (stamped "NOTICE") warns that it would be "most unfortunate" to

[20] While young Ms. Gravatt was married by the time of trial she had been living with her parents and attending school in Washington, D.C. in 1973, when the incident occurred. (Tr. 308) She had never received a telegram (Tr. 317) and had never been dunned for a debt (Tr. 320–1). She did not bother to maintain a record of her checks as written (Tr. 344) and had not bothered to look at her monthly bank balance after giving Sears, Roebuck a bad check for $12 (Tr.

make "more formal action" necessary and lays it on the line: "We can wait no more than *5 days* to hear. . . Your immediate response is imperative." (emphasis added) Nearly two weeks later, on 4/2/75 Capax sends a "FINAL NOTICE" which gives witness Gardner "*48 hours* after receipt of this notice" to "register" his **[46]** defense, etc. (emphasis added) — but payment will still be accepted, not too surprisingly. [CX 29(q)] Then follows a six months breathing spell, after which, on 10/3/75 a new series starts all over again: "This is your final opportunity. . . ."

67. A review of each series of Capax' dunning letters *in their entirety* convinces us the deadlines and exhortations to urgency found in such letters do *not* convey to the debtor the same serious message that each letter viewed individually might convey to an uninvolved reader. Indeed, it is hard to believe that an ordinary debtor will take a creditor's "5 days-to-pay," "48 hours to pay," "pay at once," etc. any more seriously than a merchandise buyer takes a hawker's "Hurry, hurry, hurry. . . while they last. . ." Sooner or later the constant dunning may stimulate the debtor to begin payment sometime during the series but it seems doubtful that the setting of deadlines plays any significant role in the process, as the almost total ineffectiveness of such "warnings" clearly confirms.

68. We find that Capax' warnings of immediate sanctions if its payment deadlines are not met may be "false" in a literal sense, because Capax is plainly programmed to give the debtor a second chance, third chance, fourth chance, etc., if payment is not made within the stated time. However, we also find that the ordinary debtor would recognize from the repetitive pattern of inconsistent warnings and forgiveness — even if he has not, like most debtors, had similar experience with other dunning agencies — that Capax' exhortations to urgency may be taken with a grain of salt. Like merchants' puffery they lack the capacity to deceive which is the ultimate issue here. They are mere bluff and bluster. **[47]**

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and personal jurisdiction over all respondents.

Comment: Jurisdiction over the subject matter here is found in Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a). Jurisdiction over the person was obtained by service of the complaint on all respondents and the subsequent general appearance of each respondent by attorney. See page 8 above.

2. The acts and practices charged in the complaint and proved here took place in commerce, within the meaning of the Federal Trade Commission Act, 15 U.S.C. 45(a).

Comment: All respondents concede this and there is no question of collusory jurisdiction. See Findings # 12 thru 15 above.

3. All individual respondents concede that as long as they were active in the affairs of this close corporation they did (and respondent Goodman still does) formulate, direct and control its acts and practices generally. Respondents Goodman and DeFelice further concede that they have formulated, directed and controlled the particular acts and practices which are the subject of this complaint. Respondent DeFelice denies but we now find that he, too, participated personally in various acts and practices which are the subject of this complaint.

Comment: See Findings # 1 thru 5 above. For a holding that domination of corporate affairs generally is sufficient to hold an individual, see *Tractor Training Service, Inc.* v. *F.T.C.*, 227 F.2d 420 (9th Cir., 1955). For a holding that [48] there must be a further showing that such individual actually participated in the challenged acts and practices. *Coro, Inc., et al.* v. *F.T.C.*, 338 F.2d 149, 154 (1st Cir., 1964) *(cert. den.*, 380 U.S. 954). We find both tests met here with respect to all individual respondents, including Bricker.

4. The acts and practices of respondents proved in this proceeding do not constitute unfair or deceptive acts or practices in commerce and are therefore not violative of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

Comment: This is primarily a factual case and our resolution of factual issues is already apparent from our findings. It remains only to note the major legal assumptions behind our findings of fact.

A. LETEGRAM

We have found as a fact that the purplish red and gray LETEGRAM format used by Capax since the fall of 1973 is not likely to deceive the ordinary debtor into believing it is really a telegram and not likely to deceive any debtor more than momentarily, certainly not long enough to affect any decision. (Findings # 18–22). While it is clear that the unfair trade practice law is designed to protect the "ordinary purchaser" rather than the common law's "reasonable man", *F.T.C.* --

talk in our cases about protecting "the gullible and credulous" as well as "the cautious and knowledgeable," *Charles of the Ritz* v. *F.T.C.*, 143 F.2d 676 (2d Cir., 1944), nevertheless ". . . . a representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *Kirchner t/a Universe Co.*, 63 F.T.C. 1282, 1290 (1963). [49]

Here our finding is based not only on our own visual inspection of CX 17(b) but on the adverse inference which we are permitted to draw from complaint counsel's failure to ask 6 of their 9 debtor witnesses whether they really mistook a LETEGRAM for a TELEGRAM; the fact that one of the remainder was testifying about a TELEGRAM instead of a LETEGRAM; and the atypical nature of the other two debtor witnesses, one of whom, incidentally did not assert more than initial confusion.[18]

While these matters are not to be decided by a Gallup Poll, the top-heavy support for our conclusion that a LETEGRAM is readily recognizable as a gimmick, not a TELEGRAM, is not to be defeated merely because for a moment a LETEGRAM may be "unreasonably misunderstood by an insignificant and unrepresentative segment" of debtors.

B. "COLLECTION AGENCY" IMAGE

This case was apparently premised on an erroneous theory of law that there is something *per se* deceptive about a debtor-dunning service which does not include all other collection functions as well as dunning. Put simply, Capax' short-line debt collection service (largely just dunning letters) is viewed as inherently [50] deceptive because, by definition, it is not a full-line service (which would apparently have to include such things as regularly receiving payments and bringing suits, as needed). According to Paragraphs 8.1 and 9.1 of the complaint the very use of the word "collection" in Capax' letterhead[19] constituted a misrepresentation that:

> delinquent debtors' accounts have been referred to respondents as an independent debt collection agency which will engage in typical debt collection activities such as making personal demands for payment and/or filing suit.

Authority for this position is said to derive from the language of Commissioner Jones in *State Credit Control Board*, 70 F.T.C. 1318 (1966); *affd. sub nom. S. Dean Slough* v. *F.T.C.*, 396 F.2d 870 (5th Cir.,

[18] We recognize the rule of *Carter Products, Inc.* v. *F.T.C.*, 186 F.2d 821, 824 (7th Cir., 1951) that even correction of an original misapprehension before action in reliance, as by entering into a contract, may not cure a violation. However, in this case we have found no more than a possible momentary deception, which would be immediately recognizable as an error. This is a horse of a different color (purplish red and gray, of course).

[19] Capax' messages other than "Letegrams" were commonly headed: "Continental Credit Corp . . . . Credit Control and Collection."

1968); *cert. den.*, 393 U.S. 980 (1968). That case was primarily concerned with a different problem: stopping the misleading use of a false aura of governmental authority by a private dunning service. With that holding of the case it would be hard to disagree.

However, Commissioner Jones also held (without regard to emulation of governmental authority) that mere use of a third party dunning agent in the circumstances of that case was deceptive:

> Third party referral, to the extent it is an effective debt-collection device, is effective because it implies to the debtor that the third party has collection authority or authority to take other legal action. If the third party does not in fact have such authority the mere lending of its name and address to the collection of the debt is wholly grounded in deception (p. 1358) (emphasis added) [51]

And again:

> The record demonstrated that use of third-party referrals is important in the collection of delinquent accounts. The evidence clearly indicates that third party referrals have this significance not simply because debtors are more apt to read what is sent by third parties,[20] but more importantly because of the debtor's assumption from the fact of such referral that the creditor has placed the delinquent account in the hands of a third party for some affirmative action (transcript citations). Debtors receiving any third-party communications respecting their delinquent accounts are thereby led to believe that their creditors will no longer extend credit and that they probably intend to collect the debt by legal action if necessary. (p. 1357)

If Commissioner Jones' opinion means that any third party referral of a debt which does not confer full authority to receive payment, bring suit, etc. is *per se* deceptive and unfair, there would be no point in pursuing this matter further: indeed, the whole dunning business would be unlawful. We are reasonably sure that *State Credit Control Board* was never intended to abolish the debt dunning business. There are several references in Commissioner Jones' opinion to record sources, such as the respondent's exposition of so-called "third party" psychology, as the basis for her conclusion in *that* situation and under *those* circumstances. Accordingly, we have assumed that it will not be *presumed* but must be *proven* in every case that a referral was made in such a way and under such circumstances as to create a likelihood or fair probability that debtors receiving dunning letters will be deceived to their prejudice. [52]

In Findings 29–38 we have found from the testimony of complaint counsel's own debtor witnesses that they did not, in reality, act the way that complaint counsel's theories presume they should act. It was *not* mere notice that a claim had been turned over to Capax which led most of these debtor witnesses to anticipate that they would be sued or their

credit would be ruined, etc. With no more than one or two possible exceptions, these debtor witnesses all attributed their alleged fears about suit or credit standing to specific language other than a mere announcement that the debt had been turned over to Capax for its action. Such findings confirm our reading of *State* to call for a realistic appraisal of the evidence in each case, not a wooden reliance of an unrealistic presumption which, if rigidly applied, would put the dunning business out of business.

C. THREATS OF SUIT

We have concluded in Finding # 45 that alleged threats of suit in Capax' dunning letters would not deceive an ordinary debtor into believing he was going to be sued by Capax, because most such letters made it quite clear on their face that any suit would be by the creditor (and none were contra). To reach our conclusion it was necessary to disregard contrary testimony by some of complaint counsel's debtor witnesses but that results in no weakness in our conclusion. As the Courts have held, the Commission is not bound in a matter of this kind by statements of witnesses as to whether they were deceived or not. *Double Eagle Lubricants, Inc.* v. *F.T.C.*, 360 F.2d 268, 270 (10th Cir., 1965). In this case the documentary evidence is all one way. It would be a travesty on justice to believe the contrary testimony of the debtor witnesses.

The ultimate issue on this branch of the case is whether it is deceptive for Capax in some instances to warn debtors that their creditors will sue them, without making specific inquiries of the specific creditors involved, on the basis of Capax' extensive experience with creditors and debtors generally and this creditor in particular. The Commission case law **[53]** in such situations does not require Capax to be an insurer of the accuracy of its warning but only to have a reasonable basis for its statement. *Pfizer, Inc.*, 81 F.T.C. 23 (1972); *Tashof* v. *F.T.C.*, 437 F.2d 707 (D.C. Cir., 1970). The extensive background for Capax' warnings, set forth in part in Finding # 47, leaves no question about what would seem highly probable anyway: that creditors almost always bring suit, assuming economic feasibility, for debts that the dunner leaves uncollected.

D. THREATS TO CREDIT STANDING

On this branch complaint counsel's showing is so deficient on the facts that there is little occasion to apply law. Two extracts from complaint counsel's three alleged examples reveal only unexceptionable warnings that the debtor's credit with Capax and/or the creditor

may suffer if he doesn't pay the debt. The third could be read to refer to the debtor's general credit reputation but, again, merely reminds him that if the claim goes to trial "your credit standing may suffer."

It is hard to see how dunning could survive if a dunner could not argue such a simple truism as this. There may be occasions when truth is presented deceptively but that is certainly not the case here; a truer warning can not be imagined. The warning may be *unpleasant* but that is no proper concern of this Commission. As the Commission stated when it was starting down the road of policing deception in debt collection:

> . . .(A)ll persons should pay their just debts. Within legal limits, creditors are entitled to pursue their collection methods energetically. *Wm. H. Wise Co., Inc.*, 53 F.T.C. 408, 426 (1956)

It is important to remember that the purpose of the Commission's activity in this field is to prevent deception, not to prevent energetic collection methods. **[54]**

E. THREATS TO ENFORCE PROMPT PAYMENT

The last legal issue in this case concerns Capax' occasional[21] setting of early time limits within which debtors are warned to pay up or face the prospect of defending themselves in court or other unpleasant consequence. There is no doubt but that Capax has set such deadlines and yet has regularly given debtors second, third, fourth and more chances to meet new deadlines while the series of dunning letters drags on. The legal issue is not whether the use of a *locus penitentiae* — known to and employed by every lawyer in this country — is fair or unfair in other ways but whether it has a tendency or capacity to deceive — to put it simply: whether anybody really takes those deadlines seriously.

"Puffing" is one of the few defenses from the common law of misrepresentations which has survived into the law of deceptive trade practices, as evolved and administered by this Commission, Kintner, E.W., *A Primer On The Law Of Deceptive Practices* (1971), pp. 7–8, 33, albeit with some restrictions, *e.g. ibid.* p. 319, *et seq.* The "puffing" rule gives merchants some freedom to describe their wares in enthusiastic terms which most people would readily recognize to be exaggerated. See, for example, *H. W. Kirchner, t/a Universe Co.*, 63 F.T.C. 1282 (1963). There the Commission recognized the possibility of a technical violation of the unfair trade practice law when a respondent advertised

[21] Most of Capax' deadlines, it will be remembered, specified no sanction for failure to perform in time. Such

as "invisible" a "Swim-Ezy" flotation device worn under a bathing suit which was, in fact, no more than "inconspicuous":

To be sure, "Swim-Ezy" is not invisible or impalpable or dimensionless, and to anyone who so understood the representation, it would be false. (p. 1289) [55]

Nevertheless, Commissioner Elman continued:

It is not likely, however, that many prospective purchasers would take the representation thus in its literal sense. (pp. 1289–90)

And the Commission thereupon dismissed that part of the charge (p. 1291).

What puffery is to a merchant, bluff and bluster are to a debt dunner. "Time frames" come naturally to a dunner in order to get debtors "off their rumps," as Mr. Goodman, Capax' President, put it here (Tr. 604–5). But it is "not likely," to use Commissioner Elman's words, that "many" debtors take those time frames seriously. We are satisfied that an "ordinary"[22] debtor would "probably" react in about the same way we do to the continuing parade of ever-new deadlines illustrated in Findings # 65–66 above. That they will not be taken seriously by most debtors is clearly confirmed here by the single instance of success for such methods among complaint counsel's nine debtor witnesses. Such bluff and bluster by debt dunners has no more real capacity to deceive than the merchant's traditional puffery. It would be a serious mistake to treat such warnings with the seriousness reserved for representations with a real capacity to deceive.

5. On consideration of the whole record, including only the reliable, probative and substantial evidence therein contained, it is the initial decision of the administrative law judge, pursuant to the [56] provisions of this Commission's Rule Section 3.51, that the complaint in Matter of Capax, Inc., Dkt. 9058, should be and hereby is DISMISSED.

OPINION OF THE COMMISSION

BY DOLE, *Commissioner*

This matter is before the Commission on an appeal by complaint counsel from an initial decision of the administrative law judge dismissing the complaint. The complaint charged that respondents Capax, Inc., two present officers, and one former officer had violated Section 5 of the Federal Trade Commission Act by making false and misleading representations in form notices and letters sent to debtors to assist in the collection of alleged delinquent debts. After an

[22] That the test is the "probable" reaction of an "ordinary" person, see again *F.T.C.* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (1963).

evidentiary hearing, Administrative Law Judge (ALJ) Paul R. Teetor issued his initial decision, which concluded that respondents' practices are neither deceptive nor unfair and therefore do not violate Section 5. [2]

Upon our review of the record, the arguments advanced in the briefs and at oral argument, and the initial decision, we reverse. The ALJ's order dismissing the complaint and his findings of fact and conclusions of law are vacated, and the findings and conclusions set forth in this opinion are substituted in their place, except to the extent that the ALJ's introductory findings of fact[1] are not inconsistent with this opinion.

BACKGROUND

Since its inception in 1972, respondent Capax, Inc. ("Capax") has been engaged in selling a service to assist creditors in various parts of the United States in the collection of alleged delinquent debts. (I.D. 6, 12–15.)[2] Respondents DeFelice, Goodman, and Bricker are present or former officers and principal owners, all of whom were properly found by the ALJ to have formulated, directed, and controlled the acts and practices of Capax. (I.D. 2–5.) Capax' service has consisted primarily of the preparation and mailing of a series of form letters, purchased by creditors at a flat rate and sent by Capax at regular intervals to alleged delinquent debtors. The service is provided on a non-commissioned basis. (I.D. 6.) [3]

Capax' clients can choose between several different series of dunning letters. There are long and short versions of a "strong" series,[3] a "diplomatic" series, a "bad check" series, and various Spanish language series. The charge for the long series was about $3.84 when the business was formed and later was increased to $4.25 (I.D. 7); it includes the mailing of a maximum of eleven letters (Tr. 795) over a period of approximately 90 days. (Tr. 801; CX 24(b), RX 91.) The short series consists of fewer letters sent out over a shorter period of time,

[1] I.D. 1–15.

The following abbreviations are used in this opinion:

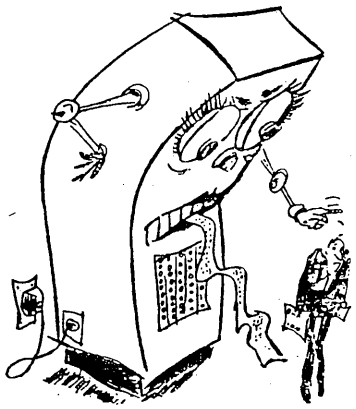
I.D. — Initial Decision (Finding No.);
I.D. p. — Initial Decision (Page No);
Tr. — Transcript of Testimony;
CX — Commission Exhibit;
RX — Respondents' Exhibit;
App. Br. — Complaint Counsel's Appeal Brief;
Ans. Br. — Respondents' Answering Brief;
Rep. Br. — Complaint Counsel's Reply Brief;
TROA — Transcript of Oral Argument before Commission.

[2] Capax was named Continental Credit Corp. until [illegible], 91, 1975. (I.D. 1.)

and is available to creditors with a high volume of low-balance accounts. (Tr. 883.)

Capax has promoted itself as a "customized, computerized control company" which is "not a collection agency" and which offers "the modern answer to an old problem."[4] According [4] to Capax' President, Mr. Goodman, the company's dunning letter service is part of a more comprehensive "credit control system consisting of sending out the letters, generating reports and advice and helping to control the receivables for the individual company." (Tr. 504, *et seq.*). In fact, the company's service operates in a rather simple and mechanical manner: a creditor who purchases the flat rate service is provided with several transmittal forms which are used to start the service (CX 33; CX 27; Goodman, Tr. 520–521, 526, 528); to suspend it if payment is received or satisfactory arrangements are made (CX 27; Goodman, Tr. 752–758); and to resume it under certain circumstances.[5] Capax' letters advise debtors to make payment directly to their creditors; money

[4] CX 9(a). This exhibit, a promotional circular, provides the following illustration:



THE MODERN ANSWER

To An Old Problem

[5] The service is resumed if the debtor fails to make a satisfactory payment or if Capax has temporarily suspended the service after contact by a debtor disputing the claim and the creditor requests that it be continued. (CX 27; Goodman, Tr. 758–759, 637–638.)

which is sent to Capax is immediately forwarded to the creditor. (I.D. 9.)[6]

When the flat rate letter writing service fails to result in payment of a debt, Capax advises the creditor of stronger actions which could be taken. (I.D. 8.) Since about May 1975, Capax' clients have been offered a "second phase" collection service for "hard core cases" where the flat rate letter writing service has not induced collection of a debt. (I.D. 10.) Capax' President testified that in "Phase 2" phone calls may be made to the debtor (Tr. 553, 791–792).[7] **[5]** Capax charges a fee for this supplementary service based on a percentage of the debt collected. (Tr. 796.)[8]

Capax has never had contractual authority from its clients to bring suit against debtors, either in its own or the creditor's name, nor has it ever brought such a suit. (I.D. 11.) In its flat rate service, Capax does not take assignments of the debts referred to it (I.D. 6; Tr. 824; CX 7(a)), and has no knowledge during the course of its letter writing series whether the creditor would take collection action if payment was not received. (Tr. 543, 567, 587–590, 600–601.) Likewise, in conducting its flat rate service, Capax has taken no action to adversely affect the debtor's credit record with a consumer reporting agency (CX 60(o), CX 61(i); Tr. 231, 537–539) and has had no control over or knowledge of whether a creditor would take any such action, if payment was not received. (Tr. 532, 546.)

I. ALLEGED DECEPTIVE APPEARANCE

Prior to October 1973, Capax sent collection notices to debtors which were captioned "Telegram" as part of its various dunning letter series. (*See* the initial letter and other letters in the CX 17, CX 18, CX 19, CX 20, and CX 21 series). These letters were printed with large type on yellow paper with a brown band across the top; the notations "DAYTIME MESSAGE URGENT" and "NIGHT MESSAGE" appeared adjacent to selection boxes. The forms were mailed in a yellow window envelope with a brown band across the bottom and the word "Telegram" appearing three times on both the front and back. (CX 22(b).) Although none of these were actually telegraphic communications (CX 60(r), 61(j); Tr.

[6] Between October 18, 1973, and October 10, 1974, payments amounting to approximately $20,000 were sent by debtors to Capax. (CX 60(r), CX 61(i); Tr. 241.) According to the testimony of Capax' President, this represented about 2 percent of the $10 million worth of claims collected for clients during this period, which in turn represented 51 percent of the $20 million of claims submitted by creditors to Capax for its service. (Tr. 881–883).

[7] The ALJ made the finding that in Phase 2 the claim may be turned over to an attorney for suit, unless the creditor gives Capax specific orders to the contrary. (I.D. 10.) Actually, Mr. Goodman testified that in the second phase a recommendation may be made by Capax to refer the account to an attorney for further action. (Tr. 555, 802.) This

240), they bore a close resemblance to Western Union telegrams (*See, e.g.*, RX 27(a), RX 27(b)).

In October 1973, Capax discontinued its use of the "Telegram" format,[9] and since that time has used a "Letegram" format. (*See* the initial letter and other letters in the CX 10, CX 11, CX 12, CX 13, CX 14, CX 15, and CX 16 [6] series; CX 60(q) and CX 61(i); *see also* CX 22(c), which is a sample "Letegram" envelope.) The "Letegram" is printed in the same type style as its predecessor, but on gray paper with a magenta band across the top. The caption "Letegram" appears in the band, with the words "URGENT MESSAGE" in the center of the band. The "Letegrams" are sent in gray window envelopes with a magenta band across the bottom and the word "Letegram" appearing three times on both sides of the envelope. Like the "Telegrams" respondents formerly used, the "Letegrams" are not actually telegraphic communications, but are letters sent by United States mail. (CX 60(q), CX 61(j).)

The complaint alleged that these materials simulate telegraphic or similarly urgent communications and thereby mislead recipients as to their nature, import, purpose, and urgency. It is well established that tendency or capacity to deceive, as well as actual deception, falls within the proscription of the FTC Act. *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *Regina Corp.* v. *FTC*, 322 F.2d 765, 768 (3rd Cir. 1963); *Goodman* v. *FTC*, 244 F.2d 584, 604 (9th Cir. 1957). In determining whether material has the capacity to deceive, the Commission may rely on its own evaluation of the evidence, *Carter Products, Inc.* v. *FTC*, 323 F.2d 523, 528 (5th Cir. 1963); *see also FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 391–2 (1965). The Commission may interpret the meanings of communications and the "impressions they would likely make upon the viewing public," *Libby-Owens-Ford Glass Co.* v. *FTC*, 352 F.2d 415, 417 (6th Cir. 1968), and may look to the overall impact of the material at issue. *Carter Products, Inc.* v. *FTC*, *supra*. *See Trans World Accounts*, F.T.C. Dkt. 9059, at 3–6 (Oct. 25, 1977) [90 F.T.C. 350], *appeal docketed*, No. 78–1398 (9th Cir. Feb. 21, 1978).

Turning first to the "Letegram," our visual inspection of the "Letegram" letters and envelopes reveals that they sufficiently resemble genuine telegraphic communications to have the tendency and capacity to deceive recipients as to their nature, import, and urgency.[10] Although the simulation of a telegraphic communication is

[9] However, there may have been some exceptions. One witness, Ms. Gravatt, testified that she received the yellow "Telegram" (CX 21(b)) from Capax in early 1974 (Tr. 310–311, 326), after the date that respondents represent the telegram format was abandoned.

[10] We do not find, however, that the simulation misleads recipients of the "Letegram's" purpose, as the complaint had charged.

less blatant [7] as to the "Letegram" than the earlier "Telegram," the overall appearance of the "Letegram" has the capacity to deceive consumers into believing that it is more urgent and significant than an ordinary letter. Both the name "Letegram" and the format of the communication are susceptible of being confused by members of the public with a telegraphic communication.[11] With respect to respondents' earlier "Telegram" format, we agree with the ALJ that there is little doubt that the "Telegram" was virtually indistinguishable from a real telegram—it had the same colors, size, and shape, and similar type.[12] As a result of respondents' simulated telegraphic [8] formats, especially in conjunction with the messages employed, discussed *infra*, the recipient is led to believe that the creditor considers the message so urgent that he went to the trouble and expense of using a telegraphic communication. "The obvious conclusion to be drawn from the receipt of a demand to pay, telegraphically communicated at substantial cost, is that precipitous action may follow if immediate response to the message is not made." *Trans World Accounts, supra* at 4.

The testimony of complaint counsel's witnesses corroborates our view. Ms. Nield testified: "My initial impression upon receiving [the "Letegram"] was that it was a fairly urgent message. It appeared to be a telegram or a Western Union letter, or gram or whatever." (Tr. 148–149.)[13] Her impression was based upon "the format, the letter, the envelope, the letterhead, the style of print." (Tr. 149). On cross-examination, she reiterated that her impression upon receiving the "Letegram" was that it was an urgent, telegraphic [9] communication. (Tr. 158-159.) Ms. Cook testified that when she received Capax' first

[11] We note that although Capax' "gram" is no longer the same color as a Western Union telegram, not all authentic telegraphic communications are yellow and brown. For example, the Western Union Mailgram, a message telegraphically communicated to the general locale of the recipient and mailed from there, is blue and white. (RX 28, 29(a), RX 29(b), RX 30(b).)

[12] Respondents content (Ans. Br. 14) and the ALJ found (I.D. 16) that use of the "Telegram" was abandoned in October 1973. This was prior to the preliminary inquiry letter to Capax, notifying it of a Commission investigation. (CX 1(a), dated January 31, 1974). Although there was some testimony that the "Telegram" format may not have actually been abandoned before initiation of the investigation, *see* n. 9 *supra*, the weight of the evidence is that Capax did generally abandon that format, as claimed.

Contrary to the ALJ's ruling that the complaint made no charge of deception with respect to the "Telegram," the allegations of the complaint were sufficiently broad to encompass the "Telegram." Paragraph Four of the complaint referred to "various printed forms, letters, and other printed material," with reference to the "Letegram" as "(t)ypical and illustrative, but not necessarily all inclusive of said forms and material."

Whether a claim of discontinuance of early deception is to be accepted is within the discretion of the Commission, *Benrus Watch Co.* v. *FTC*, 352 F.2d 313, 322 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1969); *Libby-Owens-Ford Glass Co.* v. *FTC*, 352 F.2d 415, 418 (6th Cir. 1965). Under the circumstances here, where abandonment of a form of deception was followed by another form of deception, less blatant but still unlawful, we reject the abandonment defense. Discontinuance of an offending practice, particularly under circumstances where there is no assurance that the deception will not be resumed, does not obviate the need for or propriety of an order. *Cotherman* v. *FTC*, 417 F.2d 587 (5th Cir. 1969); *Libby-Owens-Ford Glass Co.* v. *FTC*, *supra*; *Coro, Inc.* v. *FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

[13] Ms. Nield's initial impression was fortified when she read the letter: "The impression I had was there was a great sense of urgency in getting the matter resolved. I certainly didn't wish legal action. I would not have wanted a

"Letegram," she thought it was a telegram because of the appearance of the envelope. (Tr. 508 A-509 A). As previously indicated, Ms. Gravatt testified that her impression was that she had received a telegram from Capax. (Tr. 310-311.)[14]

The ALJ found that "Capax' LETEGRAM, as distinguished from its earlier TELEGRAM, is unlikely to deceive ordinary debtors into believing they have received a real telegram. Moreover, it is unlikely to deceive any debtor more than momentarily and certainly not long enough to affect any action." (I.D. 22.) The distinction drawn between "ordinary" and "any" debtors is curious, in light of the fact that the FTC Act protects the public at large, including the most credulous. *Charles of the Ritz* v. *FTC*, 143 F.2d 676, 679-680 (2d Cir. 1944). "The important criterion is the net impression which the [communication] is likely to make upon the general populace." *Id.* Moreover, although the recipients of Capax's dunning material may have "ultimately discerned that the messages were simply debt collection letters in the format of a 'fake' telegram, their initial impression was that they had received a telegram." *Trans World Accounts, supra,* initial decision at 32. The FTC Act is violated if the first contact is secured by deception, even if the consumer becomes aware of the true facts before taking action. *Carter Products, Inc.* v. *FTC*, 186 F.2d 821, 824 (7th Cir. 1951).

Respondents argue that the "Letegram" is an "impact message" which is a legitimate business technique designed to obtain reader interest and attention, and that the communications are in fact urgent because they concern a past due debt which is urgently in need of attention. (Ans. Br. 7-10.) There is no question that the collection of debts is a legitimate business activity. Many creditors understandably consider the collection of past due debts to be urgent. **[10]** However, there may be many reasons for non-payment, including a valid defense to a claimed debt or inability to pay for reasons beyond the debtor's control, and payment may not be exacted by deception or other unfair practices.[15] **[11]**

[14] We note that respondents' counsel, in describing the consumer witnesses who testified in this proceeding, have stated "all were, by their demeanor and testimony, honest citizens" who comprised "a representative sample of the public at large." (Motion for Directed Verdict, 1 and 17.)

[15] The ALJ's general position was that the format and substance of Capax' letters were mere "bluff and bluster"; in his view, they were disregarded by the recipients, as reflected by the fact that most who testified failed to respond to the letters by making payment. While the legitimacy of the claims which Capax attempted to collect is irrelevant to the legitimacy of its tactics, *cf. Trans World Accounts, supra* at 10 n. 7, the circumstances underlying a number of the claims in the record put perspective on his view. Ms. Thom was dunned for a doctor's bill. The doctor had prescibed tranquilizers for a sore throat. According to Ms. Thom, the tranquilizers had done nothing for the sore throat; the infection spread to her right eye and she lost sight in that eye. (Tr. 117-122.) Mr. Vineburgh was dunned for a bill which he claimed was erroneously sent to him through "bad bookkeeping" and was actually owed by a company for which he was a consultant. (Tr. 416-418, 420.) Ms. Viera had been mistakenly billed by a doctor for an expense owed by her insurance company; she stated that the doctor agreed it was a mistake. (Tr. 491-492.) Ms. Zuccarelli testified that she received dunning letters for a repair bill for what she believed to be a defective central air conditioning unit which had gone through eight condensers in a one year period. (Tr. 635-659.) *See also* Gardner (Tr. 247-248, 288), Gordon (Tr. 353-354, 377-378), Cook (Tr. 506A-507A). Of course, the disputed nature of these bills may not have been representative

(Continued)

Consistent with respondents' argument here, the ALJ stated: "Even though the appearance of a dunning letter may be made similar enough to a telegram to stimulate a conditioned emotional response of urgency and importance, as long as the recipient is aware that he got a gimmick, not a telegram, there is not the deception which turns a Harvard Business School market research problem into a Federal Trade Commission unfair trade practice case." (I.D. 23.) We disagree. There is no evidence that recipients were aware that they had received a gimmick.

In view of the deceptive appearance of its dunning communications, an order provision is necessary to prohibit respondents from using or placing in the hands of others materials which by their appearance misrepresent telegraphic communications. A related order provision is necessary to prevent recurrence in altered form of the violations proven, *Fedders Corp.* v. *FTC*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). This related provision will prohibit the use or placement in the hands of others of materials which, by simulating telegrams or other methods, forms, or types of communication, misrepresent the nature, import, or urgency of any communication. This remedy is entirely consistent with the Fair Debt Collection Practices Act, Pub. Law 95-109, 15 U.S.C. 1692, which became effective on March 20, 1978. That Act prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." §807, 15 U.S.C. 1692e.

Under this order, respondents may attempt to attract the recipient's attention in their letters to what their clients believe to be a matter deserving serious consideration, as long as they do not misrepresent the significance or urgency of the message.[16] [12]

II. THE FULL-LINE COLLECTION AGENCY IMAGE

The complaint charged that respondents misrepresented, directly or by implication, that delinquent debtors' accounts had been referred to them as an independent debt collection agency which would engage in typical debt collection activities such as making personal demands for payment and/or filing suit.

Upon review of Capax' communications, we find that Capax clearly

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of the claims pursued by Capax. However, the circumstances underlying them do indicate that these alleged debtors' refusal to pay after receiving Capax' letters may not have been due to dismissal of the letters as mere "bluff and bluster," as the ALJ assumed. Moreover, all of these consumers took some action in response to Capax' letters to protect or defend themselves. *See* n. 33, *infra*.

[16] As to their envelopes, respondents are also circumscribed by the Fair Debt Collection Practices Act, which forbids a debt collector from:

Using any language or symbol other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business. §808(2), 15 U.S.C. 1692f.

did imply that creditors' claims had been assigned to it for necessary collection action, and that Capax had the authority to take action as the moving party, such as by initiating suit, to collect debts. The following are examples of statements made by Capax in its communications:

YOUR DELINQUENT ACCOUNT WITH A-B-C- SUPPLY COMPANY HAS BEEN REFERRED TO CONTINENTAL CREDIT CORPORATION FOR ACTION. . . (first contact, Diplomatic series, CX 10(b–c); CX 17(b); Spanish language series, CX 12(b–c); CX 19(b));

. . .CLAIMANT HAS REQUESTED THAT CONTINENTAL CREDIT CORP. RESUME PROCEDURES TO LIQUIDATE THIS CLAIM IN ORDER TO SATISFY THE LIABILITY FOR $9999.99 SET FORTH ABOVE. . . (first contact, Reinstate Diplomatic series, CX 16(b–c));

LEGAL ASSIGNMENT OF YOUR DELINQUENT ACCOUNT HAS BEEN TRANSFERRED TO CAPAX, INC., AND DEMAND IS HEREIN MADE FOR PAYMENT DIRECTLY TO THIS OFFICE IN THE AMOUNT OF $73.50. . . (CX 29(s).)[17] [13]

In assessing the meaning of these communications, we must look to the "impression that is likely to be created," *Kalwajtys* v. *FTC*, 237 F.2d 654, 656 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957). The impression is to be ascertained not by focusing upon the technical interpretation of each phrase, but by considering the "overall impression" likely to be made on the public. *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962). We must also keep in mind that deception may be accomplished by innuendo, rather than by outright false statements. *Regina Corp.* v. *FTC*, 322 F.2d 765, 768 (3rd Cir. 1963). The impression likely to be conveyed by Capax' letters is that the company was a collection agency which had been assigned creditors' claims and had the authority to take the action necessary to collect them, such as filing suit. The letters convey the threat that dire consequences will befall the recipient who does not respond, with the innuendo that Capax will be taking the "strong action [which] is often necessary to collect an account."

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[17] Other examples in Capax' letters are:

"A-B-C- SUPPLY COMPANY HAS TURNED OVER TO US THEIR CLAIM AGAINST YOU FOR $999.99. . ." (first contact, Strong series, CX 11(b–d); CX 18(b); Spanish language series, CX 13(b–c); CX 20(b));

"STRONG ACTION IS OFTEN NECESSARY TO COLLECT AN ACCOUNT, ACTION WHICH COULD HAVE BEEN AVOIDED WITH THE DEBTORS COOPERATION. IF YOU CONTINUE TO IGNORE REQUESTS FOR A FRIENDLY DISPOSITION OF THIS CLAIM, YOU MUST ACCEPT THE RESPONSIBILITY FOR FUTURE ACTION";

"THERE IS STILL TIME TO AVOID THE UNNECESSARY CONSEQUENCES OF YOUR NEGLECT. . . (fourth contact, Diplomatic series, CX 10(f); CX 17(e); Spanish series, CX 12(f); CX (e));

". . .IT MAKES NO DIFFERENCE TO US WHETHER YOU PAY VOLUNTARILY OR UNDER COMPULSION. . . . WE HOWEVER TAKE OUR RESPONSIBILITY TO OUR CLIENT SERIOUSLY. . ." (fifth contact, Diplomatic series, and seventh contact, Strong series, respectively, CX 10(g–h); CX 11(k); Spanish series, CX 12(h–i); CX 13(l); CX 18(i); CX 19(g); CX 20(i)).

See also CX 10(e), CX 10(l), CX 11(e), CX 11(k).

That recipients of Capax' letters are likely to gain this false impression was borne out by the consumer testimony: **[14]**

Q. [W]ould you tell us whether you recall having had any impressions upon receiving these [communications from Capax]?

A. I was scared to death, as a matter of fact. I got the feeling that someone was either going to come to my door and ask me for the money or I would have to go to court to pay for the check.

Q. Why did you think you would be taken to Court?

A. Well, it said that they had turned [the] account, or whatever over to the Continental Credit. . .

Q. Who did you understand would take you to Court?

A. Continental Credit. (Gravatt, Tr. 311.)

On cross-examination, when asked which particular part of the letter she received led her to believe that such legal action would be taken, Ms. Gravatt replied, "The whole thing." (Tr. 322.) Mr. Gardner, asked who he thought would institute suit against him for a disputed bill, responded:

A. Capax has indicated throughout this that they were representing [the creditor] and that the claim had been referred to them for action, so I assumed that any action would be instituted, at least, by CAPAX. (Tr. 263.)[18]

Likewise, Ms. Thom testified that she got the impression from Capax' letters that it would be the moving party in taking her to court. (Tr. 118.) The other consumer witnesses all stated that the impression made upon them by Capax' letters was that Capax would be filing suit, taking action to adversely affect their credit ratings, or taking some other harsh action to collect a debt allegedly owed. Ms. Nield (Tr. 171), Ms. Zuccarelli (Tr. 677–679), Mr. Gordon (Tr. 355), Ms. Cook (Tr. 516 A–517 A). **[15]**

The testimony of Capax' President is noteworthy for its assessment of the impression which would likely be conveyed to the recipients of his company's letters. Mr. Goodman was asked what was meant by the phrase "strong action is often necessary to collect an account," and replied: "Well, I think we are all aware of the credit collection field and that there are all types of actions that are taken. . ." (Tr. 550–551.) He stated that these actions include "harassment, by telephone

[18] Mr. Gardner understood "Legal assignment of your delinquent account has been transferred to CAPAX, Inc., and demand is herein made for payment directly to this office in the amount of $73.50" (CX 29(s)) "to mean that, whereas CAPAX had been acting for Chesapeake [the creditor] up to that point, that now they were acting on their own. In other words, it would be CAPAX who would be suing me rather than Chesapeake." (Tr. 270–271). Mr. Gardner was unaware that Capax did not have the right to sue. (Tr. 271.)

calls, personal calls, and whatever avenue is open to the creditor." (Tr. 549.)[19]

Contrary to the impression conveyed, Capax' service consisted of simply the preparation and mailing of form letters on behalf of creditors to alleged delinquent debtors. As discussed above, there was no assignment of debts to Capax. Capax did not have the authority to file suit in its own name or that of the creditor, and has never brought a suit against any debtor. Capax did not even have the authority to make any telephone calls to debtors or to make other personal contact with debtors demanding payment, and made no such calls or contacts, until the advent of "Phase 2." (Goodman, Tr. 553, 768; Pavlo, Tr. 989–990; Absalom, Tr. 933.)[20] **[16]**

Thus, Capax misrepresented its true status and authority.[21] There can be little doubt that this misrepresentation was a deceptive practice under the Federal Trade Commission Act. As in a prior debt collection practice case,

> respondents had no authority to collect the debt but only mailed out the forms which were designed to imply that the debt had been turned over to, and was now in the hands of, the transmitting third party for collection. The Commission found that this lack of authority made the letters "wholly grounded in deception," We think this determination was readily supported, . . . for it is quite obvious that the impression conveyed to the debtor is quite different from the actual state of affairs. *S. Dean Slough* v. *FTC*, 396 F.2d 870, 872 (5th Cir. 1968).[22] **[17]**

The ALJ dismissed this allegation of the complaint on several grounds. First, although he found that Capax represented itself as a collection agency (I.D. 25), he was not convinced that this representation was false (I.D. 26), since its principal activity, dunning debtors, is

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[19] In a similar vein, which asked what was meant by such phrases in Capax' letters as "unnecessary trouble," "embarrassment," and "additional costs," Mr. Goodman candidly testified that "most people have a very poor impression of collection agencies such as 'debt wagons,' people knocking on doors, speaking to neighbors, and causing all kinds of harassment and this would probably be in [the recipients'] minds." (Tr. 592.)

[20] In its promotional material, Capax stressed that it is "NOT a collection agency" (CX 9(a)); emphasis in original), that the creditor maintains account control and is paid by the debtor directly (CX 9(a)), and that there is no assignment of accounts. (CX 7(a).)

[21] Capax also appears to have misrepresented its internal organization in its letters, for the sake of furthering its image of a full-line collection agency with complete authority to collect debts. At the end of the text of each dunning communication there appeared the name of a person identified as the manager or a person associated with the "collection department," (CX 10(l), CX 11(h–j), CX 12(h–m), CX 13(h–k), CX 16(b–e)), the "credit department" (CX 10(e, f), CX 12(d–g)), or the "claims department" (CX 10(b–d, m), CX 11(b–g, k–n), CX 14(b, c), CX 15(b, c)), yet the testimony reflected that there were no such departments. (Tr. 542, 566.)

[22] *S. Dean Slough* v. *FTC*, *supra*, affirmed the Commission's determination in *State Credit Control Board*, 70 F.T.C. 1318 (1966), prohibiting a collection service from misrepresenting that it had official governmental status, that a delinquent account had been referred to it for collection, or that any legal or other action would be instituted to effect collection. There was broad language in the Commission's opinion which could be construed to mean that any third party referral of a debt which does not confer full authority to collect it is *per se* deceptive. The ALJ here discussed that possible interpretation, noting that it would make the entire dunning business unlawful. (I.D., PP. 50–51.) Such an interpretation would be in error. In *State Credit Control Board*, as here, the Commission prohibited the representation that the third party collection service has the authority to take legal or other affirmative collection action, when such is not the case. The Commission's final order established as a defense that respondent has the authority and good faith intent to take any represented action.

an important element of the overall collection process (I.D. 28.) It true that Capax would be considered a collection agency under th Commission's Guides Against Debt Collection Deception, 16 C.F.I 237,[23] and the Fair Debt Collection Practices Act, § 803(6), 15 U.S.(1672a(6).[24] It is also irrefutable that dunning agencies are part of th collection process. However, this misses the point of the allegation; it i not that Capax simply styled itself as a collection agency, but i represented that it had authority to take action which it did nc actually possess. Second, the ALJ found that the language of Capa letters did not operate to deceive debtors. (I.D. 29.) This is clearl belied by the record, as discussed *supra*.

Finally, respondents argue that the letters sent to debtors ar merely "reminders" of their outstanding bills. (Ans. Br. 23.) There i nothing wrong with mere reminders, but they must accurately portra the situation and not convey a misleading impression, directly or b implication.

To ensure that law violations of the sort found here do not continu our order will prohibit respondents from misrepresenting their statu activities, or actions. If respondents can establish that such representa tions are factually correct, that shall serve as a defense. [18]

III. THREATS OF SUIT

According to the complaint, respondents represented that unles payment was received, steps would be taken to initiate legal actio against the debtor, but that in fact the only action taken during th form letter series was to send additional letters to the debtor or t return the uncollected account to the creditor. The ALJ found, an letters introduced in the record clearly demonstrate, that threats o legal action were made. For example,

. . .IT IS THE INTENTION OF OUR CLIENT TO EXHAUST EVERY LEGA AVENUE AT THEIR DISPOSAL IN ORDER TO COLLECT THIS CLAIM. (sixt second, eighth and second contacts, respectively, Diplomatic and Strong series, (CX 10(i CX 11(d); CX 17(h); CX 18(c); Spanish series, CX 12(j); CX 13(d));

. . .IMPERATIVE THAT SATISFACTORY ARRANGEMENTS BE MADE T AVOID FURTHER ACTION, AVAILABLE TO CLAIMANT UNDER PROVISION OF STATE STATUTES. . . (seventh contact, Diplomatic series, sixth contact, Stron series, respectively, CX 10(j)–(k); CX 11(i)–(j); CX 18(h); Spanish series, CX 12(k)–(l); C 13(k); CX 19(i); CX 20(h));

[23] Section 237.0(f) defines a "collection agency" as "any. . . corporation. . .which collects money debts for others. Section 237.0(a) defines "industry member" as "any. . .corporation. . . engaged in the practice of collecting c attempting to collect any and all kinds of money debts for itself or others. . . ."

[24] "The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mail in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts t collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

YOUR REFUSAL OR NEGLECT TO SATISFY THE ABOVE LIABILITY COMPELS US TO NOTIFY YOU TO PRESENT ANY DEFENSE AGAINST THE VALIDITY OF THIS CLAIM ON FILE. YOU MAY PROTEST SAID CLAIM OR LIST PROPERTY WHICH YOU FEEL MAY BE EXEMPT, IF A–B–C– SUPPLY COMPANY OBTAINS A JUDGMENT. (ninth contact, Diplomatic and Strong series, tenth contact, Diplomatic and Strong series, respectively, CX 10(m); CX 11(n); CX 17(k); CX 18(k); Spanish series, CX 12(n); CX 13(m)–(n); CX 19(k); CX 20(j));

WE ARE WRITING THIS LETTER TO INFORM YOU OF THE SERIOUSNESS OF YOUR DELINQUENCY AND OF THE FACT THAT SHOULD IT CONTINUE ALL POSSIBLE LEGAL MEANS WILL BE TAKEN TO COLLECT IT. (third contact, Strong series, CX 11(e); CX 18(d); Spanish series, CX 13(e); CX 20(d).[25]

The ALJ concluded, however, that these statements were not deceptive. First, he found that "most" of the statements plainly refer to a suit by the creditor rather than by Capax. (I.D. 45.) However, there are some statements, such as the last, which do not state who will be suing, and carry the innuendo that "we," Capax, will be using all possible legal means to collect the alleged debt. Such statements are patently deceptive, in view of Capax' lack of authority to initiate legal action against a debtor. Those statements threatening legal action by the creditor also have the capacity to deceive, since Capax had no knowledge during the course of its flat **[20]** rate series whether a creditor actually would take legal action against the particular debtor. (Tr. 543, 567, 587–590, 600–601.) It is a deceptive trade practice for a collection service to threaten the initiation of legal proceedings against a debtor, either by itself or another, where there is in fact no intent to actually initiate such proceedings. *Cf. Trans World Accounts, supra; Wilson Chemical Co.*, 64 F.T.C. 168, 185 (1964); *see also* § 807(5) of the Fair Debt Collection Practices Act, which prohibits the threat to take any action that cannot legally be taken or that is not intended to be taken. 15 U.S.C. 1692e.

The impression of the witnesses who received Capax' communications was that legal action would definitely be commenced unless their alleged debts were paid. (Thom, Tr. 128–130, 142; Nield, Tr. 151, 154; Gardner, Tr. 263; Gravatt, Tr. 321–322; Vineburgh, Tr. 437.) For example, when Ms. Thom was asked what statement in CX 18(c) led her to believe that she would be sued, she replied: "It is the intention of our client to exhaust every legal means at their disposal." (Tr. 128.) She elaborated: "I got the impression that it was Continental Credit

[25] Additional examples are:

". . .IF YOU WANT TO AVOID UNPLEASANT AND COSTLY ACTION, MAKE IMMEDIATE PAYMENT DIRECTLY TO A–B–C– SUPPLY COMPANY (eighth contact, Diplomatic series, sixth contact, Strong series, respectively, CX 10(l); CX 18(g); Spanish series, CX 13(i); CX 19(j); CX 20(g));

"IT IS IMPERATIVE THAT YOU CONTACT YOUR CREDITOR TODAY TO AVOID FURTHER ACTIONS. . ." (fifth, sixth and second contacts, respectively, Diplomatic and Strong series, CX 10(g)–(h); CX 17(g); CX 18(c); Spanish series, CX 12(h)–(i); CX 13(d).)

See also CX 10(i), CX 11(h), CX 11(k).

Corporation. . .that was going to sue us." (Tr. 128.) "We called Continental Credit Corporation because we sincerely felt they were going to sue us, they were going to take us to court. . ." (Tr. 129.)[26] [21]

The ALJ further ruled that while Capax did not know whether particular creditors intended to bring suit against particular debtors, Capax "did have a *reasonable basis* for warning debtors to expect suit if they did not pay up, in its knowledge that creditors generally and Capax' clients in particular, almost without exception, want to sue for their money if necessary, assuming a negligible economic feasibility factor." (I.D. 49.) The ALJ relied heavily on the testimony of Mr. Goodman, Capax' President, for the finding. He acknowledged that Mr. Goodman admitted that when a dunning letter is transmitted with a warning that suit would be brought Capax could not really say "for a fact" whether the particular creditor would sue if the debt went unpaid (Tr. 543, 588, 590); the ALJ concluded, however, that Mr. Goodman's testimony indicated there was a reasonable basis for such warnings. We disagree. After stating generally that he believed his clients intended to exhaust all possible legal means to recover a claimed debt, upon cross-examination he conceded that "we *assume* they want the money in" (Tr. 567, emphasis added), "This is *normally implied* to us by the creditor" (Tr. 588, emphasis added), and "We are under the *impression* given to us by our clients that they would [bring suit] when financially feasible to do so." (Tr. 589, emphasis added). Assumptions, implications, and impressions hardly furnish a reasonable basis. Moreover, nothing in the record provides any grounds for the finding made by the ALJ that creditors generally, and Capax' clients in particular "almost without exception," desire to sue to recover claimed debts "assuming a negligible economic feasibility factor." Assuming that such a feasibility factor exists, the record provides no indication as to whether it is "negligible" and, if so, what that amounts to.

We hold that respondents, as charged in the complaint, falsely threatened that legal action would be initiated unless payment was received. The position of the ALJ and respondents—that the threat of legal action is a "largely reasonable and justifiable prediction" (Ans. Br. 23)—must be rejected, for the net impression of Capax' representa-

[26] The ALJ dismissed much of this consumer testimony because he interpreted many of the particular phrases to which the witnesses had referred as warning only of a possibility of suit, and concluded that such a warning was literally true. However, as discussed above, in ascertaining the impression created by communications, the overall impression likely to be made upon the public, not the technical interpretation of each phrase, is crucial. *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962). The meaning conveyed by words often differs from their literal significance; a debt collector may not exploit this disparity to deceive by using words which may be literally true but convey a false message to the reader. *Cf. J. B. Williams Co.* v. *FTC*, 381 F.2d 884, 889 (6th Cir. 1967). A fair reading of the testimony here reflects that these witnesses, in fact, were testifying as to their overall impressions from Capax'

tions was that legal action definitely would be commenced, and respondents [22] admit they did not know this.[27] As the court stated in *S. Dean Slough* v. *FTC, supra* at 872, "the fault with Petitioner's position is his own readily-made admission that the entire collection scheme is designed to collect without the necessity of legal action, and therein lies the deception."

These allegations of the complaint having been sustained, the Commission's order will prohibit respondents from misrepresenting directly or by implication that legal action with respect to an alleged delinquent debt may or will be initiated, or otherwise misrepresenting in any manner the likelihood of legal action. The factual truth of such representation will provide a defense to respondents, but references to legal action in their letter series must be carefully and selectively employed to avoid deception. *See Trans World Accounts, supra* at 12–13. Respondents should not represent, directly or by implication, that legal action *will* be taken or *is intended* to be taken unless such action is taken in all cases where the threat of legal action is not met by payment. *Helix Marketing Corporation*, 83 F.T.C. 514 (1973). Furthermore, respondents should not represent, directly or by implication, that legal action *may* be taken unless they can demonstrate from their experience that suit is the *ordinary* response to nonpayment. *Cf.* Fair Debt Collection Practices Act, § 805(c)(2), 15 U.S.C. 1692c. Suit in more than half the instances of nonpayment will be sufficient to substantiate a claim that legal action may be taken. *Trans World Accounts, supra; Helix Marketing Corp., supra.* In order to facilitate compliance with the order, respondents might well treat discernible classes of alleged debtors differently, depending upon the likelihood that members of each class will be sued. "Unsatisfied claims of a particular client or clients should not be lumped together for the purpose of establishing that legal action is taken in more than 50 percent of all cases where it is the practice to treat different classes of claims in different ways." *Trans World Accounts, supra.* If claims below a certain amount are not ordinarily pursued by some creditors in court, the letters used to collect those claims should not contain references to legal action, except where a decision to sue has been made. [23]

IV. THREATS TO CREDIT STANDING

Capax' dunning letters contained the following statements:

PAID IN FULL WITHIN SEVEN DAYS, THIS ACCOUNT WILL NOT BE SHOWN ON OUR CREDIT RECORDS. . . . FORWARD YOUR PAYMENT NOW DIRECTLY TO A–B–C– SUPPLY COMPANY IN ORDER TO RECEIVE PROPER CREDIT. . .

[27] Capax admits that it never even provided any advice with respect to possible legal action until the flat rate letter service had run its course. (Tr. 766–767; 596–601.)

(first contact, Diplomatic series, CX 10(b)–(c); CX 17(b); Spanish series, CX 12(b)–(c); CX 19(b));

UP TO NOW YOUR CREDIT STANDING WITH A–B–C– SUPPLY COMPANY HAS BEEN SATISFACTORY. CREDIT IS A PRIVILEGE, NOT A RIGHT. IT IS IMPORTANT TO PROTECT THIS PRIVILEGE, BECAUSE ONCE IT IS LOST IT IS ALMOST IMPOSSIBLE TO REPLACE. LIKE MOST OTHER PRIVILEGES, YOU ONLY MISS IT WHEN YOU NEED IT. (third contact, Diplomatic series, fifth contact, Diplomatic series, second contact, Bad check series, respectively, CX 10(e); CX 17(f); CX 21(c); Spanish series, CX 12(g); CX 19(f));

IF THIS IS NOT DONE [*i.e.*, making a satisfactory arrangement for payment] CONTINENTAL CREDIT CORPORATION CAN TAKE NO OTHER POSITION BUT TO RECOMMEND A STRONGER COURSE OF ACTION TO OUR CLIENT. . . IF THIS IS DONE THERE MAY BE ADDITIONAL COSTS TO YOU AND YOUR CREDIT STANDING MAY SUFFER. . . . (fourth contact, strong series, CX 11(f–g); CX 18(e); Spanish series, CX 13(g); CX 20(e).)[28] [24]

In our judgment, these statements have the capacity to deceive recipients into believing that unless payment is received, respondents will take action to adversely affect the debtor's credit record, as alleged in the complaint. Respondents had no control over or knowledge of whether a creditor would take action to adversely affect the debtor's credit standing if payment was not received, and Capax never took any such action itself.

The ALJ dismissed this allegation of the complaint because he considered the literal meaning of the above-quoted statements to be true: in the first instance, if payment is made, the account will not be shown on Capax' credit record; in the second instance, if payment is not made, the debtor's credit standing with the particular creditor involved will suffer; and in the third instance, nonpayment will have an adverse effect on the debtor's credit standing if a law suit is brought. These are possible meanings, but the statements can also easily be interpreted to mean that failure to make payment will adversely effect the debtor's general credit standing. Representations capable of two meanings, one of which is false, are misleading. *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438, 442 (1924); *Rhodes Pharmacal Co.* v. *FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *modified on other grounds*, 348 U.S. 970 (1955). Such representations are to be construed against those making them. *United States* v. *95 Barrels of Vinegar, supra; Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962).[29] The testimony of the witnesses amply supports our view. [25]

[28] Capax' "Telegram" made the following statement:
"IN AN EMERGENCY, WHEN YOU NEED CREDIT WILL YOU BE ABLE TO GET IT OR BE TURNED DOWN BECAUSE OF YOUR PAST EXPERIENCE. . . . THIS IS SOMETHING TO THINK ABOUT. . . . IT IS YOUR CREDIT FUTURE THAT MAY SUFFER." (CX 17(d)).

Capax' President, Mr. Goodman, admitted that the phrase "your credit standing may suffer" could be interpreted to mean that the debtor's general credit standing could be adversely affected. (Tr. 593–596.) This was vividly illustrated by the testimony of the consumers who received Capax' letters. Mr. Gardner interpreted the statements regarding credit records to mean that failure to pay the alleged debt "would affect my credit in a derogatory manner." (Tr. 252; *see generally* Tr. 250–253, 289–294.)[30] Mr. Gordon was concerned from Capax' letters that "some action would be taken against my credit rating." (Tr. 355; *see also* Tr. 375–376, 381–385, 398.)[31] Mr. Vineburgh had the impression from Capax' letters that if he did not pay the bill "they were going to initiate action that would reflect on my credit and I had just gone through a rather traumatic experience a few years previously (from a substantial loss caused by riots in Washington, D.C.) and I didn't want any other reflections on my credit." (Tr. 420–421.) Ms. Viera "had the feeling that my credit was going to be harmed. . . ." (Tr. 493; *see generally* 493–499.)

It is a deceptive practice to falsely represent that a debtor's credit rating will be adversely affected if the debt is not paid. *Cf. Parents' Magazine Enterprises, Inc.*, 68 F.T.C. 980 (1973). Our order will prohibit respondents from representing that action will be taken to adversely affect the debtor's credit record with a consumer reporting agency or any other third party, or otherwise misrepresenting the impact or effect of nonpayment upon the debtor's credit record. **[26]**

V. THREATS TO ENFORCE PROMPT PAYMENT

The ALJ dismissed the final allegation of the complaint, charging respondents with misrepresenting that unless payment was received within the time specified, immediate action would be taken to collect the debt, such as the filing of suit. The complaint asserted that the only subsequent action was either the sending of additional form letters to the alleged debtor or returning the uncollected account to the creditor. We believe that the evidence amply supports the complaint allegation.

Capax' letters were replete with threats, both explicit and implicit,

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or the credit ratings they dispense." (I.D. 51; *see generally* I.D. 54–54.) However, the precise manner in which one's credit standing would be adversely affected—whether due to the action of a consumer reporting agency or otherwise—would probably be irrelevant to most consumers, since it is fair to assume that the general public is not terribly familiar with the manner in which credit ratings are made and the role played by consumer reporting agencies. The FTC Act "was not made for the protection of experts, but for the public." *Charles of the Ritz* v. *FTC*, *supra* at 679. For those consumers who would relate an adverse effect upon one's credit record to the activities of a consumer reporting agency, the inference could certainly be drawn from Capax' statements that nonpayment would result in respondents' taking action to adversely affect the debtor's credit record with a consumer reporting agency.

[30] Mr. Gardner assumed that Capax was possibly "in a position to affect my credit generally." (Tr. 294.) We find that Capax' statements have the capacity to create that assumption.

[31] Mr. Gordon did not know, of course, that Capax did not take any action to adversely affect a debtor's credit rating. (Tr. 404–405.)

that imminent adverse action awaited the debtor who failed to meet a deadline.

. . .YOUR CREDITOR HAS REQUESTED THAT YOU BE GIVEN SEVEN DAYS TO SETTLE THIS ACCOUNT. . . (first contact, Diplomatic series, CX 10(b–c); CX 17(b); Spanish series, CX 12(b–c); CX 19(b));

. . .URGENT. . .IMMEDIATELY CONTACT A–B–C– SUPPLY COMPANY. . .IF SETTLEMENT IS NOT MADE WITHIN 48 HOURS UPON RECEIPT OF THIS LETEGRAM, WE SUGGEST YOU CONTACT YOUR ATTORNEY TO DETERMINE YOUR LEGAL LIABILITY. . . ." (seventh contact, Diplomatic series, seventh contact, Strong series, eighth contact, Diplomatic series, seventh contact, Strong series, CX 10(j–k); CX 11(i–j); CX 17(i); CX 18(h); Spanish series, CX 12(k–l); CX 13(j–k); CX 19(i); CX 20(h));

WE CAN WAIT NO MORE THAN 5 DAYS TO HEAR FROM A–B–C– SUPPLY COMPANY ON SETTLEMENT. YOUR IMMEDIATE RESPONSE IS IMPERATIVE. (eighth contact, Diplomatic series, ninth contact, Diplomatic series, sixth contact, Strong series, respectively, CX 10(l); CX 17(j); CX 19(g); Spanish series, CX 12(m); CX 13(i); CX 19(j); CX 20(g)); [27]

YOU MAY IMMEDIATELY REGISTER YOUR DEFENSE, IN WRITING, WITHIN 48 HOURS AFTER RECEIPT OF THIS NOTICE, WITH YOUR CREDITOR. . . (ninth contact, Diplomatic series, ninth contact, Strong series, tenth contact, Strong series, respectively, CX 10(m); CX 11(n); CX 18(k); Spanish series, CX 12(n); CX 13(m–n); CX 19(k)).[32]

The ALJ dismissed most of the representations as irrelevant to the complaint allegation because they did not specify what would happen if the debtor did not pay. This omission appears to us to be by design, and the ambiguity may make the ultimatum more ominous. "Representations can be contrived to mislead not only by what they contain but [28] by what they omit." *Manco Watch Strap Co.*, 60 F.T.C. 495, 510 (1962). The ALJ recognized that a number of the statements warned the debtor that some sanction, such as suit, will be invoked if a specific new deadline is not met.

Contrary to Capax' representations, a debtor's failure to meet a deadline would usually result in no more than receipt of the next letter in the series. As we have noted, Capax had no authority to take action, immediate or otherwise, to force payment. Likewise, it had no

[32] Other examples are:

". . .IF NOT PAID WITHIN ONE WEEK, TO LIQUIDATE THIS MATTER WE WILL BE FORCED TO RECOMMEND ACTION WHICH MAY MEAN ADDED COSTS TO YOU. . . .PROMPT ACTION IN THIS MATTER IS IMPERATIVE. MAKE IMMEDIATE PAYMENT DIRECTLY TO A–B–C– SUPPLY COMPANY. . ." (first contact, Strong series, CX 11(b–c); CX 18(b); Spanish series, CX 13(b–c); CX 20(b);

". . .THE SEVEN DAY COURTESY PERIOD HAS EXPIRED. . . .IT IS IMPERATIVE THAT YOU CONTACT YOUR CREDITOR TODAY TO AVOID FURTHER ACTION. . ." (second contact, Strong series, CX 11(d); CX 18(c); Spanish series, CX 13(d); CX 20(c));

"LITTLE TIME REMAINS. . ." (third contact, Diplomatic series, fifth contact, Diplomatic series, second contact, Bad check series, respectively, CX 10(e); CX 17(f)).

See also CX 10(g–h); CX 11(f–g); CX 11(h); CX 11(l–m); CX 11(n); CX 14(l).

knowledge of or control over any action which might be taken by the creditor to recover an alleged debt. Mr. Goodman, Capax' President, admitted that the only consequence of the debtor's failure to pay before the indicated deadline would be the transmittal of further letters. (Tr. 562, 579.) For example, if the recipient failed to "settle" the account within the seven days specified by letter CX 10(b), "in all probability he would receive another contact." (Tr. 534.) Capax generally never suggested to its clients to stop the mailing of letters until the series had been completed. (Tr. 799–802.) The purpose of the specific deadlines for payment was to establish a "time frame" (Tr. 535) to get the debtor "off his rump" (Tr. 604–605) so that he would pay as soon as possible (Tr. 535). At the oral argument, respondents' counsel conceded that the deadlines imposed by Capax were arbitrary. (TROA 54.)

The ALJ found that Capax' warnings of immediate sanctions if its payment deadlines were not met may be false in "a literal sense," but that the ordinary debtor would recognize them as mere "bluff and bluster," analogous to puffing in merchandising, which can be taken with a "grain of salt." (I.D. 64–68.) He believed that the "debtor here—like debtors generally—learn that such threats are commonly harmless and may commonly be disregarded for a long time, at least—with impunity." (I.D. 64.) Such an approach is unprecedented in Commission annals, and for good reason. There is absolutely no support in the record for the assumptions made by the ALJ. On the contrary, the record reflects that debtors receiving dunning letters demanding payment within a deadline experience great anxiety and apprehension. The testimony of the recipients here indicates that their refusal to pay their debts was frequently due to serious disputes with the creditors or [29] erroneous billing, *see* n. 15 *supra*, rather than disregard of the threats by Capax as harmless. In fact, the general reaction of the dunned consumers was to take some action to protect or defend against the threat of imminent action by Capax.[33] Of course, it is well

[33] Upon receiving Capax' dunning letters specifying deadlines for payments, Ms. Thom took steps to defend herself against anticipated legal action, contacting an attorney. (Tr. 120–122.) She testified that the message contained in letter CX 18(d), which states that "all possible legal means will be taken to collect" the debt and directs that payment be made within the next few days, "strikes terror into your heart." (Tr. 130.) Ms. Zuccarrelli was "shocked" (Tr. 671) and "worried" (Tr. 662) by Capax' letters demanding payment for an air conditioning repair bill which she disputed. She testified that "each and every time I went to Florida [where the house with the air conditioner was located] I called the tax assessor's office to find out if a lien had been put against my property down there and also in New Jersey" (where her permanent residence was located). (Tr. 664.) From Capax' letters, Mr. Gordon feared that some action would be taken against his credit rating and called his attorney, who made the determination to contact Capax' regarding the matter. (Tr. 354–361.) Ms. Nield had the overall impression from Capax' communications that a legal suit would be commenced against her immediately, and contacted the creditor. (Tr. 151–152.) Mr. Gordon "thought some detrimental action was going to be taken, so I forwarded each letter and letegram to my attorney for his recommendation on the answers he saw fit." (Tr. 373–374.) Ms. Viera believed that the dunning letters she received were a mistake because her insurance company owed the medical bill for which she was being dunned, but was afraid that her credit standing would be harmed by Capax and anxiously contacted the doctor. (Tr. 491–496.) Mr. Gardner

(Continued)

established that capacity to deceive rather than actual deception is the standard under Section 5, and that whether or not consumers are misled into making payment or suffering injury is irrelevant if the practices under consideration have the capacity to deceive. *See, e.g. Thiret* v. *FTC*, 512 F.2d 176, 180 (10th Cir. 1975); *Mohawk Refining Corp.* v. *FTC*, 263 F.2d 818, 821 (3rd Cir.), *cert. denied*, 361 U.S. 814 (1959); *Goodman* v. *FTC*, *supra*. **[30]**

Our order will prohibit Capax from misrepresenting the imminency of any action that may be taken.

VI. AFFIRMATIVE DISCLOSURE

Complaint counsel request that the order require the following type of notice in each communication sent to alleged debtors:

> We are an independent company employed by your creditor solely for the purpose of reminding you of your outstanding obligation. We are not authorized to engage in typical debt collection activity, to institute suit or to take any action which may affect your credit rating. (App. Br. 54–55, n. 61.)[34]

Capax concedes that if its "Telegram" and "Letegram" formats are found deceptive they should be banned, as should the misrepresentations regarding the full-line collection agency image, threats of suit, threats to credit standing, and threats to enforce prompt payment. (Ans. Br. 31–32.) It argues, however, that the notice might suggest to debtors that nothing of importance can be expected from Capax' communications, to their obvious peril if suit is brought by the creditor. **[31]**

While the Commission's authority to require affirmative disclosure is well established, *see, e.g., Ward Laboratories, Inc.* v. *FTC*, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960), we do not consider the affirmative disclosure sought here by complaint counsel to be necessary, under the circumstances of this case, in light of the order's ample prohibitions on misrepresentations. Moreover, we believe that the proposed disclaimer could lull recipients into a false sense of security by giving them the impression that failure to pay the claimed debt will not result in legal action or harm to their credit standing. Because creditors might pursue an alleged delinquent debt by bringing

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interpreted Capax' letters to threaten suit in the immediate future, and contacted his lawyer as well as a state consumer protection office. (Tr. 263–264.) The reactions of the dunned consumers who testified hardly supports the view that they considered Capax' threats to enforce prompt payment as mere bluff and bluster to be disregarded.

[34] This is a modification from the proposed affirmative disclosure in the notice order accompanying the complaint.

The proposed affirmative disclosure would not be required where respondents indicate in a particular communication that (1) suit will be filed and it is, unless failure to file suit is due to subsequent bona fide instructions from the creditor or subsequent information from the debtor indicating non-existence of the alleged debt, or (2) some bona fide action against the debtor will be taken (other than filing suit or mailing subsequent requests for payment)

suit or could report the matter to a consumer reporting agency, debtors who decided not to make payment on the basis of the disclaimer could suffer harm. Therefore, our order will not include the proposed affirmative disclosure.[35]

For the foregoing reasons, the appeal of complaint counsel is granted, as provided above. The initial decision of the administrative law judge dismissing the complaint will be vacated, and an appropriate order will be entered.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted the appeal:

It is ordered, That the initial decision and order of the administrative law judge be, and they hereby are, vacated, except to the extent that the initial decision is consistent with the accompanying opinion of the Commission, and the findings of fact and conclusions of law contained in the opinion be, and they hereby are, adopted as the findings and conclusions of the Commission in this matter.

Accordingly, the following cease and desist order is hereby entered:

ORDER

It is ordered, That respondents Capax, Inc., formerly Continental Credit Corporation, Inc., a corporation, its successors and assigns, and its officers, and Joseph V. DeFelice and Arnold Goodman, individually and as officers of said corporation, and Norman Bricker, individually and as a former officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering for sale, sale, or distribution of any service or printed matter for use in the collection, or attempting to collect, or assisting in the collection of, or inducing or attempting to induce the payment of alleged delinquent debts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

[35] As complaint counsel note (App. Br. 59, n. 62), the Commission has previously ordered disclaimers similar to that sought here. *Trans-American Collections, Inc.*, Dkt. 8901, 83 F.T.C. 525 (1973); *United Compucred Collections, Inc.*, Dkt. C-2806, 87 F.T.C. 542 (1976); *Trans National Credit Corp.*, Dkt. C-2807, 87 F.T.C. 549 (1976); *Continental Collection Bureau of America, Inc.*, Dkt. C-2808, 87 F.T.C. 557 (1976); *North American Collections, Inc.*, Dkt. C-2809, 87 F.T.C. 566 (1976); *Power's Service, Inc.*, Dkt. C-2810, 87 F.T.C. 574 (1976); *Continental Collection Service*, Dkt. C-2811, 87 F.T.C. 582 (1976). The appropriateness of those disclaimers depends upon the facts of each case, including the prescribed language and the details of the firm's operations and authority. However, we are today issuing orders to show cause why those consent orders should not be modified to delete the mandated affirmative disclosures, pursuant to Commission Rule 3.72(b).

1. Using or placing in the hands of others for use, envelopes letters, forms, or any other materials which by their appearance content, or otherwise, misrepresent that they are telegraphic communications.

2. Using or placing in the hands of others for use, envelopes letters, forms, or any other materials which by simulating telegrams or other methods, forms, or types of communication misrepresent the nature, import, or urgency of any communication.

3. Representing, directly or by implication, that:

(a) Delinquent debtors' accounts have been referred to respondents or another as a debt collection agency with authority to engage in such debt collection activities as making personal demands for payment and/or filing suit; or otherwise misrepresenting respondents' status, activities, or actions.

(b) Unless payment is received, legal action with respect to an alleged delinquent debt may or will be initiated, or otherwise misrepresenting in any manner the likelihood of legal action.

(c) Unless payment is received, action will be taken to adversely affect the debtor's credit record with a consumer reporting agency or any other third party; or otherwise misrepresenting the impact or effect of nonpayment upon the debtor's credit record.

(d) Unless payment is received within the time specified by respondents, immediate action will be taken to collect the debt, such as the filing of suit; or otherwise misrepresenting the imminency of any action that may or will be taken.

Provided, that it shall be a defense in any enforcement proceeding initiated under Paragraph 3 for respondents to establish that such representations are factually correct.

4. Placing in the hands of others the means and instrumentalities to accomplish any of the matters prohibited in this order, or which fail to comply with the requirements of this order.

It is further ordered, That the respondent corporation shall distribute a copy of this order to each of its operating divisions or departments and to each of its present and future officers, agents, representatives, or employees engaged in any aspect of the offering for sale, sale, or distribution of any service or printed matter for use in the collection, or attempting to collect, or assisting in the collection of, or inducing or attempting to induce the payment of alleged delinquent debts, and that said respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the respondent corporation notify the Commission at least thirty (30) days prior to any proposed change in

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.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the individual respondents named herein shall promptly notify the Commission of their affiliation with a new business or employment whose principal activities include the offering for sale, sale, or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of alleged delinquent debts, or of their affiliation with a new business or employment in which their duties and responsibilities involve the offering for sale, sale, or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of alleged delinquent debts. Such notice shall include individual respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall, within sixty (60) days from the date this order becomes final, and periodically thereafter as required by the Federal Trade Commission, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.