

Chairman Kirkpatrick concurring in the disposition of this proceeding.

IN THE MATTER OF

CAL-ROOF WHOLESALE, INC., ET AL.

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

Docket C-2307. Complaint Oct. 30, 1972—Decision, Oct. 30, 1972

Consent order requiring a Portland, Oregon, wholesaler and distributor of building materials, including residential siding products, among other things to cease misrepresenting any aspect of contests or other promotional schemes or devices; misrepresenting the quality or properties of its siding or other building products; and representing that its products are guaranteed unless pertinent information with respect thereto is clearly and conspicuously disclosed.

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 Cal-Roof Wholesale, Inc., a corporation, and Morris Greenstein, individually and as an officer of said corporation, hereinafter 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 Cal-Roof Wholesale, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 110 S.E. Taylor, Portland, Oregon.

Respondent Morris Greenstein is an officer of the corporate respondent. He formulates, directs and controls the acts and practices herein described. His business address is the same as that of the corporate respondent.

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dent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

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

IN THE MATTER OF

FABBIS, INC., ET AL., DOING BUSINESS AS ROCHESTER
PLUMBING AND HEATING CONTRACTORS

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

Docket 8833. Complaint, Jan. 18, 1971—Decision Oct. 30, 1972.

Order requiring a Rochester, New York, firm engaged in the sale of plumbing and heating equipment and installation services to the public, among other things to cease violating the Truth in Lending Act by failing to provide each customer with a notice of the right to rescind prior to consummation of the transaction; making any physical changes in customer's property or performing any work on such property before expiration of the rescission period; and failing to make any other necessary disclosures as required by Regulation Z of the said Act.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Fabbis, Inc., a corporation, doing business as Rochester Plumbing and Heating Contractors, and Richard J. Fabrizio and James J. Rebis, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and 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 Fabbis, Inc., 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 123 Barberry Terrace, Rochester, New York. It is doing business under the name of Rochester Plumbing and Heating Contractors.

Respondents Richard J. Fabrizi and James J. Rebis are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale of plumbing and heating equipment and installation services to the public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents arrange, and for some time last past regularly have arranged, for the extension of 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 and in connection with their arranging for consumer credit, have caused, and are causing, customers to execute retail installment contracts, herein referred to as "the contract," which results or may result in a security interest being retained or acquired in real property which is used or is expected to be used as the principal residence of the customer. The customers thereby have the right to rescind such transactions, as provided in Section 226.9(a) of Regulation Z.

PAR. 5. In connection with the consumer credit transactions set forth in Paragraphs Three and Four hereof, respondents prepare documents containing consumer credit cost disclosures required by Section 226.8 of Regulation Z and obtain from customers written acknowledgment of receipt of these disclosures, but in some instances nevertheless fail to provide the customer with a copy of such disclosures, as required by Section 226.8(a) of Regulation Z.

PAR. 6. In connection with the consumer credit transactions set forth in Paragraphs Three and Four hereof, respondents complete notices of the right of rescission in the form required by Section 226.9(b) of Regulation Z and obtain from customers written acknowledgment of receipt of these notices, but in some instances nevertheless fail to provide each customer who has the right to rescind the transaction with two copies of such notices, as required by Sections 226.9(b) and (f) of Regulation Z. In many such instances, respondents fail to provide the customer with any copies of the required notice.

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PAR. 7. Having entered into the consumer credit transactions set forth in Paragraphs Three and Four hereof, respondents in some instances fail to delay making any physical changes in the property of the customer and fail to delay performing any work or service for the customer until the three day rescission period provided for in Section 226.9(a) of Regulation Z has expired, in violation of Section 226.9(c) of Regulation Z.

PAR. 8. Pursuant to Section 103(k) of the Truth in Lending Act, respondents' aforesaid failures to comply with the requirements of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents thereby have violated the Federal Trade Commission Act.

Mr. James M. Katz and Mr. Myer S. Tulkoff supporting the complaint.

Mr. Percival D. Oviatt, Jr., and Mr. Samuel P. Merlo, of Woods, Oviatt, Gilman, Sturman & Clarke, Rochester, New York for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

JUNE 16, 1971

PRELIMINARY STATEMENT

Respondents, a corporation, and two individual officers, are charged with violating the Truth in Lending Act (15 U.S.C. 1601), as implemented by Federal Reserve Regulation Z (12 C.F.R. § 226). The complaint was issued on January 18, 1971, against Fabbis, Inc., doing business as Rochester Plumbing and Heating Contractors and its officers, Richard J. Fabrizi and James J. Rebis, individually and as officers of the corporation.

It charged that:

1. Respondents regularly arrange for the extension of consumer credit to their customers, and have failed to provide them with a duplicate copy of consumer credit cost disclosures, to retain, as required by Section 226.8(a) of Regulation Z.
2. In rescindable transactions, respondents have failed to provide their customers with requisite copies of notices of the right of rescission, as required by Section 226.9(b) of Regulation Z.
3. In rescindable transactions, respondents have failed to delay during the three day rescission period, making any physical changes in the customers' property, commencement of the work or deliveries to customers' residences for the duration of the rescission period, in violation of Section 226.9(c) of Regulation Z.

Respondents' Answer admitted the following facts:

1. Respondent Fabbis, Inc., 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 123 Barberry Terrace, Rochester, New York. It is doing business under the name of Rochester Plumbing and Heating Contractors.

2. Respondents Richard J. Fabrizi and James J. Rebis are officers of said corporation. Their address is the same as that of the corporate respondent. Respondents are now, and for some time last past have been, engaged in the sale of plumbing and heating equipment and installation services to the public.

3. As a part of their business, in the ordinary course and conduct of their business as aforesaid, respondents arrange, and for some time last past regularly have arranged, for the extension of 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.

Respondents' Answer either flatly denied, or denied knowledge of, all of the other allegations in the complaint.

A prehearing conference was held in Washington, D.C., on March 2, 1971. Evidentiary hearings were held in Rochester, New York commencing on March 18, 1971, and were concluded on March 22, 1971.

The following abbreviations will sometimes be used herein making references to the record: Transcript—Tr.; Commission Exhibits—CX; Respondents' Exhibits—RX; Complaint Counsels' proposed findings of fact—CPF; ¹ Respondents' proposed findings of fact—RPF; Complaint—C; Answer—A.

On the basis of the entire record ² the hearing examiner makes the following findings, conclusions and order. All proposed findings not found expressly or in substance are denied as erroneous, irrelevant or immaterial.

1. Respondent Fabbis, Inc., 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 123 Barberry Terrace, Rochester, New York. It is doing business under

¹ References to proposed findings of the parties include the citation of authority or reasons submitted therewith on the accuracy of which the hearing examiner has relied in light of the requirements of the ninety (90) day rule.

² In accordance with the Commission rules reference is made to the principal supporting items of evidence. The citation of particular references in no way indicates that the entire record has not been considered. The findings are based on the record as a whole and not only on the citations to the exhibits or transcript pages specifically noted.

the name of Rochester Plumbing and Heating Contractors (Tr. 44; C., A.).

2. Respondents are now, and for some time last past, have been engaged in the sale of plumbing and heating equipment and installation services to the public (Tr. 44; C., A.). There was no proof that respondents have engaged in interstate commerce (Tr. 98-101, 411, 423-425).

3. In the ordinary course and conduct of their business as aforesaid, respondent corporation under the direction and control of the individual respondents has arranged and for some time last past, regularly has arranged, for the extension of 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 (C., A.; Tr. 85-88, 95, 443-444, 528).

A number of customer witnesses testified expressly that respondent corporation arranged for the extension of consumer credit to them: (Tr. 61-62; Tr. 110; Tr. 137). Commission Exhibits 25A-59G (Tr. 390) are the bank records in evidence of thirty-six additional instances in which respondent corporation arranged credit for customers.

4. Subsequent to July 1, 1969, respondent corporation in the ordinary course and conduct of its business and in connection with arranging for consumer credit, has caused, and is causing, customers to execute retail installment contracts to finance home improvements on real property that is used as the principal residence of the customer.

A number of customer witnesses testified that respondent corporation performed work on a structure which was used as a home and that was the principal residence of the witness and his or her spouse (Tr. 56-57; 105-106; 132; 166; 182; 236-237; 253; 263-264; 280; 315; 335-336; 357).

5. Respondent corporation employed workmen to install the plumbing and heating equipment it sold to its customers (Tr. 80).

6. No waivers of workmen's liens were presented at the hearing (CPF 6), however, the corporate respondent specifically waived any security interest or right of lien in connection with each transaction (RPF 5).

7. In consumer credit transactions respondents have failed to render consumer credit cost disclosures to their customers prior to consummation of their transactions.

A number of customer witnesses who testified at the hearing indicated that he or she discussed the method of payment with respondents' salesman before or at the time the sales agreement was executed

and that it was understood that respondents would arrange for the extension of credit to them (Tr. 61; 110; 137; 173; 189-190; 212-213; 242; 256-257; 282-283; 317; 340-342; 361-362).

Mr. Apostalou, one of the respondents' salesmen, testified that the first thing discussed with a customer who indicated an intent to make a purchase was the method by which payment would be made (Tr. 478-479). Mr. Rease testified that the company wants to know that it is going to be paid so that the method of payment is discussed with the customer (Tr. 432, 440).

Mr. Apostalou testified that he would contact Mr. Rease after a contract was signed in order to have him come out to a customer's home and seek execution of the bank papers (Tr. 478).

Mr. Rease's testimony indicated that by the time he arrived at the home of a customer, to arrange for the extension of consumer credit, the sales contract would already be signed (Tr. 432).

Thus, the consumer witnesses would not receive the consumer credit cost disclosures prior to execution of the sales proposal or of the retail installment contract. (Tr. 62; 108-112; 116; 135-137; 168-169; 186-189; 212-214; 241-243; 258; 282-284; 317-318; 357-361).

8. In connection with consumer credit transactions respondents obtained from customers written acknowledgment of receipt of documents containing spaces for consumer credit cost disclosures, but in some instances, nevertheless, failed to provide customers with a completed copy of such disclosures.

Customer witnesses presented by counsel supporting the complaint testified that respondents failed to provide them with a fully completed retainable copy of consumer credit cost disclosures. The documents in evidence, nevertheless, reveal that each customer signed an acknowledgment of receipt of the disclosures. (Tr. 116-117, CX 10-A; Tr. 137, CX 12-A; Tr. 169, CX 8-B; Tr. 187-189, CX 11-A; Tr. 214-216, CX 14-B; Tr. 241, CX 9-C; Tr. 258-260, CX 17-C; Tr. 285-286, 288 CX 21-B; Tr. 323, CX 15-B; Tr. 345-346, CX 24-A; Tr. 360, CX 13-B).

9. In connection with consumer credit transactions, respondents obtained from customers written acknowledgment of receipt of notices of right of rescission, but failed, in fact, to provide each such customer who it is claimed had the right to rescind with any copies of such notices.

Customer witnesses testified that they did not receive a copy of these notices of right of rescission to retain. However, the documents reveal that receipt thereof was acknowledged (e.g. Tr. 170; 116-117; CX 10-C, 10-D; Tr. 137, 148, CX 12-C, D; Tr. 216; Tr. 258, CX 17-C, D; Tr. 288; Tr. 323, CX 15-D, E; Tr. 345-346, CX 24-C, D; Tr. 360, CX 13-D, E).

10. Having entered into credit transactions with their customers, respondents failed to delay making any physical changes in their customers' property, performing any work or making any deliveries to the residences of such customers, for the duration of a three-day period. A number of customer witnesses testified that the respondents commenced performance of the work during the first three days after the contract was signed (Tr. 62, 67; 111; 138-139; 172; 189; 217; 245; 262; 291; 317; 348; 362).

11. In such credit transactions, respondents did not obtain valid waivers of the right of rescission from such customers. A number of customer witnesses testified that there was no emergency situation requiring that the work upon their homes be performed before expiration of the three-day period (Tr. 117; 172; 208).

Although respondents' counsel elicited testimony from several of Commission witnesses indicating that they believed they had executed waivers of their right of rescission (Tr. 171; 204-205) the witnesses testified that there was no bona fide emergency situation requiring immediate performance of the work (Tr. 172; 190).

A witness from one of the banking institutions testified that he had examined the records of transactions arranged with his bank by respondents during the period of July 1, 1969, through December 30, 1969, and was unable to find any waivers of the right of rescission in the bank files for the period of July 1, 1969, through December 1969 (Tr. 387). George Rease, respondents' general manager, testified on cross-examination that, during the period covered by the Commission's investigation no valid waivers of the right of rescission were obtained (Tr. 446-447). Respondent Rebis confirmed that some waivers that had been obtained were deemed inadequate by counsel and were thrown away upon counsel's advice (Tr. 540-541).

12. Shortly before the hearings in this matter were scheduled, respondents' attorneys were supplied with a list of complaint counsel's prospective witnesses. Thereafter, Mr. Rebis, one of the individual respondents, contacted a number of prospective witnesses and sought to obtain handwritten statements (Tr. 537-539). Mr. Larmon, the respondents' customer relations man, accompanied Mr. Rebis to the homes of the prospective Federal Trade Commission witnesses. He made notes, then asked that witness copy, in his or her own handwriting, a statement embodying what was contained in the notes (Tr. 495-506).

A number of the Commission's witnesses testified that they executed such statements for respondents. However, each one also testified under oath, contrary to the written statement, at the hearing and in-

licated that the contradictory written statements were in error (Tr. 141; 146-148; 202-203; 231-232; 306-308; CPF 12).

13. During the hearing, respondents also produced certain questionnaires signed by customer witnesses, entitled "Help Us Maintain Good Business," and offered them into evidence to contradict the sworn testimony of these witnesses. Because of the manner in which these documents were procured and because of the concealment of their true purpose by respondents' employees, the hearing examiner accepts the sworn statements given at the hearing.

The questionnaire was prepared as a result of the Commission's investigation (Tr. 532-533). Examination of these questionnaire forms reveals that part of Question 2 relate to allegations of violations which were subsequently brought against the company by the Commission (RX 7, 9, 11, 13, 15, 16).

Representatives of the respondents called upon every credit customer with whom the company dealt during the period covered by the investigation (Tr. 550) and, in some instances, the salesman who sold the equipment to the customers interviewed was the same person who came with the questionnaire (Tr. 552).

The method by which these questionnaires were completed was confusing and lent itself to erroneous answers being obtained. The company's representative read each question orally to the respective signer (Tr. 468) and marked or checked off the answers himself (Tr. 467). Although Question 2 of the questionnaire referred to the respective customer's receipt or non-receipt of certain documents, the questioner did not have any samples of those documents available for the customer's examination (Tr. 488). The company's representative asked to see the documents that the customers had in their possession; some had them and others did not (Tr. 488). The customers were not informed as to the true purpose of the questionnaire. Although, one of the salesmen who went around with the questionnaires explained that they were merely designed to see if the company's customers received required papers and knew their rights (Tr. 482). Mr. Larmon, the customer relations man of the company, testified that he himself did not know the true purpose of the questionnaire (Tr. 505-508). Mr. Kramer, another company salesman, testified that it was merely to help the company maintain good business (Tr. 476).

Mrs. Szczepanski, one of the customer witnesses, testified that she believed the questionnaire which she executed (RX 4) was a public relations device (Tr. 178). She also stated that she was not told the significance of the document or the reason for its execution (Tr. 179).

Mrs. Simon testified that she did not pay much attention to the

questionnaire before signing (Tr. 199). She did not even look at it (Tr. 200).

Mrs. Grodner testified that she only signed the questionnaire because the company's representative, who came with it, promised that she would thereafter be furnished with copies of everything which she had signed at the time the transaction was entered into (Tr. 250).

Mr. Crews testified that the answers contained in the boxes in the questionnaire were not true and never had been true (Tr. 272-274).

Mr. Zimmer testified that the respondents' representatives came around with the questionnaire and indicated that the company had found a number of incomplete papers behind a desk and that they wanted to be sure he had received all documents which he was entitled to and that it was to be used merely for public relation purposes (Tr. 302, 305). He also stated that he did not read the statement (Tr. 304).

Mr. Dunbar testified that he did not read the statement and that the answers were marked by the company's representative (Tr. 355).

The statements contained in the questionnaire are unclear and capable of misinterpretation. The testimony of Mr. Henning indicates the possibility of misinterpretation because of the omission of dates (Tr. 75-76).

Mr. Wiemer testified that he did not understand the questions asked in the questionnaire (Tr. 119). Mrs. Szczepanski stated that she did not understand the questions and only later realized that what she had signed was not the truth (Tr. 179). Mrs. McKnight testified that her answers to the questionnaire were erroneous (Tr. 229-231).

14. Respondents Richard J. Fabrizio and James J. Rebis are officers of said corporation. Their address is the same as that of the corporate respondent. (Admitted by Respondents' Answer, and Amended Answer to Paragraph One of the Complaint, and Stipulation (Tr. 44).)

15. Respondents Richard J. Fabrizio and James J. Rebis are responsible for the acts and practices of Fabbis, Inc., with regard to the requirements of the Truth in Lending Act.

Mr. Fabrizio testified that he and Mr. Rebis are the president and vice president, respectively, of the corporate respondent, and have been such since the firm's incorporation in 1963 (Tr. 84-86). They are its chief operating officers, being the company's general manager (Tr. 78) and its sales manager (Tr. 85). During the entire corporate existence the individual respondents, Messrs. Fabrizio and Rebis, have been the company's sole stockholders, sharing the stock equally (Tr. 84, 86, 411). In essence, the company is a continuation of the informal partnership between these individuals which was begun several years

prior to formation of the present corporation (Stipulation, Tr. 44). The very name of the corporation, "Fabbis," was derived from a combination of the first part of Mr. Fabrizi's name and the last part of Mr. Rebis' name (Tr. 84).

The individual respondents testified that they were aware of what Regulation Z required of them. Mr. Fabrizi stated that the lending institutions with which the respondents dealt informed him and Mr. Rebis about these requirements (Tr. 90). Marine Midland's sales representative, Frank Griffin, testified that he called upon the individual respondents many times regarding Truth in Lending matters and spoke with them personally (Tr. 377-379). Additionally, the individual respondents had conferences with their attorney relating to compliance with Truth in Lending (Tr. 415). Mr. Rebis testified that he and Mr. Fabrizi knew what their company was required to do to comply with the law (Tr. 528).

Mr. Fabrizi testified that he or Mr. Rebis telephoned one out of ten customers when the law first became effective to ascertain whether they received their copies of the bank papers (Tr. 95).

Mr. Rebis hired all the company salesmen, was responsible for assigning them their duties and supervising their activities (Tr. 85-87). Together, the individual respondents hired George Rease (Tr. 86) whose duty it was to make consumer credit cost disclosures and to secure execution of retail installment obligations on the finance paper of the various local banks (Tr. 94). Mr. Rease was, and is, responsible to them for his activities (Tr. 87). Mr. Rease testified that he has been employed by the company for 7 years (Tr. 427) and that he sees Messrs. Fabrizi and Rebis every day that they are in town and often discusses individual consumer credit transactions with them (Tr. 443-444). He testified that Mr. Fabrizi was shown every paper relating to every transaction of the company during the period in question (Tr. 444).

REASONS FOR DECISION

The threshold question in this matter, *i.e.*, the power of Congress to legislate on credit questions regardless of their interstate character has been resolved by the Supreme Court's action on another Title of the Truth in Lending legislation.³ Since the jurisdiction delegated to the Commission expressly deals with the the question of commerce and states that the Commission may act "irrespective of whether the person is engaged in commerce * * *."⁴ The question of jurisdiction requires no further comment.

³ *Perez v. United States* 39 LW 4487 [402 U.S. 146], April 26, 1971.

⁴ 15 U.S.C. 1601.

The next serious question involves the credibility of the consumer witnesses. Respondents take the position that because the witnesses, prior to the trial, signed statements for the respondents that were contradictory to their testimony (some both in the form of questionnaires and also in the form of written statements and others in the form of questionnaires only) their testimony should be given no weight. We disagree.

The questionnaires were presented as a form of public relations device. "Help Us Maintain Good Business" was the title. These questionnaires were made out after the investigation by the Federal Trade Commission was commenced, and designed, not by counsel who would have had a responsibility to the Commission to insure that they were properly taken, but, by employees of the corporate respondent who were wholly untrained and who were clearly interested in securing the "right" answers. The written statements were not secured until after the complaint was issued and the list of witnesses submitted to counsel. These too were taken, not by counsel, but by one of the respondents accompanied by another employee. One witness was told that she could avoid coming to the hearing if she signed (Tr. 202-203). Under the circumstances, the weight of the combined testimony under oath that the questionnaires and statements were false makes it much more probable than not that the respondents had failed to abide by the Truth in Lending Act and regulations. This is particularly true when the recollection of the respondents' employees was vague concerning their instructions in securing the questionnaires and concerning the events which gave rise to the requirements for notice of rescission and delay of commencement of the work. Moreover, several of respondents' witnesses made it clear that the question of how the financing was to be done was discussed before the sales proposal was signed and at that time the prerequisites of disclosure were not complied with so that the customers had no opportunity to compare financing costs. The contention that the transactions started out as cash transactions and only later credit was sought is inherently incredible, despite the form of the proposal.⁵ The witnesses made it very apparent in their testimony that they they could not afford the large expenditures required and had to secure financing. We turn next to the far more serious question of the waiver of lien by respondents.

Respondents contend and the papers filed establish that they waived any lien they would secure on the property. Thus, they claim the transaction does not create any security interest and accordingly it is not

⁵ We need therefore not consider the claim by respondents that they had secured an interpretation from the Chief of the New York Office of the Federal Trade Commission that in the case of financing, not discussed at the time of the proposal but later requested, the provisions of the act and regulation have no application.

rescindable. Respondents further claim that an interpretation to this effect was secured from the Chief of the New York Office of the Commission.⁶

Complaint counsel take the position that even though the waiver might be effective to prevent respondents from securing a lien on the property for themselves, the New York lien law creates a lien in favor of their workmen and their material supplies in the event that the wages or material charges are not paid⁷ and it was the purpose of the Truth in Lending legislation to require that all liens be considered even though not under the control of the lender. This position, it seems to the undersigned is wholly unwarranted. It would make it impossible ever to secure a waiver because, particularly in the case of union labor where the union may dispatch the employees directly to the job, the employer would not even know who they were at the time the transaction was entered into and could not secure waivers from them. There is moreover, here, no claim that the materialmen were unpaid or that the workmen did not receive their wages. To the contrary, the materials were paid for in the normal course in advance of their delivery to the job. Unless the law and regulations are to be construed to require a waiting period and a right to rescission in all cases—which is clearly not true since a waiver by the customer in cases of emergency is provided for⁸—there cannot be a requirement that the possible liens of workmen and materialmen must be waived also. By reason of the waivers of the banks and of the respondents, it seems to me that this phase of the charge must be dismissed.

This is not, however, dispositive of the proceeding. Paragraph Five of the complaint contains the following charge:

In connection with the consumer credit transactions set forth in Paragraphs Three and Four⁹ hereof, respondents prepare documents containing consumer

⁶ Since the person by whom the interpretation was allegedly given was not called to deny it, we must assume that the claim was correct. While as a matter of law such interpretation may carry little weight, from the standpoint of the public interest in issuing an order in this matter it may be very significant.

⁷ McKinneys "Lien Law" Volume Article 1, 1-3.

⁸ I have not discussed the waiver by the customer of the waiting period because respondents admit that the waivers secured were inadequate.

⁹ The paragraphs referred to provide as follows:

Paragraph Three: In the ordinary course and conduct of their business as aforesaid, respondents arrange, and for some time last past regularly have arranged, for the extension of 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.

Paragraph Four: Subsequent to July 1, 1969, respondents in the ordinary course and conduct of their business and in connection with their arranging for consumer credit, have caused, and are causing, customers to execute retail installment contracts, herein referred to as "the contract," which results or may result in a security interest being retained or acquired in real property which is used or is expected to be used as the principal residence of the customer. The customers thereby have the right to rescind such transactions, as provided in Section 226.9(a) of Regulation Z.

credit cost disclosures required by Section 226.8 of Regulation Z and obtain from customers written acknowledgment of receipt of these disclosures, but in some instances nevertheless fail to provide the customer with a copy of such disclosures, as required by Section 226.8(a) of Regulation Z.

This it seems to the hearing examiner includes a charge that the customer is not provided with the cost disclosures prior to the time he or she signs the sales proposal. This is true because Section 226.8 (a) of Regulation Z specifically provides:

(a) General rule. Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as provided in paragraphs (g) and (h) of this section¹⁰ *such disclosures shall be made before the transaction is consummated*. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified. All of the disclosures shall be made together on either

(1) The note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or

(2) One side of a separate statement which identifies the transaction. (Emphasis and Footnote added)

Admittedly, it was the practice of the salesmen prior to November or early December 1969 when Mr. Rease was in sole charge of handling the "bank papers" to secure the commitment in the sales proposal and then to call Mr. Rease to come over to the customer's house and have the

¹⁰ The subsections referred to have no applicability. They read as follows:

(g) Orders by mail or telephone. If a creditor receives a purchase order or a request for an extension of credit by mail, telephone, or written communication without personal solicitation, the disclosures required under this section may be made any time not later than the date the first payment is due, provided:

(1) In the case of credit sales, the cash price, the downpayment, the finance charge, the deferred payment price, the annual percentage rate, and the number, frequency, and amount of payments are set forth in or are determinable from the creditor's catalog or other printed material distributed to the public; or

(2) In the case of loans or other extensions of credit, the amount of the loan, the finance charge, the total scheduled payments, the number, frequency, and amount of payments, and the annual percentage rate for representative amounts or ranges of credit are set forth in or are determinable from the creditor's printed material distributed to the public, in the contract of loan, or in other printed material delivered or made available to the customer.

(h) Series of sales. If a credit sale is one of a series of transactions made pursuant to an agreement providing for the addition of the amount financed plus the finance charge for the current sale to an existing outstanding balance, then the disclosures required under this section for the current sale may be made at any time not later than the date the first payment for that sale is due, provided:

(1) The customer has approved in writing both the annual percentage rate or rates and the method of treating any unearned finance charge on an existing outstanding balance in computing the finance charge or charges; and

(2) The creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sale price including any finance charges attributable thereto. For the purposes of this subparagraph, in the case of items purchased on different dates, the first purchased shall be deemed first paid for, and in the case of items purchased on the same date, the lowest priced shall be deemed first paid for.

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Initial Decision

other papers signed. Thus the customers did not at the time they agreed to the purchase on time have any disclosure of what the cost of financing would be. So the expressed purpose of the Act "* * * that the customer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit" (15 U.S.C. § 1661) was frustrated.

Accordingly, the following conclusions and order should be entered:

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondents and over the subject matter of this proceeding. Under the law it is not necessary that the transaction be in interstate commerce.

2. The individual respondents, by reason of their ownership of the corporate respondent, their direction and control over its operations, and the history of the corporation as successor to a partnership involving the individual respondents and the ease with which the corporation could be eliminated, should be held individually responsible if the corporation is held responsible.

3. The corporation and the banks validly waived any security interest they might have over the residences of respondents' customers and thus no right of rescission arose.

Securing a waiver from others who might conceivably secure a lien, in the event of malfeasance of respondents in failing to pay their obligations to wage earners and materialmen, is not required by the Act.

4. The respondents systematically failed to afford to the prospective customers the disclosure of the credit costs before the sales order was executed and a downpayment made. Thus the requirements of Section 226.8(a) of Regulation Z were not met and the purpose of the Act was not carried out.

5. The following order should be issued:

ORDER

It is ordered, That respondents Fabbis, Inc., a corporation, doing business as Rochester Plumbing and Heating Contractors or under any other name, and its officers, and Richard J. Fabrizi and James J. Rebis, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with any consumer credit sale, as "consumer credit" and "credit sale" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to provide any customer prior to consummation of the transaction with a copy, which the customer may retain, of all disclosures required to be made by Section 226.8 of Regulation Z, in the form and manner prescribed therein, as required by Section 226.8(a) of Regulation Z.

2. Failing, in any consumer credit transaction or advertisement, to make all disclosures required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z, in the manner, form and amount prescribed therein.

It is further ordered, That a copy of this order to cease and desist be delivered to all present and future personnel of respondents engaged in the consummation of any credit sale, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale, resultant 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.

CONCURRING STATEMENT OF CHAIRMAN KIRKPATRICK

I have serious reservations about the validity of Sections 226.9(a) and 226.2(z) of Regulation Z insofar as they define nonconsensual mechanics' liens arising by operation of law to be security interests which trigger the Act's rescission provisions. I would not have interpreted Section 125(a) of the Act in this way, and I believe the Board may have exceeded its authority in so doing.

I am reluctant, however, to take a position which, if adopted by the majority, would result in an unreviewable decision to terminate most governmental enforcement in this regard. The opportunity for appellate review is foreclosed, of course, when the Commission decides an issue in the favor of the respondent. That factor alone would not ordinarily influence my judgment. In this particular instance, however, I believe that for a variety of reasons the Commission's decision should be subject to the scrutiny of full judicial review.

The validity of the regulations here at issue presents a close question—one which involves a difficult matter of statutory interpretation. As the majority notes, courts in two jurisdictions have disagreed on whether or not Section 125(a) of the statute applies in the factual situation here present. The statute itself provides little guidance in determining the precise limits of the Board's discretion in

interpreting the statute. According to Section 105, regulations are valid if, "*in the judgment of the Board* (they) are necessary or proper to effectuate the purposes of (the statute) to prevent circumvention or evasion thereof or to facilitate compliance therewith." (emphasis added). Thus, the law gives the Board a broad mandate for the exercise and application of its expertise, and the outer boundaries of its discretion have not to date been satisfactorily defined.

To its task of interpreting the statute, the Board brings considerable knowledge acquired from its long involvement with monetary and credit matters, as well as from public comments which it receives on all regulations before they are promulgated in final form. We have little indication on this record of the factors which in the Board's judgment made necessary and proper the interpretation of the statute here challenged.

In these circumstances and in a case which does not involve a clear abuse of discretion, I am not inclined to rule that the regulations of a Congressionally empowered expert body operating under so broad a mandate are invalid.

Accordingly, I concur in the disposition of this case.

OPINION OF THE COMMISSION

By MACINTYRE, *Commissioner*:

This matter is before the Commission upon the appeal of complaint counsel from the initial decision of the administrative law judge filed June 16, 1971. In this decision the administrative law judge held that some, but not all, of the charges of the complaint were sustained, and he entered an order to cease and desist as to those practices he found to be unlawful. Complaint counsel filed an appeal, respondents have answered such appeal, and complaint counsel in turn have filed a reply. Oral argument on the appeal was held January 6, 1972.

The complaint charges the respondents with violations of the Truth in Lending Act (15 U.S.C. 1601, *et seq.*) (referred to hereafter as the Act) and Regulation Z (12 C.F.R. § 226), the implementing regulation, as well as the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*). The charges are, in general, that respondents, in connection with the extension of consumer credit, in transactions covered by the Act, have failed, as required by Regulation Z, to provide customers with a copy of consumer credit cost disclosures; have failed, as required by Regulation Z, to provide their customers with copies of a notice of the right of rescission; and have failed, as required by Regulation Z, to delay, during the three-day rescission period, the making

of physical changes in the customers' property and the commencement of work or service.

The respondents are Fabbis, Inc., a New York corporation doing business as Rochester Plumbing and Heating Contractors, as well as the individuals Robert J. Fabrizi and James J. Rebis, named individually and as officers of the named corporation. The respondents, at the time of the hearing and prior thereto, engaged in the sale of plumbing and heating equipment and installation services to the public.

The administrative law judge, in his initial decision, held that respondents systematically failed to afford prospective customers the disclosure of credit costs before the sales order was executed and a downpayment made; thus, that the requirements of Section 226.8(a) of Regulation Z were not met and the purpose of the Act not carried out. He included in his initial decision an order to prohibit such practices. The administrative law judge failed to find a violation of law, however, insofar as the respondents were charged with failing to provide their customers with notices of the right of rescission as required by Section 226.9(b) of Regulation Z and with the failure to delay performance during the three-day rescission period required by Section 226.9(c) of Regulation Z. On the two latter charges the administrative law judge agreed with respondents' contention that since the corporation and the banks providing the loan money had waived any security interest they might have in the property there was thus no right of rescission for the customer. He rejected complaint counsel's position that liens created by operation of law, such as workmen's and materialmen's liens, constituted a security interest under the Act and made the transactions rescindable.

Complaint counsel appeals from the part of the initial decision in which the administrative law judge failed to find violations of law as charged in the complaint, contending that he was in error in not holding respondents' credit transactions to be rescindable and therefore subject to the requirements of the Act and Regulation Z covering the customer's right of rescission. Complaint counsel requests that the order prohibit for the future all the violations charged, and in addition he seeks a provision in the order which would require respondents to afford their customers in prior transactions the right to rescind such transactions.

Except for a question on the scope of the order, there is only one issue of substance raised by complaint counsel's appeal. It is whether or not respondents' credit transactions are rescindable transactions, and therefore subject to Section 125 of the Act and to Section 226.9 of Regulation Z providing a right of rescission, where respondent cor-

poration and the banks making the loans acted to waive all their security interest but where mechanic's liens or liens created by operation of law in favor of workmen and others were not waived.¹

Since July 1, 1969 (the effective date of Regulation Z), respondents, in connection with the arranging for consumer credit caused customers to execute retail installment contracts to finance home improvements on real property used as customers' principal residences (finding 4, page 4 [p. 682, herein], initial decision). The record is clear, and the administrative law judge found, that respondents failed to supply copies of the required notice to such customers of their right of rescission and that they further failed to delay the making of physical changes in the customers' properties and the performing of work on such residences during the three-day rescission period (findings 9 and 10, pages 5 and 6 [pp. 683 and 684, herein] of the initial decision).

Although respondents claim that respondent corporation and the lending banks waived all of their security interest in the transactions involved, they made no such claim for the liens created by operation of state law covering subcontractors, workmen and others. The administrative law judge specifically found that no waivers of workmen's liens were presented at the hearing (finding 6, page 4 [p. 682, herein], initial decision). Respondents, who have the burden of going forward with the evidence on this point since they seek to establish that they come within an exception to the general requirements of the statute, have made no showing of a waiver of workmen's liens or of all other liens created by operation of law. Furthermore, the credit

¹ Section 125(a) of the Act reads in part:

"Except as otherwise provided in this section [exceptions which are not here applicable], in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this chapter, whichever is later, by notifying the creditor, in accordance with the regulations of the Board, of his intention to do so. * * *

Section 226.9 of Regulation Z implements this section of the Act and reads in part:

"* * * Except as otherwise provided in this section, in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer, the customer shall have the right to rescind that transaction until midnight of the third business day following the date of consummation of that transaction or the date of delivery of the disclosures required under this section and all other material disclosures required under this Part, whichever is later, by notifying the creditor by mail, telegram, or other writing of his intention to do so. * * *

Other parts of Section 226.9 contain requirements relating to notice for opportunity to rescind, delay of performance and other matters.

forms used by the respondent corporation suggest that mechanic's liens of subcontractors, laborers and others were not waived.²

There is no dispute that the law of the State of New York, the jurisdiction in which the transactions presented herein took place, grants mechanic's liens on customers' homes to subcontractors, laborers and others for work performed (N.Y. Lien Law, § 3 (McKinney 1966)). Respondent corporation employed workmen to install the plumbing and heating equipment it sold to customers (finding 5, page 4 [p. 682, herein], in initial decision). Thus, it appears that if the mechanic's liens or the right to such liens granted to respondents' workmen by operation of law are a security interest within the meaning of that term in the Act, respondents are in violation of the Act and Regulation Z.

It is our view that a security interest under the Act does include mechanic's liens and other liens created by operation of law. In this view we follow the holding and the reasoning of the Circuit Court of the United States Court of Appeals for the District of Columbia, which held to that effect in *Gardner and North Roofing Siding Corporation v. Board of Governors of the Federal Reserve Board*, 464 F. 2d 838 (D.C. Cir. 1972); 4 CCH Consumer Credit Guide § 99159.³ At issue in the *Gardner* case was the validity of the Board's regulations, which had the effect of requiring the seller to notify a customer of his right to rescind when there is a probability that a lien on his house will arise by operation of law even though he has not executed an indenture on the property. The statute (Section 125(a)) provides for the right of rescission in a consumer credit transaction "in which a security interest is retained or acquired" in customers' residences, whereas the Board's regulation reads in pertinent part: "in which a

² A section of respondents' "Retail Installment Obligation" used in the transactions shown in the record reads as follows:

"3. SECURITY INTERESTS: Represents that, except as a provision is made in 'D-2' of this Obligation for the execution and delivery of a Collateral Mortgage on the above 'Property to be Improved' by the Buyer(s) [and by any other owner(s) of any interest in said Property] to the Bank designated above, and/or b. the right to a Mechanic's Lien on said Property of a subcontractor, laborer, materialman, or other person (excluding the Seller) who performs labor or furnishes materials for the improvement thereof, may be a security interest in said Property within the meaning of 'security interest' as used in Federal Reserve Board Regulation Z, no security interest is or is to be held, retained or acquired by the Seller, the Bank designated above, or any other person in connection with the extension of credit evidenced by this Obligation." (Commission Exhibit 9-j.)

³ The same or a similar issue is raised in *N. O. Freed Company, Inc., et al. v. Board of Governors of the Federal Reserve System*, U.S.D.C. W.D.N.Y. September 29, 1971, CCH Consumer Credit Guide § 99356. The district court in the case held that only contracts which acquired a security interest through a mortgage, deed of trust, or other type consensual liens are rescindable; that Congress did not include liens which arise in the future by operation of law. The *Freed* case has been appealed to the United States Court of Appeals for the Second Circuit. *N. O. Freed Company, Inc., et al. v. Board of Governors of Federal Reserve Board*, appeal docketed, No. 72-1381 (2d Cir.).

security interest is *or will be* retained or acquired" (§ 226.9(a)) (emphasis supplied). The Board also defined the term "security interest" to include liens created by operation of law (§ 226.2(z)). The court upheld the Reserve Board's regulations on this point. It reasoned in part that a contract to renovate, remodel or repair a house imports the materials will be furnished in connection with that work; and that, therefore, *implicit in the contract* is a provision that a lien will attach to secure payment for the work and the materials. We believe it is clear from the decision that the court's reasoning and its holding covers all nonconsensual security interests, including the mechanic's liens granted by statute to the creditor as a contractor or supplier, as well as mechanic's liens granted to third parties not privy to the original contract, such as subcontractors, laborers and others, for their work, services or materials.

Accordingly, we hold that respondents violated the Act and Regulation Z not only in the respects found by the administrative law judge but also in the other respects charged in the complaint, *i.e.*, for failing to provide notice of rescission and for failing to delay performance within the three-day period provided by law.

There is no direct issue before the Commission on the validity of respondents' waiver policy. That issue would have been before us had respondents shown that all security interests were waived, including the mechanic's liens of their workmen and others. In the circumstances there is no need to inquire into the validity and appropriateness of the waivers. They were incomplete and so the defense must fail.⁴

It should be noted, however, that Section 226.901 also provides that if, as a result of the transaction, a security interest is or will be retained or acquired by a subcontractor, workman or other person, the transaction is rescindable and the creditor then would be responsible for delivering the rescission notice and the applicable disclosures and for delaying performance.

⁴ Neither the Act nor Regulation Z expressly provides for the waiver of security interests. The only explicit language on waiver they contain is that for the *customer's* waiver of his right of rescission under certain emergency-type circumstances (see Section 125(d) of the Act and Section 226.9(e) of Regulation Z). The concept of a waiver of security interest by the creditor appears in Section 226.901 of the Reserve Board's "interpretations" of Regulation Z. This interpretation section provides that where a creditor *effectively* waives his right to retain or to acquire a mechanic's or a materialmen's lien he has not retained or acquired that security interest. Under this interpretation, if all security interests are waived, the transaction is not rescindable and the creditor does not have to comply with Section 125 of the Act and the regulation concerning the consumer's right of rescission.

It should be noted, however, that Section 226.901 also provides that if, as a result of the transaction, a security interest is or will be retained or acquired by a subcontractor, workman or other person, the transaction is rescindable and the creditor then would be responsible for delivering the rescission notice and the applicable disclosures and for delaying performance.

As indicated above, complaint counsel, so far as remedy is concerned, contends for a new paragraph in the order which would require respondents on past sales between July 1, 1969 and January 18, 1971, for which they arranged the extension of consumer credit and in which a security interest in real property was retained or acquired, to afford the customers involved, within fourteen days of the receipt of a specified notice, the opportunity to rescind the transactions. The Commission's order, he argues, can and should compel respondents to give their credit customers what they are entitled to under the Act and regulations. He claims that such a remedy will bear more than a reasonable relationship to the violations uncovered. Complaint counsel cites the relief granted by the hearing examiner in another matter, *Charnita, Inc., et al.*, Docket No. 8829.

The Commission, on June 6, 1972 [80 F.T.C. 892], issued its own decision in that *Charnita* matter, holding, among other things, that so far as certain lot-buying customers were concerned those respondents had "an unfulfilled and continuing duty to give notice, in accordance with Section 226.9 of Regulation Z, of the customers' right of rescission." The Commission there further stated that "[u]ntil such notice is given, respondents are thus in a continuing violation of the statute."

We do not believe that the same approach is justified on the facts in this proceeding. *Charnita* concerned land sales, not home improvement sales as in this case. The installations and alterations involved in home improvement transactions cannot easily be undone, if they can be undone at all. These improvements are generally of a permanent nature, such as the installation of a new furnace, new air conditioning equipment and the like. Removal of this equipment will often be impractical and possibly damaging to the house in which it is installed. Furthermore, removal could lead to additional expenses to the home owner. Inflation and other factors might easily make replacement more costly than was the original installation. In such a case a mere right to rescind, without more, would not restore the customer to his prior position and might be detrimental to him if the seller in fact removed the equipment.

A provision in the Reserve Board's regulation covering the right of rescission (Section 226.9(d) of Regulation Z) appears to be directed to this situation. It states in part:

If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. * * *

While the record here has not been developed on this point, it may be assumed that in most of the transactions return of the creditor's property would be impracticable and so cancellations would necessarily raise problems as to the return of "reasonable value." Very likely each situation would require individual negotiation to arrive at equitable results. We further assume in these situations of cancellation that under the Board's rule the customer would have the option of removal or of tendering reasonable value, though this is not altogether clear.

This matter, therefore, raises problems, as mentioned, of likely adjustments and negotiations not present in *Charnita* and the facts developed in this record are inadequate to make appropriate determinations as to just how such an order would work or what its impact would be insofar as the home owners are concerned or the respondents. Without greater factual details on this point we do not believe that an order looking to past transactions is justified on this record.

In our view, it would not be helpful to remand this matter for the taking of additional evidence on the scope of the order. Time is important in order to provide protection to respondents' future customers. We believe that a broader public interest will be served by seeking an immediate enforcement of a prospective order to cease and desist rather than to suffer the inevitable delays which would result from a remand for further facts.

In connection with the order, there is one further point which should be mentioned. The administrative law judge, in footnote 6, page 12 [p. 689, herein], stated that he assumed the correctness of respondents' claim to the effect they were advised by the head of the New York office that their transactions because of their waiver policy were not rescindable. He based this assumption on the fact that the person referred to was not called to deny the claim. The next sentence in the footnote reads: "While as a matter of law such interpretation [by the New York office head] may carry little weight, from the standpoint of the public interest in issuing an order in this matter it may be very significant." Whether or not the administrative law judge's assumption is warranted, we do not agree with the sentence above quoted if he means by this that the Commission is thereby in some way not fully free to issue an appropriate order in this case in the public interest. No principle of equitable estoppel bars the Commission from the performance of its duty because of the mistaken action of subordinates. *Double Eagle Lubricants v. F.T.C.*, 360 F.2d 268, 270 (10th Cir.1965). To prevent any misinterpretation on the issue we will strike the footnote.

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Accordingly, complaint counsel's appeal will be granted to the extent above indicated and otherwise denied. The initial decision of the hearing examiner will be modified so as to conform to the views expressed in this opinion and as modified adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon complaint counsel's appeal from the administrative law judge's initial decision and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the initial decision should be modified in accordance with the views and for the reasons stated in the accompanying opinion and as modified adopted as the decision of the Commission:

It is ordered, That pages 123 and 13 [*supra* at 688-90] of the administrative law judge's initial decision be modified as follows:

witnesses made it very apparent in their testimony that they could not afford the large expenditures required and had to secure financing. We turn next to the far more serious question of the waiver of lien by respondents.

Respondents contend that they waived any lien they would secure on the property. Thus, they claim the transaction does not create any security interest and accordingly it is not rescindable. Respondents further claim that an interpretation to this effect was secured from the Chief of the New York Office of the Commission.

Complaint counsel take the position that even though the waiver might be effective to prevent respondents from securing a lien on the property for themselves, the New York lien law creates a lien in favor of their workmen and their material suppliers in the event that the wages or material charges are not paid⁶ and it was the purpose of the Truth in Lending legislation to require that all liens be considered even though not under the control of the lender. The position of complaint counsel is correct for the reasons stated by the court in *Gardner and North Roofing and Siding Corporation v. Board of Governors of the Federal Reserve Board*, 464 F. 2d 838 (D.C. Cir. 1972); 4 CCH Consumer Credit Guide § 99159. Accordingly, respondents' transactions shown on this record were rescindable and subject to the requirements of § 226.9 of Regulation Z governing the customer's right to rescind.

Paragraph Five of the complaint contains the following charge:

"In connection with the consumer credit transactions set forth in Paragraphs Three and Four⁷ hereof, respondents prepare documents containing consumer credit cost disclosures required by Section 226.8 of Regulation Z and obtain from customers written acknowledgment of receipt of these disclosures, but in some instances nevertheless fail to provide the customer with a copy of such disclosures, as required by Section 226.8(a) of Regulation Z."

This it seems to the hearing examiner includes a charge that the customer is not provided with the cost disclosures prior to the time he or she signs the sales

proposal. This is true because Section 226.8(a) of Regulation Z specifically provides:

⁶ McKinneys "Lien Law" Volume Article 1, 1-3.

⁷ The paragraph referred to provide as follows:

"PARAGRAPH THREE: In the ordinary course and conduct of their business as aforesaid, respondents arrange, and for some time last past regularly have arranged, for the extension of 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.

"PARAGRAPH FOUR: Subsequent to July 1, 1969, respondents in the ordinary course and conduct of their business and in connection with their arranging for consumer credit, have caused, and are causing, customers to execute retail installment contracts, herein referred to as 'the contract', which results or may result in a security interest being retained or acquired in real property which is used or is expected to be used as the principal residence of the customer. The customers thereby have the right to rescind such transactions, as provided in Section 226.9(a) of Regulation Z."

It is further ordered, That footnote 10, page 14 [*supra* 690], in the initial decision be, and it hereby is, renumbered 8.

It is further ordered, That conclusion 3 on page 16 [*supra* at 691] of the initial decision be, and it hereby is, modified to read as follows:

3. Respondents, in credit transactions shown in this record, violated the Truth in Lending Act and Section 226.9(b) of Regulation Z by failing to provide their customers with the opportunity to rescind and copies of a notice of the right of rescission in accordance with the regulation. Respondents, in credit transactions shown on this record, violated the Truth in Lending Act and Section 226.9(c) of Regulation Z by failing to delay during the three-day rescission period making physical changes in the customer's property and in the performing of work and services for such customers. The claim that security interests were waived is rejected because there is no showing that all liens created by operation of law, such as mechanic's liens of workmen, were waived.

It is further ordered, That the order contained in the initial decision be modified to read as follows:

ORDER

It is ordered, That respondents Fabbis, Inc., a corporation, doing business as Rochester Plumbing and Heating Contractors or under any other name, and its officers, and Richard J. Fabrizi and James J. Rebis, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection

with any consumer credit sale, as "consumer credit" and "credit sale" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to provide any customer prior to consummation of the transaction with a copy, which the customer may retain, of all disclosures required to be made by Section 226.8 of Regulation Z, in the form and manner prescribed therein, as required by Section 226.8(a) of Regulation Z.

2. Failing, in any transaction in which a security interest is or will be retained or acquired in real property which is used or is expected to be used as the principal residence of the customer, to provide each customer with notice of the right to rescind, in the form and manner specified by Section 226.9(b) of Regulation Z, prior to consummation of the transaction.

3. Making any physical changes in a customer's property or performing any work or services for the customer on such property before expiration of the rescission period provided for in Section 226.9(a) of Regulation Z, in any transaction in which a security interest is or will be retained or acquired in real property which is used or is expected to be used as the principal residence of the customer, as provided in Section 226.9(c) of Regulation Z.

4. Failing, in any consumer credit transaction or advertisement, to make all disclosures required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z, in the manner, form and amount prescribed therein.

It is further ordered, That a copy of this order to cease and desist be delivered to all present and future personnel of respondents engaged in the consummation of any credit sale, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale, resultant 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 initial decision of the administrative law judge, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

Chairman Kirkpatrick concurring in the disposition of this proceeding.

IN THE MATTER OF

CAL-ROOF WHOLESALE, INC., ET AL.

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

Docket C-2397: Complaint Oct. 30, 1972—Decision, Oct. 30, 1972

Consent order requiring a Portland, Oregon, wholesaler and distributor of building materials, including residential siding products, among other things to cease misrepresenting any aspect of contests or other promotional schemes or devices; misrepresenting the quality or properties of its siding or other building products; and representing that its products are guaranteed unless pertinent information with respect thereto is clearly and conspicuously disclosed.

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 Cal-Roof Wholesale, Inc., a corporation, and Morris Greenstein, individually and as an officer of said corporation, hereinafter 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 Cal-Roof Wholesale, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 110 S.E. Taylor, Portland, Oregon.

Respondent Morris Greenstein is an officer of the corporate respondent. He formulates, directs and controls the acts and practices herein described. His business address is the same as that of the corporate respondent.

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PAR. 2. Respondents are now and for some time last past have been, engaged in the wholesale sale, offering for sale, and distribution of building materials, including residential siding products.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Oregon to purchasers thereof located in various other States of the United States, and have operated branches outside of the State of Oregon, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. To promote the sale of their building materials, respondents have distributed and have caused to be distributed in commerce to potential home siding purchasers, a substantial number of mailers announcing a "17 Second Contest." Two such mailers were so distributed. One advertised aluminum siding and the other advertised vinyl siding. Each had a number printed on it and solicited the entry of the recipient in a "contest." The offered grand prize was a free siding job, second prize was a color television set, and the third prize was a clock or a mystery gift. The foregoing is hereinafter referred to as the "promotion." Respondents have sent out or have caused to have sent out 137,200 of the aluminum siding mailer and approximately 135,000 of the vinyl siding mailer.

After the mailers are received, the recipients may, and many do, return the attached cards to the respondents, or their agents. The returned cards are then sent to siding contractors which have purchased the promotion service from respondents and contractor salesmen are sent to call on prospects who have returned the card to attempt to sell them siding installation jobs and to deliver the appropriate prizes.

In the said promotion mailers the following statements appear in connection with the advertised siding:

So new and different, it makes all other sidings obsolete

* * * * *

Imagine, you never have to paint your house again

* * * * *

Save by eliminating house-painting and repairs over the next ten, twenty, or thirty years.

* * * * *

Mail this card within 5 days

* * * * *

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PAR. 5. By and through use of the said promotion, and through the use of the aforementioned statements and assertions, respondents have represented directly or by implication that:

1. A true contest was being conducted in which the determination of whether each recipient of a promotion mailer was entitled to receive the third prize was based upon chance.
2. Promotion entrants could not qualify to participate unless the entry was mailed within five days of receipt.
3. The promotion would be limited to a relatively short period of time.
4. A grand prize of a residential siding installation job and three second prizes of new color television sets would be awarded in each of the two promotions.
5. Individuals entered or participating in the promotions were afforded a reasonable opportunity to win the represented first and second prizes.
6. The advertised siding makes all other sidings obsolete.
7. The advertised siding is "new" and "different."
8. The advertised siding will eliminate the need for house painting and siding repairs for as long as 30 years.

PAR. 6. In truth and in fact:

1. The determination of whether mailer recipients would receive the third prize was not based on chance. Each and every promotion mailer entitled the recipient to receive the third prize under the criteria established in the mailer.
2. The mailing of promotion entry cards more than five days after receipt of the mailer would not disqualify the entrant.
3. The promotion has not been limited to a relatively short period of time, mailers having been sent into various areas intermittently from June 1970 through July 1971, in the case of the aluminum siding mailer, and since August 1970 in the case of the vinyl siding mailer.
4. No residential siding installation jobs or color television sets were won or awarded in either of the two promotions.
5. Individuals entered or participating in the promotions were not afforded a reasonable opportunity to win the represented first and second prizes. In the aluminum siding promotion, 137,200 mailers were sent, out of which one was a first prize winner and three were second prize winners. In the vinyl siding promotion, approximately 135,000 mailers were sent out, of which one was a first prize winner and three were second prize winners.
6. The advertised siding did not obsolete all other sidings.
7. The advertised siding was not "new" and "different."

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8. The advertised siding will not eliminate the need for house painting and siding repairs for as long as 30 years.

PAR. 7. To promote the sale of their building materials, respondents have distributed and have caused to be distributed in commerce to potential home siding purchasers, a substantial number of mailers advertising steel house siding. The mailer invited the recipient to return a postage-paid card in order to obtain the free gift of a junior grandfather clock at the time of a sales presentation. The returned coupons were forwarded to siding contractors who had purchased the mailer service. The coupons were utilized by the siding contractors for obtaining leads for siding installation work. In the mailer, the following statements and representations, among others, were made:

This offer is limited to ten days only

For your security, vinylized siding comes with a transferable guarantee that you can depend on

Now say good-bye to house painting

Immediate financing available

Easy terms to fit your budget

Act now, absolutely free * * * no obligation,
nothing to buy

This offer is limited to ten days only

PAR. 8. By and through use of the aforementioned statements and representations, respondents have represented directly or by implication:

1. That the offer to receive a junior grandfather clock by returning the coupon is only available for 10 days from the date of receipt of the mailer.
2. That the advertised steel house siding is guaranteed in all respects without conditions or limitations.
3. That houses to which the advertised steel house siding has been applied will never need painting.
4. That immediate financing would be provided to all recipients of

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the mailer by the respondents or by some person or firm connected with respondents.

5. That lower downpayments, longer periods of repayment, lower interest charges, or lower monthly payments than those regularly offered would be available to each mailer recipient.

6. That recipients of the mailer which returned the card would be under no obligations with respect thereto.

PAR. 9. In truth and in fact:

1. The offer in the mailer was not limited to ten days.

2. The siding guarantee is not unconditional, but is pro-rated and contains other conditions to the obligations of the guarantor.

3. Application of the advertised steel house siding will not eliminate the need for house painting forever.

4. Financing of the house siding installation work is only available to those who can qualify for credit extensions.

5. The downpayments are not lower, the interest charges are not less, the periods of repayment are not longer, and the monthly payments are not less than those that would be regularly and ordinarily available to individuals obtaining financing for siding installation work.

6. The mailer recipient who returns the coupon obligates himself to listen to a siding sales presentation.

PAR. 10. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of siding materials and other products of the same general kind and nature as that sold by respondents.

PAR. 11. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations 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 said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Cal-Roof Wholesale, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 110 S.E. Taylor, Portland, Oregon.

Respondent Morris Greenstein is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Cal-Roof Wholesale, Inc., a corporation, and its officers, and Morris Greenstein, individually and as an

officer of said corporation, and their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the preparation, advertising, promotion, sale, distribution or use of any contest, game or other promotional device, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, orally or in any other manner, directly or indirectly, from:

1. Representing that a contest or other similar promotional device is being conducted in which the determination of whether a participant is a winner or loser is based on chance, when such is not the fact; or misrepresenting in any manner any aspect of any contest or other promotional scheme or device.

2. Representing that an offer to a potential individual participant of an opportunity to participate in any promotional scheme or receive a free gift is limited to a certain specific period of time, excepting such disclosures as are required in Paragraph 3 of this section of this order.

3. Failing to accurately and truthfully disclose on all materials distributed to the public the date that any contest, game, or other promotional device is initiated and the date it will end.

4. Failing to award and distribute all prizes of the value and type represented.

5. Engaging in the preparation, promotion, sale, distribution, or use of any contest, game, or other promotional device unless the following are disclosed clearly and conspicuously in all advertising and promotional material concerning said devices:

- (a) The total number of prizes to be awarded;

- (b) The exact nature of the prizes, the approximate retail value of each prize, and the number of each separate type of prize;

- (c) The odds of winning each prize;

- (d) The geographical area or states in which any such device is used.

It is further ordered, That respondents and their successors and assigns, and respondents' officers, 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 building or siding materials, or any other similar products in

commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, orally or in any other manner, directly or indirectly, from:

1. Representing that any siding or other building product renders all other similar products obsolete; or otherwise misrepresenting siding or other building products.

2. Representing that any siding or other building product is different when such product is not different and representing that any such product is new more than six months after initial introduction to the public, exclusive of any test marketing periods.

3. Representing that any siding or other building product will eliminate the need for house painting and siding repairs for as long as 30 years or forever.

4. Representing, directly or by implication, that any of respondents' products are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

5. Representing that financing is available without disclosing that credit is only available on approval of credit and without disclosing the source of such financing.

6. Representing that lenient credit terms are available, including, but not limited to use of the term "easy terms."

7. Representing generally that a mailer recipient or participant in any promotional device may receive a free gift or participate in a promotion without obligation or condition in connection with a promotion where a salesman may contact the recipient or participant.

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

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale or sale of any product or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the

emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commis-