
IN THE MATTER OF

KASSLER & CO.

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

Docket C-2631. Complaint, Feb. 3, 1975 - Decision, Feb. 3, 1975

Consent order requiring a Denver, Colo., mortgage banker, among other things to cease distributing to real estate agents forms which restrict the buyer's source of home loan credit, which require the purchaser to sign at a later date a real estate contract form, the terms of which are not set forth or attached to the earnest money agreement, and which require a purchaser's title insurance policy or preliminary report only be delivered to the respondent. Other provisions of the order will enable the buyer to be informed of the conditions of the real estate contract into which he is entering.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondent: *Jones, Grey, Bayley & Olsen, Seattle, Wash.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Kassler & Co., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Kassler & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 600 Grant St., Denver, Colo. Respondent operates thirty branch and district offices located primarily in the western United States, including four offices in western Washington. Respondent services trust deeds and mortgages totaling in excess of \$882,000,000.

PAR. 2. Respondent is and has been engaged in the business of brokering, granting, and servicing loans secured by mortgages and trust deeds on residential real estate, and performing escrow and closing services in connection with the purchase of residential real estate.

PAR. 3. In the course and conduct of said business, respondent sends substantial quantities of documents, records, and messages between its branch offices and regional headquarters located in Washington State and its head office in Denver, and also between the branch offices and regional headquarters located in Washington State and the office of the head of residential home mortgage production in Encino, Calif. Respondent also regularly transfers funds between Washington State and its Colorado headquarters. A significant portion of the foregoing activities pertain specifically to the generation and promotion of respondent's business. Respondent is thereby maintaining and has maintained a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. For the purpose of promoting its business, respondent has distributed to real estate agents throughout many parts of western Washington a contract form generally known in that area as an "earnest money agreement" form. This form is utilized by real estate agents to create legally binding sale and purchase obligations between sellers and purchasers of residential real estate. The earnest money agreement form is written so that it can be utilized both for mortgage

loan financing and for sales of property pursuant to a real estate contract.

PAR. 5. Said earnest money agreement form contains, among others, the following provisions:

1. If financing is required, the purchaser and seller hereby authorize Agent herein to select the lending institution and to arrange the financing of this sale and to advance so much of the earnest money as may be necessary for loan costs. Purchaser agrees to make application immediately for such financing upon request of Agent, sign necessary papers and deposit, before closing, said advances and all closing costs attributable to purchaser.

2. If this agreement is for sale on real estate contract, seller and purchaser agree to execute a Real Estate Contract for the balance of the purchase price on Real Estate Contract Form No. A-1964 of Pioneer National Title Insurance Company, Security Title Insurance Company or Transamerica Title Insurance Company. The terms of said forms are herein incorporated by reference and the terms of any one of said forms are satisfactory to the parties hereto and said parties agree to execute any one of said contract forms selected by the closing agent.

3. Seller shall make available to purchaser, at office of KASSLER & CO. MORTGAGE BANKERS, or its agent, after acceptance of this offer, a standard form purchaser's policy of title insurance or report preliminary thereto issued by a Title Insurance Company, and seller authorizes Agent to apply at once for such title insurance. . . . Delivery of such policy or title report to KASSLER & CO. MORTGAGE BANKERS, or its agent shall constitute delivery to purchaser.

PAR. 6. The aforesaid provisions are unfair to purchasers of residential real estate in that:

1. The provision set forth above in Paragraph Five, subparagraph 1, (a) permits the real estate agent to select the lender, thereby preventing the home purchaser from shopping among competing financial institutions for the most favorable credit terms and services, (b) permits the real estate agent to advance the purchaser's money to a lending institution for preliminary loan costs without further consent of the purchaser, thereby restricting the purchaser's freedom to seek financing elsewhere, (c) may lead purchasers to interpret recommendations and suggestions made by real estate agents concerning sources of residential loans as being obligatory upon the purchaser, (d) permits real estate agents to send business to lenders without regard to the best interests of the purchaser in order to receive gifts, monies or other things of value from such lenders, (e) permits real estate agents to send business to lenders which will forego or diminish discounts chargeable to the seller while charging the buyer a higher interest rate, higher loan fees, or other charges, and (f) creates an irreconcilable conflict between the fiduciary duties owed by the real estate agent to the seller and duties owed to the purchaser.

2. The provision set forth above in Paragraph Five, subparagraph 2, requires the purchaser to sign at a later time a real estate contract form, the terms of which are not set forth in the body of the earnest money agreement, nor included as an attachment thereto. Such

undisclosed terms of the real estate contract which is required to be signed include, among other provisions, the following: (a) forfeiture of the entire amount theretofore paid by the purchaser in the event of a default by the purchaser, (b) that the purchaser has made full inspection of the real estate and that the seller will not be held to any covenant as to condition, or agreement for alterations unless in writing, (c) assumption by the purchaser of all risks of damage to the property during the term of the real estate contract. Although the foregoing terms, and other terms of the real estate contract, are of substantial significance to the purchaser, the purchaser, in the absence of the real estate contract form, is not normally aware of such terms at the time of signing the earnest money agreement.

3. The provision set forth above in Paragraph Five, subparagraph 3, requires only that a purchaser's title insurance policy or preliminary report be delivered to the respondent. The prevailing practice in transactions where respondent's said earnest money agreement form has been utilized is to deliver a copy of the preliminary report only to the respondent or other lending institution used by the buyer and to send a copy of the final title insurance policy to the purchaser only after the transaction has been closed and the monies disbursed. Accordingly, (a) there is no requirement that the purchaser be provided with a copy of any preliminary title report or insurance policy, (b) the purchaser is generally not apprised before the closing of the real estate transaction of the extent of title insurance coverage, including the existence of conditions and exceptions to such coverage, (c) the purchaser may be deprived of the opportunity for timely renegotiation of the purchase price to compensate for title defects not apparently curable, (d) the purchaser may be deprived of the timely exercise of his or her contractual right not to purchase because of incurable title defects, and (e) the purchaser may be deprived of the opportunity to undertake to negotiate prior to closing for the removal of unwanted encumbrances which would not normally be removed through the closing process.

PAR. 7. Inasmuch as most purchasers of residential real estate do not have sufficient knowledge or capability to effectively bargain with the seller or his representatives to vary the printed terms and conditions set forth in respondent's earnest money agreement form, the provisions set out in Paragraph Five are almost invariably retained and included in the executed earnest money agreements which utilize respondent's forms. Additionally, subsequent to the execution of the form earnest money agreement, purchasers of residential real estate which utilize respondent's said form generally do not have the

knowledge and capability to effectively ameliorate, renegotiate or otherwise diminish the effect of the terms stated in Paragraph Five.

PAR. 8. In the course and conduct of its business, and at all times mentioned herein, respondent has been and now is in substantial competition, in commerce, with corporations, firms and individuals engaged in the performance of services of the same general kind and nature as those provided by respondent.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair acts and practices in commerce and unfair methods of competition 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 respondent named in the caption hereof, and the respondent 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 respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty 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. Proposed respondent Kassler & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 600 Grant St., Denver, Colo.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Kassler & Co., 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 promoting and granting of residential loans in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Disseminating or distributing, in any manner, directly or indirectly, any earnest money or other contract forms used in connection with the purchase and sale of real estate (all hereinafter referred to as "earnest money forms"):

a. which provide that the seller or purchaser authorizes the real estate agent to select a lending institution, or to arrange financing of the sale, or to advance any of the purchaser's funds to any lending institution, or that otherwise have the effect of restricting where the purchaser may seek credit;

b. which provide that the seller or purchaser agree to execute a real estate contract or any other document without, at the option of respondent, either (1) setting forth the terms of such real estate contract or other document in the earnest money forms, or (2) setting forth the following language in the earnest money forms: "THIS AGREEMENT IS VOID without further action by any of the parties hereto unless a copy of the blank real estate contract form which the parties agree to execute is provided to the parties hereto prior to their signing this agreement.

I/WE ACKNOWLEDGE RECEIPT OF BLANK REAL ESTATE CONTRACT FORM NO. _____ ISSUED BY _____ PRIOR TO THE SIGNING OF THIS AGREEMENT.

Purchaser(s)

Seller(s)"

c. which provide for delivery of the title policy and report preliminary thereto to any party other than the purchaser, or which provide for delivery at any specified place; *Provided*, That nothing herein shall preclude the inclusion of a provision permitting the sending of copies of the preliminary report and title policy to the lender or other closing agent, or other interested parties.

2. Failing to send, by certified mail, return receipt requested, a notice to all purchasers of residential real estate (hereinafter referred to as "covered applicants") who have, after the effective date hereof, both (a) executed an agreement on the form printed and distributed by the respondent which contains the language quoted in Paragraph Five

of the complaint, and (b) filed a loan application with the respondent. Such notice shall be sent within two business days of the receipt of the loan application by any representative of Kassler & Co. and shall advise the covered applicant that he may withdraw his loan application without costs, obligations or penalties by delivering or posting written notice to respondent of his determination to do so within ten calendar days of receipt of the required notice from respondent. The notices described herein, which shall include a blank form of loan withdrawal notice, shall be sent by the respondent in the language, form and manner, and with the enclosures, approved by the Seattle Regional Office of the Federal Trade Commission or other representative designated by the Commission.

3. Failing to allow all covered applicants to withdraw their application for credit without costs, obligations or penalties if the respondent receives a loan application withdrawal notice as described above in subparagraph 2.

4. Failing to make contact in person with each real estate office to which respondent may have distributed earnest money agreement forms which contain the language stated in Paragraph Five of the complaint, and to use its best efforts to obtain possession of such earnest money agreement forms from the agent, and to destroy such forms.

It is further ordered, That respondent maintain at all times in the future, for a period, in each case, of not less than one year, complete records relative to the manner and form of its continuing compliance with the above terms and provisions of this order.

It is further ordered, That respondent deliver a copy of this order to cease and desist to the heads of each operating division and separate office within the company and to the heads of each region and branch office, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondent notify the Commission at least thirty days prior to any proposed change in the 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 respondent shall, within sixty days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

ADOLPH COORS COMPANY

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT

Docket 8845. Decision, July 24, 1973 - Modifying Order, Feb. 4, 1975

Order modifying an earlier order dated July 24, 1973, 83 F.T.C. 32, 38 F.R. 23399, pursuant to decision and judgment of June 4 and 21, 1974, respectively, of the United States Court of Appeals for the Tenth Circuit,* by deleting Paragraphs 12 and 13 of the order which rewrite the termination provisions of respondent's distributor contracts.

Appearances

For the Commission: *Anthony Low Joseph and Thomas V. Vakerics.*
For the respondent: *Leo N. Bradley, Earl K. Madsen, Bradley, Campbell & Carney, Golden, Colo.*

ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondent, having filed in the United States Court of Appeals for the Tenth Circuit on Aug. 15, 1973, a petition to review and set aside an order to cease and desist issued herein on July 24, 1973, and the Court having rendered its decision on June 4, 1974, and its judgment on June 21, 1974, affirming the order to cease and desist, except for numbered Paragraphs 12 and 13 of the order which it directed be set aside.

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court to read as follows:

ORDER

It is ordered, That respondent Adolph Coors Company and its subsidiaries, successors, assigns, officers, directors, agents, representatives and employees, individually or in concert with others, directly or indirectly, or through any corporate or other device, in connection with the brewing, distribution, offering for sale or sale of beer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, maintaining, establishing or setting of the

* *Cert. denied*; Jan. 13, 1975, 419 U.S. 1105.