

Complaint

91 F.T.C.

IN THE MATTER OF

USLIFE CREDIT CORPORATION, ET AL.

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

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

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

Appearances

For the Commission: *Michael E.K. Mpras* and *Robert L. Patterson*.
For the respondents: *Edward W. Keane* and *Bruce E. Clark*,
Sullivan & Cromwell.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that USLIFE Credit Corporation, a corporation, and USLIFE Corporation, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent USLIFE Credit Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 1300 North Meacham Road, Schaumburg, Illinois. Respondent USLIFE Credit Corporation is a wholly-owned subsidiary of USLIFE Corporation.

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

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

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

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

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

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

PAR. 3. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PAR. 8. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failure to comply with Sections 226.4, 226.5 and 226.8 of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW
JUDGE

JANUARY 27, 1977

PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

In their answer, respondents asserted the following defenses:

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

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

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

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

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

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

The Striking of Seven Witnesses' Testimony

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

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

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

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

It is worthy of specific mention that . . .

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

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

The Requirements of The Jencks Act

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

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

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

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

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

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

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

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

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

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

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

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

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

Bases for the Findings of Fact; Abbreviations Used

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

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

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

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

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

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

CCPF - Complaint Counsel's Proposed Findings.

RPF - Respondents' Proposed Findings.

FINDINGS OF FACT

The Respondents

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

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

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

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

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

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

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

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

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

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

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

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Life Insurance in Force	17,881,058	17,013,034
Consumer Credit Receivables (RX 21, pp. 1 and 19.)	155,209	143,337

[12] *Sale Of Insurance*

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

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

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

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

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

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

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

Oral Quotes of Loan Costs

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

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USLIFE CREDIT CORPORATION[illegible]

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[illegible]

Initial Decision

LOAN REGISTER DISBURSEMENT RECORD—HOME OFFICE

LOAN REGISTER DISBURSEMENT RECORD — BRANCH OFFICE

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ACCOUNT NUMBER TYPE	DUE	DATE OF LOAN	PREVIOUS ACCOUNT NO. TYPE	DATE OF PREVIOUS ACCT	REL CODE	HIGH CREDIT	BRANCH NO. NAME ADDRESS AND PHONE NUMBER
SECURITY	CODE	PURPOSE	SOURCE CODE	PRE-STATEMENT EXPIRATION DATE			
☐ IND ☐ JOINT ☐ JOINT ☐ JOINT	BORROWER'S LAST NAME	FIRST NAME	DATE OF BIRTH	SPOUSE	DATE OF BIRTH	DEF	
STREET ADDRESS	CITY	STATE	ZIP CODE	PHONE	☐ RES ☐ W/C		
CO-NAME - LAST NAME	FIRST NAME	DATE OF BIRTH	PHONE	☐ RES ☐ W/C			
STREET ADDRESS	CITY	STATE	ZIP CODE				
ANNUAL PERCENTAGE RATE							
1. DATE FIRST PAYMENT DUE	2. INTEREST PER MONTH	3. DISABILITY INS. PREMIUM	4. DEATH CREDIT LIFE INS. PREMIUM	5. LEVEL CREDIT LIFE INS. PREMIUM	6. POINT CREDIT LIFE (BOL & SPOUSE)	7. TOTAL INS. PREMIUM	
8. LATE FEE (PREVIOUS ACCOUNT)	9. INTEREST PER MONTH (PREVIOUS ACCOUNT)	10. RENEWAL BALANCE (PREVIOUS ACCOUNT)	11. PREVIOUS ACCOUNT INFORMATION	12. AUTO TITLE FEE	13. OFFICIAL FEES	14. TOTAL FEES	
15. INTEREST REPAYMENT	16. INS. PRE. INS. REPAYMENT	17. SOCIAL INS. REPAYMENT	18. LIFE OR LIFE INS. REPAYMENT	19. LEVEL OR LIFE INS. REP	20. POINT OR LIFE INS. REP	21. PAYOFF BALANCE DUE ON PREVIOUS ACCOUNT	
SCHEDULE OF PAYMENTS	04	05	06	07	08	09	
EMPLOYER	OCCUPATION	FEE INCL.	NO. SALARY	PAY DAY	BUS. PHONE		
PL-16 EMPLOYER							
INITIAL SOURCE/AMOUNT	ORIGINAL AMOUNT OF NOTE						
7. BOX 2 LESS BOXES 4, 5 & 6							
LOAN DISTRIBUTION							
LESS CHECKS TO BA AMOUNT							
LESS TO BORROWER							
TOTAL OF CHECKS MUST EQUAL BOX 7							

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

Borrower

Borrower

Initial Decision

[illegible]

Initial Decision

91 F.T.C.

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

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

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

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

The undersigned hereby jointly and severally authorize the Lender, its agents and assigns to communicate in any manner with any person, firm, corporation or governmental agency for any purpose in connection with the making or collection of the loan evidenced by this note and also waive the right to enforce any claim, action or cause of action which the undersigned may hereafter have for violation of right of privacy by reason of such communications. The construction, validity, and effect hereof shall be governed by the laws of North Carolina, as modified by the Federal Consumer Credit Protection Act. A statement of said loan has been delivered to the undersigned Debtor as required by Section 53-181, General Statutes of North Carolina.

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

SECURITY AGREEMENT

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

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

☐ Motor Vehicle:

YEAR	MAKE	BODY TYPE	MPG/EST. NO.	YEAR	MAKE	BODY TYPE	MPG/EST. NO.
1				2			

☐ Other (describe):

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

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

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

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

Witness

(DEBTOR/BORROWER) SEAL

(DEBTOR/BORROWER) SEAL

(DEBTOR/BORROWER) SEAL

(DEBTOR/BORROWER) SEAL

RECEIPT — PREVIOUS ACCOUNT

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

Borrower

Borrower

SEE OTHER SIDE FOR IMPORTANT INFORMATION

ORIGINAL — OFFICE COPY

-15e-

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

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

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

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

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

Xs on the Loan Agreements To Show Locations for Signatures

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

[17]

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

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

Computations of the Annual Percentage Rate

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

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

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

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

calculation of the finance charge. The documentary and testimonial evidence shows that customers execute, or always have presented to them for execution, a clearly marked and separately distinguishable section of the loan agreement, which section has to do solely with apprising the customer (1) that he or she need not purchase insurance in order to take out the loan, (2) that he or she may decline to take out insurance, and (3) that he or she has a choice of disability/health or life insurance if any is wanted. (CXs 95, 98, 103, 106, 110, 116, 119-20, 122, 125, 135-414.)

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

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

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

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

Did Customers Know That Insurance Was Optional?

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

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

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

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

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

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

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

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

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

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

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

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

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

NAMING USLIFE AS A RESPONDENT

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

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

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

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

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

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

Where the parent company is shown to be accountable for the acts and practices of its subsidiaries because of the latent power to control which is the situation here, it is unnecessary to demonstrate that the practices of the subsidiary alleged to be illegal were expressly authorized by the parent or that the parent actively participated in them. See *P. F. Collier & Son Corp. v. F.T.C.*, *supra*, 427 F.2d at 270.

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

Initial Decision

establishes and judicial precedents support the naming of USLIFE as a respondent.

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

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

The evidence establishes that in spite of respondents' compliance with the written disclosure requirements of the Truth in Lending Act and employees "going over" loan terms with borrowers, some of the borrowers were still under the impression that insurance coverage was mandatory (e.g., Ferrari, Richardson, Martin; Findings 30-32). Consequently, it appears that the disclosure practice respondents use could be improved upon. For example, the loan application form (RX 7) does not contain space for an entry to indicate the borrower's wish, or reference as to insurance coverage, although the loan agreement form (e.g., RX 32) does contain such spaces. (See pp. 14a-b, 15d hereof.)

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

ORDER OF DISMISSAL

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

OPINION OF THE COMMISSION

By CLANTON, *Commissioner*:

I. BACKGROUND

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

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

- (1) oral quotation of monthly repayment figures that include insurance charges;
- (2) automatic inclusion of insurance charges in loan agreement papers;
- (3) placement of an "X" at the appropriate signature line on the insurance authorization form prior to obtaining the customer's selection of insurance;
- (4) failure to inform consumers as to the purposes of their signatures; and
- (5) inclusion of charges for insurance in the "records of disbursements" section of the loan agreement without adjusting the finance charge and the annual percentage rate. (Complaint, para. 4)

The administrative law judge (ALJ) issued his decision dismissing

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

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

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

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

¹ The following abbreviations will be used in this opinion:

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

II. THE REQUIREMENTS OF THE TRUTH IN LENDING ACT

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

5) Charges or premiums for credit life . . . insurance, written in connection with any credit transaction unless:

(i) the insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and [4]

(ii) any customer desiring such insurance coverage gives specifically dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance.²

Respondents contend that since the general purpose of the Act and Regulation Z is to insure uniform disclosures, and not to serve as an "antifraud" statute, no violation will lie if the creditor's policy is to make insurance³ coverage optional and the policy is disclosed in writing [5] to customers. (R.Ans at 5-8)⁴ We reject such a restrictive interpretation of the statute.⁵ The issue here relates not to respondents' official policy, or the adequacy of their written disclosures, but to whether certain practices utilized by respondents effectively prevented consumers from exercising a free and knowing choice as to their insurance option. That is, despite respondents' official policy, have they engaged in practices that serve to obscure or defeat this

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

(b) Charges or premiums for credit life, accident, or health insurance written in connection with any consumer credit transaction shall be included in the finance charge unless

(1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and

(2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.

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

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

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

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

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

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

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

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

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

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

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

⁶ Conf. Rep. No. 1207, 90th Cong., 2d Sess. (1967).

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³ 112 Cong. Rec. 18400 (1967).

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

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

III. RESPONDENTS' PRACTICES

A. Insurance Election

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

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

¹⁵ See e.g., *Mirabel v. General Motors*, 537 F.2d 871,878 (7th Cir. 1976); *Rachbach v. Cogswell*, 547 F.2d 502,506 (10th Cir. 1976); *Johnson v. McCrackin-Sturman Ford*, 527 F.2d 257,262 (3d Cir. 1975); *Littlefield v. Flanagan & Co.*, 498 F.2d 1133,1136 (10th Cir. 1974); *Eby v. Reb Realty*, 495 F.2d 646,650 (9th Cir. 1974).

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Dating of Insurance Election*

As the ALJ found, insurance authorization forms signed by respondents' customers were not always separately dated. (ID 27) The law judge concluded, however, that the requirements of Regulation Z²⁷ were satisfied because the insurance authorization appeared on the same page of the loan agreement as the TILA disclosure statement which was dated.²⁸

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

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

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

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

Although the violation alleged here may be relatively minor in nature, we believe that the ALJ erred in his determination.²⁹ Section 226.4(a)(5)(ii) of Regulation Z provides that a customer's request for insurance coverage must be "specifically dated and separately signed." On its face, that language leaves little doubt that the insurance authorization itself must be signed and dated. Moreover, the Federal Reserve Board has consistently maintained that this provision calls for the insurance authorization form to possess a date block separate from that which appears elsewhere on the loan agreement.³⁰ This policy is reflected [22] in the sample forms used by the Board to illustrate compliance with Regulation Z³¹ and respondents' own forms contain a separate date block, although they were not uniformly filled in. (CX 135-414)

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

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

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

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

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

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

³¹ See FRR Model Forms Exhibits C & E 1 CCH Cons. Cred. Guide ¶¶ 3853-3855.

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

IV. LIABILITY OF USLIFE CORPORATION

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

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

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

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

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

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

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

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

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

V. THE JENCKS ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The more extensive evidence available in this case indicates that the

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

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

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

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

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

VI. RELIEF

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

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

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

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

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

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

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

FINAL ORDER

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

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

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

Final Order

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

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

ORDER

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

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

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

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

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

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

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

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

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

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

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

(v) each option available to the borrower; and

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

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

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

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

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

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

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

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

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

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

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

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

It is further ordered:

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

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

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

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

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

(c) That respondents notify the Commission within thirty (30) days of any change in the corporate respondents which may affect compliance obligations with regard to the extension of consumer loans arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations with regard to the extension of consumer loans which may affect compliance obligations arising out of this order.

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

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Final Order

Commissioner Pitofsky did not participate.

ATTACHMENT A

VOLUNTARY INSURANCE ELECTION

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

Insurance Premiums (if desired)

Credit Life \$ _____

Credit Disability \$ _____

(accident & health)

Combined Life and Disability \$ _____

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

I/We Do <i>NOT</i> Want Credit Insurance	I/We Want Credit Life Only	I/We Want Credit Disability Only	I/We Want Credit Life & Disability
_____ (Borrower)	_____ (Borrower)	_____ (Borrower)	_____ (Borrower)
_____ (Co-Signer)	_____ (Co-Signer)	_____ (Co-Signer)	_____ (Co-Signer)
_____ Date	_____ Date	_____ Date	_____ Date

Complaint

91 F.T.C.

IN THE MATTER OF

CAPAX, INC. FORMERLY CONTINENTAL CREDIT
CORPORATION, INC., ET AL.*Docket 9058. Complaint, Sept. 30, 1975—Final Order, May 25, 1978*

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

Appearances

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Capax, Inc., a corporation, formerly Continental Credit Corporation, Inc., a corporation, and Joseph V. DeFelice and Arnold Goodman, individually and as officers of said corporation, and Norman Bricker, individually and as a former officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Capax, Inc., formerly Continental Credit Corporation, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Route 130 and Beverly-Rancocas Road, Willingboro, New Jersey.

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