

IN THE MATTER OF
USLIFE CREDIT CORP., ET AL.

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

Docket 9057. Decision, May 23, 1978 — Modifying Order, Sept. 14, 1978

This order, granting and denying in part respondents' petition for reconsideration, modifies the cease and desist order issued on May 23, 1978, 43 FR 34124, 91 F.T.C. 985, by deleting from the first line of paragraph 2 the word "Failing," and inserting the word "Failing" as the first word of subparagraph (a) of paragraph 2.

ORDER GRANTING IN PART, AND DENYING IN PART,
RESPONDENTS' PETITION FOR RECONSIDERATION

An opinion and final order in this matter having been issued on May 23, 1978; respondents having been served by mail with the said opinion and order on July 19, 1978; respondents having petitioned for reconsideration of said opinion and order on August 10, 1978; and the Commission, for the reasons stated in the accompanying opinion, having determined to grant in part, and deny in part, respondents' petition for reconsideration;

It is ordered, That the final order to cease and desist be, and hereby is, modified as follows:

From the first line of paragraph 2 of the Order, delete the word "Failing."

In subparagraph (a) of paragraph 2 of the Order, insert as the first word thereof the word "Failing."

Commissioner Pitofsky did not participate.

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner*:

Respondents have petitioned for reconsideration of our recent opinion and order in which we held that certain of their practices in connection with the sale of credit life and credit disability insurance violated the Truth in Lending Act ("TILA") (15 U.S.C. 1601, *et seq.*), Regulation Z (12 C.F.R. 226) and the Federal Trade Commission Act ("FTC Act") (15 U.S.C. 41, *et seq.*),

Respondents urge (1) that our interpretation of the pertinent provisions of the TILA and Regulation Z is novel and unsupportable, and that our decision rests upon supposed practices neither alleged

in the complaint, nor made a part of the record before the administrative law judge ("ALJ"); (2) that the Commission's opinion is undercut by two Court of Appeals decisions and a Federal Reserve Board ("FRB") staff interpretation, all of which were rendered after the Commission took the case under advisement; (3) that the cease and desist order is overbroad and that it unfairly penalizes respondents' employees; and (4) that they have been denied due process, because the Commission acted as "investigator, complainant, prosecutor, judge and legislature."

Section 3.55 of the Commission's Rules of Practice limits the scope of a petition for reconsideration to "new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." We find that while certain of respondents' objections are inappropriate for disposition by reconsideration, other contentions are permissible in this context, and they warrant a brief opinion.

I.

First, respondents object to our holding that their routine and automatic inclusion of insurance premiums in loan agreement papers prior to obtaining the customer's written approval for insurance, when considered in the context of this record as a whole, constituted a violation of the TILA and Regulation Z. In essence, respondents simply disagree with our holding; in the absence of a new issue, therefore, reconsideration of this question is inappropriate. Nonetheless, in our discretion, we think it useful to note that the Commission has examined the additional authorities cited by respondents, and finds that respondents have misapprehended their application to this case.

Respondents assert that our opinion conflicts with Section 129(b) of the TILA and Section 226.8(a)(1) of Regulation Z. They contend that these provisions require no more than that the necessary written disclosures be made to the consumer by the time of the closing, rather than prior to completion of the loan agreement form. But these provisions are inapplicable here. Section 129(b) addresses only the timing of disclosures specified in Section 129(a), all of which are found in Chapter 2 of TILA; the insurance authorization disclosure requirements are located in Chapter 1, and are not addressed by Section 129(a) in any event. Similarly, Section 226.8(a)(1) of Regulation Z governs only disclosures required by Section 226.8; the credit insurance authorization is required by Section 226.4(a)(5). Respondents' further reliance upon FRB Letter No. 408 as allegedly undermining FRB Letter No. 398 is also

misplaced. Nothing in Letter No. 408 retracts the FRB's condemnation, expressed in Letter No. 398, of the practice of automatically preparing loan documents with the cost of insurance included in the completed calculations. Finally, respondents' reliance upon the model form which appears as Exhibit C, 1 *Cons. Cred. Guide* (CCH) ¶2853, is without avail. Exhibit C is exemplary only of a proper disclosure format. But the sufficiency of respondents' forms is not at issue; rather, we are concerned with respondents' other practices designed to encourage selection of credit insurance, notwithstanding the apparent propriety of the form utilized.

Respondents' next assertion is that the Commission's decision is based upon a charge not made in the complaint and upon which the ALJ took no evidence. We find this allegation to be without merit. The complaint adequately alleged the violations which the Commission has found, *e.g.*, that insurance was automatically included in many loan documents prior to closing without the consumer's knowledge. *See, e.g.*, complaint ¶4(2) and Opinion at 15. And the record is replete with testimony which establishes that automatic inclusion of insurance charges in the loan documents operates, directly or indirectly, to defeat the elective language of the insurance authorization and to prevent consumers from exercising a free choice of whether to obtain credit insurance.

Respondents maintain that the charges reflected in the complaint involved only the issue of whether or not consumers orally authorized insurance prior to signing the written disclosure at the closing. Yet, however, the issues are framed, both the complaint and the trial clearly focused on the adequacy as well as the existence of respondents' oral disclosures before insurance was included in the loan papers. Indeed, we found on the basis of record evidence that even to the extent oral disclosures may have been made in some instances, they were inadequate to alert many consumers to the optional nature of credit insurance. Review of the applicable legal standards manifests the adequacy of the complaint in this respect.

The propriety of a pleading is judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought. *Curtiss-Wright Corp., Wright Aero. Div. v. NLRB*, 347 F.2d 61, 72 (3d Cir. 1965); *Intercontinental Indus., Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. den.*, 409 U.S. 842 (1972). A complaint in an administrative proceeding need not enumerate precisely every event to which an agency may finally attach significance. *L. G. Balfour v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *see also ITT Continental Baking Co., Inc. v. FTC*, 532 F.2d 207, 215-18 (2d Cir. 1976). Thus, the complaint is sufficient if "the

one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was mislead." *L. G. Balfour, supra* at 19, citing *Cella v. United States*, 208 F.2d 789 (7th Cir. 1953), *cert. den.*, 347 U.S. 1016 (1954). Measured against this standard, individually and collectively, the allegations of the complaint sufficiently apprised respondents of the alleged violations for which they were ultimately held. See *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 886 (9th Cir. 1972), *cert. den.*, 412 U.S. 918 (1973); *A. E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

Furthermore, we are convinced that the fundamental requirements of due process were met when, as the case unfolded, respondents were afforded a reasonable opportunity to meet and rebut these allegations. See, e.g., *Curtiss-Wright Corp., supra*; *Golden Grain Macaroni, supra*; *Swift & Co. v. United States*, 393 F.2d 247, 252 (7th Cir. 1968); *J. B. Williams Co. v. FTC*, 381 F.2d 884, 888 (6th Cir. 1967).

Accordingly, we cannot credit respondents' contention that "the Commission has found a violation on the basis of a charge that was never made."

II.

Second, respondents rely upon new authorities to support their contentions (a) that their compliance with the TILA may be measured only by the adequacy of the written disclosure form, and (b) that the Commission erred in holding that respondents violated Regulation Z because their insurance authorization form was not separately dated. We reject the first of these contentions, but accept the second, and withdraw our finding that respondents' failure to obtain a separate date on the insurance authorization constituted an independent violation of Regulation Z. We note, however, that this finding does not compel any change in the provisions of the cease and desist order.

Respondents cite *Anthony v. Community Loan & Investment Corp.*, 559 F.2d 1363 (5th Cir. 1977), and a recent FRB Official Staff Interpretation, FC-0119, 42 F.R. 55881 (Oct. 20, 1977) [1974-1977 Transfer Binder] *Cons. Cred. Guide* (CCH) ¶31,705 in support of the first contention. Neither of these authorities, however, compels us to alter our decision.

In the *Anthony* case, a private suit for damages under TILA, the Fifth Circuit held that a credit customer's assertion that she had neither requested nor desired insurance, but had simply signed the loan documents which included an insurance election, was insuffi-

cient to vary the terms of her contract or to negate the executed insurance authorization. In reaching this result, the court applied the Georgia parol evidence rule to exclude plaintiff's proffered oral evidence that defendant had given her the impression that insurance was required. 559 F.2d at 1369.

Notwithstanding that the findings of fact in the instant case are bottomed, in part, upon the type of consumer testimony which was excluded by the Fifth Circuit in *Anthony*, we do not view that decision as necessarily inconsistent with our own. Sound reasons of judicial administration may argue for not entertaining such oral testimony in the context of private damage litigation, where doing so might weaken the principles underlying the parol evidence doctrine or open the gates of the courthouse to frivolous litigation. But these factors are not present here.

It is clear that the Commission, as a law enforcement agency, empowered by Congress with a mandate to prevent unfair and deceptive practices and to enforce the TILA and Regulation Z, may hear all such evidence as is necessary to establish whether violations of law have occurred. Frequently, the existence of a pattern of deception can be proved only by resort to oral testimony, including so-called "parol evidence." The evidentiary standard on which the *Anthony* decision is based is simply not applicable to an FTC administrative enforcement proceeding.¹ A recent case regarding the admissibility of parol evidence in administrative proceedings is on point. In *Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 353 (3d Cir. 1976), *cert. den.*, 429 U.S. 1092 (1977), the Third Circuit held that "as a matter of administrative law, . . . the Commission was not bound to apply the parol evidence rule." The court continued that:

the basic precept of administrative law [on the standards of admissibility of evidence is] set forth in §556(d) of the Administrative Procedure Act: "Any oral evidence or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence . . ." We recognize that the parol evidence rule is frequently said to be a rule of substantive law and not a rule of evidence. No reason is apparent why the FCC could not apply the rule as a matter of substantive law or policy, if it chose to do so, but we hardly imagine that it is required to do so in view of the plain language of §556(d) that "[any] oral or documentary evidence may be received." 541 F.2d at 353 and n. 14.

Accordingly, we do not believe that *Anthony* is inconsistent with

¹ In general, evidentiary and exclusionary rules applicable to judicial trials have little bearing in administrative proceedings. See, e.g., *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 155 (1941); 2 Davis, *Administrative Law Treatise*, §14.08 at 284 (1958), citing Rep. Atty. Gen. Comm. Ad. Proc. 70 (1941) ("An administrative agency must serve a dual purpose in each case: It must decide the case correctly as between the litigants before it, and it must also decide the case correctly so as to serve the public interest which it is charged with protecting. This second important factor makes it necessary to keep open the channels for the reception of all relevant evidence which will contribute to an informed result.").

our earlier determination in this matter, to which we adhere. Nothing in the Commission's Rules of Practice, including Section 3.43(b), requires or suggests a different result.

Next, review of FRB Official Staff Interpretation FC-0119 demonstrates that respondents have misunderstood the thrust of that letter. FRB staff there address only the sufficiency of the wording of the disclosure in the correspondent's form. No intimation that an inquiry may not properly be carried beyond the form itself may be drawn from that letter. Indeed, two subsequent FRB Staff Opinion Letters reveal that the FRB staff interprets Regulation Z in a manner squarely in accordance with our recent decision in this case.

In FRB Letter No. 1270 (December 20, 1977), 5 *Cons. Cred. Guide* (CCH) ¶31,756, the author of FC-0119 wrote:

FC-0119 was intended by staff to deal only with the method by which a customer might indicate, in writing, his or her desire for credit life, accident, health, or loss of income insurance in order to comply with §226.4(a)(5)(ii) of Regulation Z. Staff did not and does not mean to suggest that, because a customer gives a proper 'specifically dated and separately signed affirmative written indication' of his or her desire for such insurance, there may be no further inquiry as to whether the customer's election to obtain the insurance was truly voluntary and not required by the creditor. Whether a customer desired such insurance is a question of fact, which can only be answered by reference to all the circumstances of a particular transaction. Inquiry into these circumstances is, of course, not foreclosed by the presence of a customer's signature on an insurance authorization.

And in FRB Letter No. 1286 (March 21, 1978), 5 *Cons. Cred. Guide* (CCH) ¶31,777, FRB staff noted:

While the customer's signature on a document would be some evidence of voluntariness, of course, it would not conclusively establish that the insurance was not required. Any number of collateral acts or practices by a creditor could negate the apparently affirmative nature of the customer's election to purchase insurance.

* * * * *

Routine inclusion of the insurance premium in the preparation of the credit documents . . . might be evidence that the creditor had created the impression that the insurance was a condition of the extension of credit.

Since we are in accord with these FRB Staff Opinions and since, as respondents acknowledge, such opinion letters are entitled to great weight with respect to the proper interpretation of Regulation Z, *Philbeck v. Timmers Chevrolet*, 499 F.2d 971, *reh'g den.*, 502 F.2d 1167 (5th Cir. 1974), we decline to modify our decision.

Finally, respondents call to our attention the Fifth Circuit's recent decision in *Hayslip v. Dunlop Chevrolet Co.*, 560 F.2d 192 (5th Cir.

1977), which holds that the absence of a date in the insurance authorization section of a disclosure statement signed by a borrower is not a TILA violation, so long as the correct date is inserted at the top of the loan agreement. We had held that USLIFE's practice of not always separately dating the insurance authorization did constitute an independent violation of TILA. Opinion at 21. Examination of the *Hayslip* opinion and a most unusual set of circumstances convince us to alter our decision.

The key provision is Section 226.4(a)(5)(ii) of Regulation Z, which describes the nature of the indication that a consumer must give if he or she desires insurance coverage. This case was briefed and argued by both complaint counsel and respondents on the assumption that subparagraph read:

Any customer desiring such insurance coverage gives *specifically* dated and separately signed affirmative written indication of such desire after receiving written disclosure . . . [emphasis added]

The administrative law judge tried the case on this understanding as well. And the official printing of Regulation Z by the Board of Governors of the Federal Reserve System (as amended to March 23, 1977) also uses this language.

On closer examination, however, and after consideration of the *Hayslip* opinion, we have determined that the correct and authentic version of Section 226.4(a)(5)(ii) employs the word "specific" in lieu of the word "specifically." The initial Federal Register printing of this section, 34 FR 2002 (February 11, 1969) uses "specific," as does the current compilation of the Register in the Code of Federal Regulations, 12 C.F.R. 226.4(a)(5)(ii) (as amended to January 1, 1977). Research discloses that no published amendment has changed the language to read "specifically."

This seemingly uneventful semantic distinction necessitates a change in our determination, notwithstanding that we believe that public policy considerations suggest the wisdom of adherence to our original position. The Fifth Circuit's opinion in *Hayslip* places great weight on the fact that the word "specific" must modify "indication", rather than "dated," so that the proper reading of Section 226.4(a)(5)(ii) is that there must be a "specific . . . indication," the nature of which is that it shall be "dated and separately signed."² The draftsmen of Section 226.4(a)(5)(ii) could have placed the word

² In our earlier opinion, we had placed considerable weight on the fact that the subparagraph used the word "specifically" (which could only have modified "dated," not "indication"). Indeed, FRB staff had stressed the identical point in several opinion letters. See, e.g., FRB Letter No. 398 (August 26, 1970) [1969-1974 Transfer Binder] *Cons. Cred. Guide* (CCH) §30,576, and FRB Letter No. 1163 (March 16, 1977) [1974-1977 Transfer Binder] *Cons. Cred. Guide* (CCH) §31,556. We had also noted that separate dating has the virtue of providing a means to ascertain whether insurance was authorized before being included in the credit contracts. The latter factor alone,

(Continued)

"separately" in front of the word "dated," suggesting thereby that both the date and the signature must distinctly appear on the authorization form, but they did not. Application of a variety of maxims of construction, including *expressio unius est exclusio alterius*, compels us, under the circumstances, to hold that Regulation Z does not require that a separate date appear on the insurance authorization, so long as the correct date otherwise appears on the same form.

Our disposition of this issue, however, does not necessitate any change in the order to cease and desist. As a remedial measure addressed to respondents' other violations of TILA, Regulation Z, and the FTC Act, we have ordered that respondents utilize a separate form of Voluntary Insurance Election, see Attachment A to the cease and desist order, upon which consumers may indicate their desire or lack thereof to purchase insurance. Since this form is distinct from the loan agreement itself, the date on the loan papers cannot be assumed to carry over to the insurance form. This case is thus distinguishable from *Hayslip, supra*, and from *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), which were discussed in our earlier opinion. Opinion at 22. Accordingly, no change in the order is required.³

III.

Respondents' final contentions can be dealt with quickly. First, they object that paragraphs 4, 5, and 6 of the order are overbroad. These provisions enjoin respondents from failing to disclose accurately the finance charge and annual percentage rate on consumer loans (§§4,5) and from failing to otherwise make the disclosures required by related Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z (§6). These issues are not new and respondents had ample opportunity to address them during the course of the trial and on appeal to the Commission. Suffice it to say, as we have previously noted, Opinion at 34, these fencing-in provisions are justified given their integral relationship to the requirements of Regulation Z which were found to have been violated in this case. *See also Security Industrial Loan Association*, 90 F.T.C. 186, 219 (1977).

Next, respondents contend that the cease and desist order imposes liability upon respondents' employees, who were not named as party

however, while a salient policy consideration, cannot sustain our original holding, in light of the actual language of Section 226.4(a)(5)(ii).

³ Respondents have, however, called to our attention a typographical error in paragraph 2 of the order to cease and desist. The word "Failing," which begins paragraph 2 of the order, should be deleted from that line and inserted as the first word in subparagraph (a) of paragraph 2. An appropriate order is annexed.

respondents and whose work may be unrelated to the sale of insurance. It does not. While the order addresses respondents' employees and representatives, and directs that they cease and desist from certain unlawful practices conducted on behalf of and for the benefit of the named respondents, liability for violations of the order (even by employees) is limited to the named corporate respondents, their successors and assigns.

Lastly, respondents urge upon us a due process objection, the essence of which seems to be an expression of their dissatisfaction with the administrative law process. In response, it will suffice to note that no allegations of actual or apparent impropriety have been made by respondents, and a review of the record reveals none. Each of the participants in an administrative law proceeding has well defined roles, none of which were transgressed here. For example, neither the Commission, nor any member thereof, investigated this case, acted as complaint counsel, or conferred with those who did after issuance of the complaint. The procedures undertaken in this matter were those established by the Administrative Procedure Act, 5 U.S.C. 500, *et seq.* See *FTC v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968). Accordingly, respondents' objection is without basis in law.

Complaint

92 F.T.C.

IN THE MATTER OF
AUSTRALIAN LAND TITLE, LTD., ET AL.

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

Docket C-2928. Complaint, Sept. 14, 1978 — Decision, Sept. 14, 1978

This consent order, among other things, would require a Los Angeles, Calif. seller of undivided interests in Australian land to cease advertising, selling, transferring, or collecting payments on such land. Additionally, the firm is required to return all payments received on or after July 1, 1977; pay property taxes and other charges levied against the tracts as they become due; and provide consumer redress to eligible parties.

Appearances

For the Commission: *Edward D. Steinman.*

For the respondents: *Foster G. Mori, Roush, Mori, Welch & Steiner*, Phoenix, Arizona for Australian Land Title, Ltd., *Miles W. Kirkpatrick, Caswell O. Hobbs, Morgan, Lewis & Bockius*, Washington, D.C. for Safeguard Industries, Inc. and *Daniel C. Smith, Arent, Fox, Kintner, Plotkin & Kahn*, Washington, D.C. for Morlan International, Inc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Australian Land Title, Ltd., Safeguard Industries, Inc., and Morlan International, Inc., corporations, (hereinafter referred to as respondents) have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its Complaint stating its charges in that respect.

PARAGRAPH 1. Respondent Australian Land Title, Ltd. (hereinafter sometimes referred to as "ALT") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, as of 1970, with its principal office and place of business located at 9060 Santa Monica Boulevard, Los Angeles, California. Prior to 1970 there was a predecessor California corporation which did business under the same name.

ALT or its predecessor until 1973 was engaged in the business of acquiring undeveloped land in Western Australia and contracting with representatives to advertise, offer for sale, and sell undivided