

IN THE MATTER OF
SEEKONK FREEZER MEATS, INC., ET AL.

Docket 8880. Interlocutory Order, September 21, 1990

ORDER

It is ordered, That this show cause proceeding is dismissed.
Commissioner Strenio dissenting.

OPINION OF THE COMMISSION

Per Curiam:

The Commission has reopened this matter to consider modifying our earlier decision and order, which found that respondents had violated the Truth-In-Lending Act and Regulation Z. Staff now urges that we find that respondents' conduct constitutes an unfair act or practice under Section 5 of the FTC Act. The issue presented is nearly identical to that posed by *Reliable Mortgage Corporation, et al.*, D. 8956, where, in an accompanying decision, the Commission finds the record insufficient to support the proposed modification. For similar reasons, we reject the arguments proffered here and dismiss this show cause proceeding.

I. Procedural History

On March 15, 1973, the Commission issued an order against Seekonk Freezer Meats, Inc. and its chief executive officer Lawrence Fontes ("Seekonk" or "respondents") for violations of Section 5 of the FTC Act, 15 U.S.C. 45, the Truth-In-Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.* and Regulation Z, 12 CFR 226, which implements TILA. *Seekonk Freezer Meats, Inc., et al.*, 82 FTC 1025 (1973) ("Seekonk"). The Commission found that respondents advertised certain credit terms without disclosing others in violation of Regulation Z's triggering term provision,¹ TILA and the FTC Act. *Seekonk*, 82 FTC at 1052.² The Commission's order, among other things,

¹ Regulation Z's triggering term provision currently appears at 12 CFR 226.24(c) (1981) (previously 12 CFR 226.10(d)(2)).

² Through advertising such as "only \$4.72 per week for 26 weeks" and "only \$3.30 per week for 52 weeks", respondents represented the amount of an installment payment, the number of installments and the period of repayment without also disclosing: (1) cash price; (2) amount of down payment required; (3) amount of finance charge expressed as an annual percentage rate; and (4) deferred payment price. *Seekonk*, 82 FTC at 1052.

prohibited respondents from stating any of Regulation Z's identified credit terms without stating all required terms. *Seekonk*, 82 FTC at 1059. Predicating its findings on TILA, Regulation Z and the FTC Act generally, the Commission did not determine that the violations constituted unfair or deceptive practices under Section 5 of the Federal Trade Commission Act.

On January 31, 1989, the Commission issued an order to show cause to respondents in this matter³ as to why the *Seekonk* proceeding should not be reopened and the order modified to clarify that the TILA violation constitutes an unfair and deceptive act or practice in violation of Section 5. *Seekonk*, D. 8880 (January 31, 1989) (Show Cause Order). Respondents failed to answer the show cause order.

Consequently, on September 25, 1989, the Commission issued an order reopening this proceeding and ordering the staff to file a brief addressing the proposed modification. *Seekonk*, D. 8880 (September 25, 1989) (Order Reopening Proceeding to Consider Modification of Decision and Directing Submission of Briefs). The Commission invited interested parties to submit amicus curiae briefs on the proposed revisions to the *Seekonk* decision.⁴ The staff filed their brief on January 2, 1990. No amici briefs were received.

II. Discussion

The issue presented is whether the credit advertising violation in *Seekonk*—advertising certain credit terms without disclosing other required terms—constitutes an unfair practice under Section 5 of the FTC Act.⁵ Staff advances two primary arguments in support of the proposed modification. First, staff claims that by enacting TILA, Congress determined that this practice is unfair. Second, staff argues that the TILA violation independently meets the unfairness criteria. These arguments are nearly identical to those presented in *Reliable*, where, in an accompanying opinion, we decline to adopt the proposed modification. *Reliable Mortgage Corporation et al.*, D.8956 (FTC Sept. 21, 1990), slip op. at 3-7. Although *Seekonk* involves a different credit advertising violation than *Reliable*, the same conclusions apply. First, we reject the argument that Congress' general concern with

³ On the same date, the Commission issued a similar show cause order against respondents in *Reliable Mortgage Corporation, et al.*, 85 FTC 21 (1975) ("*Reliable*"). *Reliable*, D.8956 (January 31, 1989) (Show Cause Order). Our opinion denying the proposed modification accompanies this decision.

⁴ 54 Fed. Reg. 47,826 (November 17, 1989).

⁵ The reopening order also invited proof on whether the violation was deceptive under Section 5. Staff declined to brief this issue.

unfair and misleading credit advertising practices amounts to a determination that a violation of TILA constitutes an unfair or deceptive act or practice under Section 5. Neither the statutory language nor the legislative history supports such an approach. *Reliable*, D.8956, slip op. at 3-5.

Second, we find the record insufficient to establish that a violation of Regulation Z's triggering term provision independently meets the unfairness criteria. A finding of unfairness requires evidence of substantial unavoidable consumer injury. *Orkin Exterminating Co., Inc.*, 108 FTC 263, 360 (1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 865 (1989).⁶ Staff claims that Seekonk's failure to disclose crucial credit terms obscured the true cost of credit and may have resulted in erroneous credit choices and unavoidable search costs. Br. at 15-16. But no evidence is cited in support.⁷

In short, absent a record with supporting evidence, we cannot find that *Seekonk's* failure to disclose was unfair. This is not to say that the practice might be deemed unfair in another case on a litigated record. We are simply reluctant to make new law in the context of a nonadversarial proceeding where the evidence is lacking.⁸

III. Conclusion

For the reasons set forth above, and in our accompanying opinion in *Reliable*, we find the record insufficient to support the proposed modification. Accordingly, we dismiss this show cause proceeding.

SEPARATE STATEMENT OF CHAIRMAN JANET D. STEIGER

I concur in the decision to dismiss this show cause proceeding, but reach that decision for different reasons than those stated by the Opinion of the Commission. My separate statement made in *Reliable Mortgage Corporation*, Doc. No. 8956, applies here as well.

⁶ The Commission considers: (1) how substantial the injury is; (2) whether the practice produces offsetting benefits that outweigh the injury; and (3) whether the consumers could have reasonably avoided it. *Orkin*, 108 FTC at 362; *International Harvester Co.*, 104 FTC 949, 1061 (1984).

⁷ At most, the record shows that Seekonk failed to disclose annual percentage rates as high as 21% and down payments from \$117.50 to \$42.50. Br. at 13-14. We have no way of ascertaining whether this omitted information in fact imposed substantial consumer injury.

⁸ In certain circumstances, "half-truths" may be deceptive under Section 5 of the FTC Act. See *International Harvester*, 104 FTC at 1057-58. Here, however, the record contains no evidence or findings to support a conclusion that Seekonk's partial disclosure constituted deception under Section 5.

CONCURRING OPINION OF COMMISSIONER DEBORAH K. OWEN

I agree with the result and the underlying analysis of the Majority Opinion in this matter. The observations made in my Concurring Opinion in *Reliable Mortgage Corporation*, Doc. No. 8956, apply here as well.

IN THE MATTER OF
RELIABLE MORTGAGE CORPORATION, ET AL.

Docket C-8956. Interlocutory Order, September 21, 1990

ORDER

It is ordered, That this show cause proceeding is dismissed.
Commissioner Strenio dissenting.

OPINION OF THE COMMISSION

BY CALVANI, *Commissioner*:

The Commission has reopened this matter to consider modifying our earlier decision and order, which found that respondents had violated the Truth-in-Lending Act and Regulation Z. Staff now urges that we find that respondents' conduct also constitutes an unfair or deceptive act or practice under Section 5 of the FTC Act. For the reasons discussed below, we reject the arguments advanced to support the proposed modification and dismiss this show cause proceeding.

I. Procedural History

On January 8, 1975, the Commission issued an order against Reliable Mortgage Corporation and its chief executive officer Edward Siegel ("Reliable" or "respondents") for violations of the Truth In Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.* and Regulation Z, 12 CFR 226, which implements TILA. *Reliable Mortgage Corporation, et al.*, 85 FTC 21 (1975) ("*Reliable*"). The Commission adopted the ALJ's finding that respondents advertised a mortgage interest rate without stating the annual percentage rate ("APR") in violation of Regulation Z. *Reliable*, 85 FTC at 25.¹ The final order, among other things, prohibited respondents from stating the rate of finance charge in a consumer credit advertisement without also disclosing the APR, as defined by Regulation Z. *Reliable*, 85 FTC at 26. Predicating its findings on TILA and Regulation Z, the decision did not hold that respondents had violated the Federal Trade Commission Act.

On January 31, 1989, the Commission issued an order to show

¹ When the Commission issued *Reliable*, this requirement was contained in 12 CFR 226.10(d)(1). It now appears at 12 CFR 226.24(b) (1981).