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).

cause to respondents in this matter[2] as to why the *Reliable* proceeding should not be reopened and the order modified to clarify that the TILA violation at issue also constitutes an unfair and deceptive act or practice in violation of Section 5. *Reliable,* D. 8956 (January 31, 1989) (Show Cause Order). Respondents failed to answer the show cause order.[3]

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. *Reliable,* D. 8956 (September 25, 1989) (Order Reopening Proceeding to Consider Modification of Decision and Directing Submission of Briefs).[4] The Commission invited interested parties to submit amicus curiae briefs on the proposed revisions to the *Reliable* decision.[5] The staff filed their brief on January 2, 1990. No amici briefs were received.

II. Whether the Practice is Unfair or Deceptive Under Section 5

Staff now urges the Commission to modify the *Reliable* decision to expressly state that the practice at issue, advertising a finance charge without stating the APR, is unfair and deceptive.[6] Staff advances two primary arguments in support of the proposed modification. First, staff claims that by enacting TILA, Congress determined that this practice is deceptive and unfair. Second, staff argues that the TILA

[2] On the same date, the Commission issued a similar show cause order against respondents in *Seekonk Freezer Meats, Inc., et al,* 82 FTC 1025 (1973) ("*Seekonk*"). The show cause order proposed to modify the *Seekonk* order to state that the TILA and Regulation Z violation at issue also constitutes an unfair or deceptive practice under Section 5. *Seekonk,* D. 8880 (January 31, 1989) (Show Cause Order).

[3] They did, however, informally reply by letter to FTC staff that Reliable had no objections to the proposed reopening. 54 Fed. Reg. 47,827 (November 17, 1989).

[4] The Commission issued a similar order reopening the *Seekonk* proceeding. *Seekonk,* D. 8880 (September 25, 1989). Our per curiam decision with respect to that matter accompanies this opinion.

[5] 54 Fed. Reg. 47826 (November 17, 1989).

[6] The Commission initiated this proceeding in response to an Eighth Circuit opinion holding that the Commission's failure in *Reliable, Seekonk,* and two other credit advertising cases to determine that the TILA violations also constitute unfair or deceptive practices under Section 5 of the FTC Act precluded their use as the basis for a civil penalty action under Section 5(m)(1)(B) of the FTC Act. *United States v. Hopkins Dodge Sales, Inc.,* 849 F.2d 311 (8th Cir. 1988).

Under Section 5(m)(1)(B) of the FTC Act, the Commission may seek civil penalties for any act or practice of a nonparty to a previous Commission proceeding finding such act or practice to be unfair or deceptive, only if: (1) the Commission determined the particular act or practice in question to be unfair or deceptive in a proceeding under Section 5(b) of the FTC Act, and then issued a final cease and desist order with respect to such act or practice; and (2) the defendant (nonparty to the previous proceeding) had actual knowledge of this determination and order. *Hopkins,* 849 F.2d at 314-15.

The fact of these modification proceedings suggests that no previous Commission decisions meet the first prerequisite with respect to the particular acts and practices at issue. If previous Commission decisions meet the first prerequisite, then the current proceedings may be unnecessary; the Commission could provide the required actual notice to prospective Section 5(m)(1)(B) defendants by furnishing such decisions. The staff has not addressed whether any such decisions exist. We base our opinion on the legislative history and the unfairness and deception standards as applied to the record in this proceeding.

violation independently meets the unfairness and deception criteria. Neither argument is convincing for the reasons discussed below.

A. Whether Congress Has Determined that the TILA Violation at Issue Constitutes Unfair or Deceptive Acts Or Practices Under Section 5 of the FTC Act

Staff argues that the express language of TILA and its legislative history demonstrate that Congress has already determined that the TILA violation in *Reliable* constitutes an unfair or deceptive practice under Section 5. Brief dated January 2, 1990 ("Br.") at 8-11. In essence, this contention relies on two related arguments. First, staff maintains that subsection 108(c) of TILA, 15 U.S.C. 1607(c), providing that "a violation of any requirement imposed under [TILA] shall be deemed a violation of a requirement imposed under the [FTC Act]," requires a finding that respondents' TILA violations breached some requirement of the FTC Act. Br. at 8. Second, staff claims that the only FTC Act "requirements" to which TILA logically can refer are Section 5's prohibitions against unfair or deceptive acts or practices. In staff's view, this latter conclusion flows directly from the Eighth Circuit's recognition in *United States v. Hopkins Dodge Sales, Inc.*, 849 F.2d at 314 ("*Hopkins*"), that the applicable FTC Act requirement is Section 5 (Br. at 8) and legislative history demonstrating that the prohibition against unfair or deceptive acts is the relevant Section 5 requirement. Br. at 9-10. We are unpersuaded for several reasons.

First, subsection 108(c)'s express language and apparent purpose fail to support staff's interpretation. Staff selectively quotes only a portion of the relevant language. The entire sentence makes clear that a violation of TILA is deemed a violation of the FTC Act for procedural purposes—so that the FTC may invoke all of its functions and powers under the FTC Act in enforcing TILA violations. Thus, the entire sentence states:

> [F]or the purpose of the exercise by the FTC of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act (emphasis added).

This reading of the sentence is confirmed by its context. Reading subsection 108(c) as a whole discloses Congress' intent to provide the Commission with authority for using FTC Act powers and procedures,

including the power to seek civil penalties, against TILA violations. If further confirmation were needed, it is provided by the full context: the other parts of Section 108. Like subsection 108(c), subsections 108(a) and (b) allow other agencies with responsibilities under TILA to invoke, for enforcement purposes, the procedures set forth in their respective statutes. 15 U.S.C.s 1607(a), (b).[7]

TILA's legislative history does not contradict this interpretation. The legislative history of subsection 108(c), which would be most relevant, in fact confirms it. *See, e.g.*, H.R. 1040, 90th Cong., 1st Sess. 18, 30 (1968), *reprinted* in 1968 U.S. Code Cong. & Admin. News 1962, 1976 and 1988 (Section 207 of House Bill (renumbered Section 108 in conference substitute) establishes administrative enforcement procedures and permits agencies to invoke their own statutory procedures). To be sure, there are passages from certain reports and debates that could illustrate a general intent to prevent unfairness and deception. *See* Br. at 9-10. Although the cited passages demonstrate a concern with certain misleading or unfair credit advertising practices, this does not amount to a determination that violating TILA constitutes an unfair or deceptive practice under Section 5.

Moreover, other consumer credit statutes enacted after TILA specifically provide that a violation constitutes an unfair or deceptive practice. *See, e.g.*, the Fair Credit Reporting Act, 15 U.S.C. 1681*s*(a); and the Fair Debt Collection Practices Act, 15 U.S.C. 1692*l*(a). Since TILA is part of this overall statutory scheme, staff argues that it should be construed similarly. Br. at 11, n. 8. On the contrary, Congress' failure to include such language in TILA, in contrast to the other credit statutes, is dispositive.

B. Whether The Practices At Issue Meet The Deception And Unfairness Criteria

Does application to the record evidence of the legal criteria for finding deception and unfairness independently support a finding that Reliable's practices were deceptive or unfair in violation of Section 5?

1. Deception

Staff claims that Reliable's practice of advertising an interest rate

[7] We disagree that the Eighth Circuit "recognized" that TILA violations constitute unfair or deceptive practices under Section 5 of the FTC Act. Br. at 8. Rather, in observing that subsection 108(c) incorporates by reference the same "remedial procedures" as Section 5, the Eighth Circuit confirms that subsection 108(c) is a procedural rather than substantive provision. *Hopkins*, 849 F.2d at 314. Were it otherwise the Court of Appeals should not have affirmed the district court's order since violation of TILA would have constituted a violation of Section 5 of the FTC Act as a matter of law.

of 8.5% without also disclosing the APR of 11.93% meets the deception standard.[8] Since the APR includes all charges (buyer's points, mortgage insurance, loan origination fees and other costs), a rate that omits these charges understates the true cost of credit and suggests that the advertised rate is the APR. Br. at 13. Therefore, the omission of the APR is a deceptive act proscribed by Section 5 of the FTC Act.

The Commission has two options. First, it could conclude that advertising an interest rate, without stating the APR, is—as a matter of law—deceptive.[9] Under certain circumstances, the Commission may determine without extrinsic evidence that an advertisement conveys a particular claim and is misleading. *See, e.g., Thompson Medical Co.*, 104 FTC 648, 788-89 (1984). However, we are reluctant to do so in the absence of an adversarial proceeding where the issues have been joined. Second, the Commission could determine, on the basis of the record, that staff has proved that advertising an interest rate without stating the APR is deceptive. Unfortunately, no such record exists in this case. There is simply no supporting evidence from which we can conclude that consumers were in fact misled by the advertising in question. Nor can we resolve whether consumers believed that the advertised rate represented the APR. In short, absent a record with supporting evidence, we cannot find that Reliable's practice was deceptive.

2. Unfairness

Staff's unfairness argument fails for similar reasons. Unfairness requires a finding of substantial unavoidable consumer injury. *Orkin Exterminating Company, Inc.*, 108 FTC 263, 360 (1986).[10] Once again we refuse to find the practice at bar unfair as a matter of law in an uncontested proceeding.

And, again, the record is bare. Staff's entire unfairness analysis rests on unsupported assumptions that Reliable's advertisements created substantial unavoidable injury. Br. at 17-18.[11] By contrast,

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[8] The Commission will find deception if there is a material representation, omission or practice that is likely to mislead consumers acting reasonably. *Cliffdale Associates, Inc., et al.*, 103 FTC 110, 165 (1984).

[9] Thus, should Congress repeal TILA, the use of an interest rate without stating an APR as in this case would nonetheless remain illegal under Section 5 of the FTC Act.

[10] The Commission considers: (1) how substantial the injury is; (2) whether the practice in question 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).

[11] Staff's use of the word "may" illustrates the speculative nature of its argument. For example, in describing the injury caused by Reliable's practices, staff states that understating the true cost of credit would be "likely" to cause serious injury because: consumers "may" not learn the true cost of credit until locked into

(footnote cont'd)

the records in both *Orkin* and *International Harvester* contained substantial evidence to justify the Commission's conclusions. For example, in *Orkin*, respondent's practices affected over 200,000 consumers and imposed financial costs of $7.5 million. *Orkin*, 108 FTC at 362. Similarly, *International Harvester* involved serious physical injury, including death and severe disfigurement. *International Harvester*, 104 FTC at 1064.[12]

To summarize, on this record we are unable to conclude that Reliable's practices independently satisfy the deception and unfairness criteria. This is not to say that the practices might meet these standards 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.

III. Conclusion

For the reasons set forth above, 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 in the Opinion of the Commission.

It has been the Commission's longstanding and well publicized view that certain violations of Regulation Z and the Truth in Lending Act (TILA)[1]—such as stating an interest rate in a consumer credit advertisement without specifying the annual percentage rate for the financing, and advertising of certain credit terms without stating other terms—are unfair and deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act (FTCA).[2] In 1975, pursuant to Section 5(m)(1)(B) of the FTCA,[3] the Commission issued its first synopsis stating that certain violations of the TILA are unfair and deceptive acts or practices: Credit Advertising Practices—Synop-

a loan; they "may" lose opportunities for more favorable credit terms; and they "may" incur costs in applying for credit based on a non-APR rate. *See* Br. at 17.

[12] Staff suggests that specific findings may be unnecessary where Congress has already determined the practices are unfair. Br. at 19. However, the absence of express statutory language or persuasive legislative history demonstrating this "congressional determination" counsel against taking this approach.

[1] 15 U.S.C. 1601 *et seq.*

[2] 15 U.S.C. 45(a).

[3] 15 U.S.C. 45(m)(1)(B).

sis of FTC Determinations. The synopsis was later amended to track the 1980 TILA amendments.[4] The Commission based its substantial credit advertising law enforcement program on these synopses. As a result, in the past 15 years, the Commission has secured over 25 consent judgments, and has imposed civil penalties of more than $1.29 million dollars for credit advertising violations.

In 1988, the U.S. Court of Appeals for the Eighth Circuit held that the synopsis was flawed because the Commission had not directly determined that the TILA violations in the cases underlying the synopsis were also unfair and deceptive acts or practices in violation of Section 5(a) of the FTCA.[5] Therefore, civil penalties could not be awarded. In an attempt to address this determination, the Commission began this show cause proceeding pursuant to Section 3.72 (b) of its Rules, which provides a mechanism for the Commission to reopen a proceeding after a decision has become final, by issuing an order to show cause, and thereafter modify an existing order.[6]

In this show cause proceeding, the Commission staff proposed modifications of the order against *Reliable Mortgage* that would clarify the Commission's determinations and expressly state that Reliable's violations of Regulation Z and the TILA also constituted unfair or deceptive practices in violation of Section 5(a) of the FTCA. Despite the Commission's best efforts, the respondents failed to answer the show cause order and failed to submit a brief in opposition to the proposed modifications.[7] In addition to serving the respondents, Federal Register Notices were twice published requesting comments and amicus curiae briefs from interested parties,[8] but none were received.

The Commission's Rules of Practice for show cause proceedings specifically address a default situation by providing that the Commission may, in its discretion, decide the matter on its own. Section 3.72(b)(1) provides that "[a]ny person not responding to the order

[4] Truth in Lending Simplification and Reform Act of 1980 (Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, 94 Stat. 168.)

[5] *United States v. Hopkins Dodge, Inc.*, 849 F.2d 311 (8th Cir. 1988). There could be an historical explanation for the Commission's failure to do so. At the time the decisions underlying the synopsis were rendered, Section 5(m)(1)(B) had not yet been enacted, so there was no need to include Section 5(a) allegations.

[6] 16 CFR 3.72(b) (1990).

[7] The respondents were properly served when the Commission issued the show cause order and again when the Commission reopened the proceedings and requested the submission of briefs. The individual respondent in *Reliable* informally responded that he had no objections to the Commission's proposed changes, but no formal response was received.

[8] 54 Fed. Reg. 7294 (February 17, 1989) and 54 Fed. Reg. 47826 (November 17, 1989).

within the time allowed may be deemed to have consented to the proposed changes." Consequently, as a general rule, the failure to respond to a show cause order does not preclude Commission action. Thus, I do not believe, as the Commission's Opinion might be read to suggest, that without respondents' participation, the Commission cannot determine that certain conduct is, as a matter of law, unfair or deceptive.

I join in dismissing the show cause proceeding, however, because in my view the record before us is not sufficient to support a determination, as a matter of law or fact, that the practices at issue are deceptive or unfair. I am concerned that a court would decline to hold that a determination made on the basis of this record could provide a basis for civil penalty actions brought under Section 5(m)(1)(B).

I am nevertheless concerned that the Commission's opinion could be read to hold that before a finding of deception can be made, it must be shown that consumers were in fact misled by the advertising at issue. (*See* Opinion of the Commission at 6.) The Commission never has had the burden of proving actual deception. Initially, Commission cases applied a "tendency or capacity" to mislead or deceive standard which more recently evolved into the "likely to mislead" standard embodied in the 1983 Deception Policy Statement. In either event, as the 1983 Statement makes clear, "The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception."[9] The Commission's opinion has advanced no reason to reverse the Commission's more than 50-year precedent of not requiring a showing of actual deception, and I therefore dissent from that portion of the opinion.

In conclusion, this proceeding involves a very important area of the FTC's consumer protection program—the prevention of deceptive credit advertising throughout the nation. As a result of the court's decision in *Hopkins Dodge*, the FTC's enforcement ability has suffered a significant setback. This show cause proceeding by the Commission was an attempt to cure the legal problem delineated by the Court of Appeals, and it is with great reluctance, for the reasons set forth above, that I concur in the decision to dismiss this proceeding. However, I commend the staff for their efforts, and emphasize my commitment to seeking other solutions to this problem

[9] Commission Deception Statement, *Cliffdale Associates, Inc.*, 103 FTC 110, 176 (1984).

so that the FTC can continue to be an effective law enforcement agency in the credit advertising area.

CONCURRING OPINION OF COMMISSIONER DEBORAH K. OWEN

I agree with the result and the underlying analysis of the Majority Opinion in this matter. In this concurring statement, I wish to offer a few additional observations.

Neither the plain language of the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.*, nor its legislative history clearly supports a finding by this Commission that the Congress intended a violation of TILA to be "unfair" or "deceptive" *per se* for purposes of determining whether Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, has been violated. Nothing in TILA expressly provides that violations thereof are necessarily "unfair" or "deceptive," and the wording of Section 108(c) of that Act is simply too susceptible of other interpretations to justify jumping to such a conclusion.

The legislative history on this issue is indeed scanty, but does seem to provide some support for the view that Section 108 of TILA, regarding administrative enforcement, was added in the later stages of the legislative process merely as a procedural and jurisdictional enhancement to enforcement of the statute.[1] Furthermore, there is no definitive indication in that legislative history that Congress consciously intended to declare that any violation of TILA's affirmative disclosure requirements automatically meets the criteria for a finding of unfairness or deception under Section 5. The legislative history is mixed. On one hand, several legislators referred to certain practices that prompted passage of TILA as "unfair" and fraudulent.[2] On the

[1] The Conference Report of May 20, 1968, contains very limited reference to the administrative enforcement provision, acknowledging that the bill then being considered "also provided for administrative enforcement by the Federal Trade Commission as to businesses generally...." H. Rep. No. 1397, 90th Cong., 2d Sess. 24. The most lengthy reference to this provision in the Report states:

> Section 108 of the conference substitute clarifies the legislative intention that the vesting of sole rulemaking power under title I in the Board of Governors of the Federal Reserve System does not impair the authority of the other agencies having administrative enforcement responsibilities to make rules respecting their own procedures in enforcing compliance. It also makes clear that, except for the exclusions specifically stated in the section, the jurisdiction of the Federal Trade Commission is plenary and attaches to any creditor subject to the title, irrespective of whether the creditor meets any jurisdictional test in the Federal Trade Commission Act.

Id. at 26 (emphasis added). This arguably supports a statutory interpretation that Congress may have intended Section 108(c) to be purely a procedural and jurisdictional provision, which would not increase the substantive liability imposed under the statute. Further, this passage buttresses the argument advanced in the Majority Opinion with respect to the context created by the other subsections of Section 108.

[2] *See, e.g.*, statements quoted in Proposed Modification to Decision and Supporting Brief [hereinafter "Brief"] at 8-10; *see also, Consumer Credit Labeling Bill: Hearings on S. 2755 Before the Subcomm. on*

(footnote cont'd)

other hand, the legislative history suggests that Congress' primary purposes in enacting TILA may have been regulatory: to establish a uniform system of advertising credit in order to eliminate "confusion;" to "permit consumers to compare the cost of credit among different creditors and to shop effectively for the best credit buy;" and to prevent the deceptive practices of "some unscrupulous creditors."[3] The Report of the Senate Committee on Banking and Currency emphasized that the proponents of the legislation:

> ...[do] not imply or infer that most creditors have been deliberately untruthful. The bill contains no assumptions that consumer credit is bad or that the vast majority of those who extend consumer credit are engaged in deceitful practices.[4]

The vagueness of the language in TILA and its surrounding legislative history stands in marked contrast to Congress' subsequent, clear expressions that violations of some other credit practices laws *ipso facto* constitute unfairness or deception for purposes of the FTC Act.[5] There are several possible explanations for the differences.[6] They may be the result of method; or they may be attributable to inartful drafting, an understandable inability to foresee every potential interpretation of the language by those outside the legislative process, or even happenstance.[7] In light of the clear variations in Congressional approach to this issue among the various acts, this Commission would be overstepping its bounds if it were to unilaterally

Production and Stabilization of the Senate Comm. on Banking and Currency, 86th Cong., 2d Sess. 16 (1960) [hereinafter "Hearings"] (Memorandum from Sen. Paul H. Douglas to Cosponsors of S. 2755) ("... Because of the widespread use of misleading and deceptive methods of stating the price of credit, ordinary citizens find it difficult to make meaningful comparisons and therefore intelligent choices of the various credit terms offered to them.") While many discussants of the legislation in 1967 and 1968 did not appear to use the terms "unfair" and "deceptive" as terms of art under the FTC Act, Senator Douglas' 1960 Memorandum cites with approval certain FTC actions and principles as "excellent guidelines for the truth-in-lending legislation we have put forward...." *Hearings* at 21-22. Senator Douglas' Memorandum is somewhat at odds with certain statements made by TILA's managers at the time of passage eight years later. *See* notes 3 & 4 and accompanying text *infra*.

[3] *See, e.g.*, S. Rep. No. 392, 90th Cong., 1st Sess. (1967) *passim* and at 1-3. The Committee also noted that differing disclosure practices "[i]n large part ... have arisen out of historical circumstances" and that requiring a uniform method of disclosure would alleviate the competitive disadvantage that any one segment of the industry might suffer if it attempted to "reform itself by disclosing the simple annual rate." *Id.* at 3.

[4] *Id.* at 2 (emphasis added).

[5] *See, e.g.*, the Fair Credit Reporting Act, 15 U.S.C. 1681s (1970), and the Fair Debt Collection Practices Act, 15 U.S.C. 1692*l*(1977); *but see*, the Equal Credit Opportunity Act, 15 U.S.C. 1691c (1974) (tracking the TILA language).

[6] I am unaware of any explanatory Congressional history surrounding the passage of any of the acts cited in note 5 *supra*.

[7] Later amendments to TILA would have been logical vehicles for correcting any unintended discrepancy, but no such change was made. *See, e.g.*, Pub. L. No. 93-495, 88 Stat. 1500 (1974); Pub. L. No. 94-222, 90 Stat. 197 (1976); Pub. L. No. 94-240, 90 Stat. 257 (1976); Pub. L. No. 96-221, 94 Stat. 132 (1980).

attempt to conform them on a question of such moment. In the face of what little enlightenment is available to us in the legislative history, we should not presume that the differences are meaningless.

In sum, the proscriptions of TILA and Regulation Z, 12 CFR 226, which implements it, are many, varied and often complicated. Although the Commission might very well find, on an adjudicated record, that specific violations of one or more provisions are unfair or deceptive under the Federal Trade Commission Act, I cannot conclude on the basis of the evidence available that Congress intended all violations of TILA and Regulation Z to be unfair and deceptive simply because it gave the FTC certain powers to enforce the TILA.

Having found the plain language of the statute and the legislative history insufficient to support an automatic finding of unfairness or deception, I turn to the question of whether a review of Reliable's actions gives me reason to believe that they were unfair or deceptive under Section 5 of the Federal Trade Commission Act, and that such a finding would be in the public interest. This is a question that I cannot fairly answer, because the factual record is simply too bare with respect to certain basic elements of unfairness and deception identified in the Majority Opinion. Theories are useful and case precedents are important, but in the end, they can be hollow in the absence of evidentiary support related to a specific case. In this matter, there are no current adjudicated findings of fact,[8] nor any stipulated finding of facts[9] on the factual issues identified in the Majority Opinion. I appreciate the arguments that staff has proffered for finding that the actions of Reliable were unfair and deceptive. Nevertheless, I do not believe that the Commission should make such findings in this context; I would prefer to make them on a more complete factual record.[10]

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[8] The Commission clearly has the authority to issue an adjudicated decision, or an order reopening and modifying a decision, even if the respondents do not contest the proceeding. Commission Rules 3.51(a), 3.72, 16 CFR 3.51(a), 3.72 (1990). Here, the absence of a formal contest by the respondent is not by itself dispositive as to whether the Commission, in its discretion, should modify the order. Respondent's silence is relevant because it comes in the context of an otherwise scant record on certain elements of unfairness and deception, as discussed in the Majority Opinion. Had more factual evidence been available from the record, the failure of the respondents to reply would have been less significant, in my judgment. Accordingly, our action here should not be construed to prevent the Commission from modifying orders in appropriate, uncontested cases.

[9] Section 3.25(g) of the Commission's Rules provides for settlement through the adjudicative process on the basis of an admission answer, or stipulated facts and an agreed order.

[10] I do not reach the question of whether, in light of the motives outlined in the staff Brief (at 21-26), an action against the individual respondent in this matter might constitute an abuse of discretion by the Commission.

IN THE MATTER OF

RECKITT & COLMAN PLC

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3306. Complaint, Sept. 26, 1990—Decision, Sept. 26, 1990

This consent order allows, among other things, a London, England corporation to acquire the Boyle-Midway Division of American Home Products Corp., but requires respondent to divest its own rug-cleaning products business to a Commission-approved acquirer, within eight months, and to comply with all terms of the Hold Separate Agreement. In addition, for ten years, respondent is required to obtain prior Commission approval before acquiring any interest in any company that manufactures or sells rug cleaning products in the U.S.

Appearances

For the Commission: *Robert W. Doyle, Jr.* and *Steven A. Newborn.*

For the respondent: *Allen T. Maulsby, Cravath, Swaine & Moore,* New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Reckitt & Colman plc, a corporation subject to the jurisdiction of the Federal Trade Commission, proposes to acquire the Boyle-Midway Division of American Home Products Corporation, a corporation subject to the jurisdiction of the Federal Trade Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For the purposes of this complaint the following definitions apply:

1. *Reckitt & Colman plc ("R&C")* means Reckitt & Colman plc, a corporation organized, existing, and doing business under and by

virtue of the laws of England, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships, and joint ventures. The words "subsidiary", "affiliate" and "joint venture" refer to any firm in which there is partial (10 percent or more) or total ownership or control between corporations.

2. *American Home Products Corporation ("AHP")* means American Home Products Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, its directors, officers, employees, agents and representatives, its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, employees, agents and representatives of its domestic and foreign parents, predecessors, successors, assigns, divisions, subsidiaries, affiliates, partnerships and joint ventures.

3. *"Boyle"* means the Boyle-Midway Division of AHP, which includes four corporations, directly or indirectly, wholly-owned by AHP, with their principal offices at 685 Third Avenue, New York, New York: Boyle-Midway, Inc., and Boyle-Midway Household Products, Inc., both of which are organized and doing business under the laws of Delaware; Boyle-Midway Puerto Rico, Inc., organized and doing business under the laws of Puerto Rico; and Boyle-Midway Subsidiary Corporation, which is organized and doing business under the laws of Nevada.

4. *"Rug cleaning products business"* means the business of formulating, manufacturing, marketing, and selling home rug cleaning products, either in liquid form or applied by aerosol or pump spray, and sold primarily in grocery and general merchandise stores.

II. The Respondent

5. Respondent R&C is a corporation organized and existing under the laws of England, with its offices and principal place of business at One Burlington Lane, London, England W4 2RW. R&C does business in the United States through its wholly owned subsidiary, Reckitt & Colman Inc., a corporation with its offices and principal place of business at 1655 Valley Road, Wayne, New Jersey.

6. For purposes of this proceeding, R&C is, and at all times relevant