Office of Commissioner
Rebecca Kelly Slaughter

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

Regarding FTC v. Progressive Leasing
Commission File No. 1823127
April 20, 2020

Like many parents, I am facing an uncertain amount of time with my kids at home right now, trying to tackle a new universe of distance learning. Many American families are trying to figure out how to provide their kids with the devices they need to keep up with their schoolwork. Some can afford to pay for a new device—say, one that costs $200—either in cash or on a credit card. That is a position of privilege, but a commitment to providing one's children with educational tools is not reserved for the wealthy. Families with less financial flexibility still want to provide their kids a device for online learning, but may not have $200 cash on hand, especially not right now, and may not have access to a credit card or in-store financing. Good news: They can still buy the same device, at the same store, and pay it off over time! But it will cost them $495 instead.[1]

When we talk about economic inequality and the growing, persistent financial insecurity of low- and middle-income families in this country, the specific causes can be complex. From income inequality and the lack of equal access to traditional financial institutions to oversold narratives about merit-based upward mobility, the reasons abound. But here is an easy one: financing practices that allow the privileged to pay one price for standard household goods while those struggling pay double. That is why advocates for civil society groups and lower-income consumers are broadly united in condemning the predatory practices of the rent-to-own industry.[2]

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[1] *See* Abha Bhattarai, *A Best Buy Program Is Doubling the Price of Items for Some Customers*, Wash. Post (Feb. 27, 2020), https://www.washingtonpost.com/business/2020/02/27/best-buy-program-gets-shoppers-pay-twice-list-price-big-ticket-items/. And this scenario is disturbingly common—forty-five percent of rent-to-own (RTO) transactions involve consumer electronics. *See* National Consumer Law Center et al., Comment Letter In the Matter of Rent-to-Own Store Swaps, FTC File No. 191-0074, at 5 (Mar. 20, 2020), https://www.regulations.gov/document?D=FTC-2020-0020-0002. My colleagues at the FCC have been vocal in highlighting the ways in which the coronavirus has exposed the perils of the digital divide in this country, with their focus primarily on broadband access. *See Review of the FY2021 Budget Request for FCC: Hearing Before the Subcomm. on Financial Services and General Government of the S. Comm. on Appropriations*, 116th Cong. (2020) (Statements of Comm'rs Jessica Rosenworcel & Geoffrey Starks, Fed. Commc'ns Comm'n), https://www.appropriations.senate.gov/hearings/review-of-the-fy2021-budget-request-for-the-fcc. They are, of course, absolutely correct in their concerns. But the gap between the haves and the have-nots in America is being laid bare in other ways during this time as well. Access to fairly priced goods is one of them.

[2] *See, e.g.*, National Consumer Law Center et al., *supra* note 1, at 2 (representing the views of the National Consumer Law Center on behalf of its low-income clients as well as Consumer Action, Consumer Federation of America,

The Commission is filing a federal court complaint and proposed stipulated order against Progressive Leasing ("Progressive"), which provides "lease-to-own" payment plans to consumers who are shopping at traditional brick-and-mortar stores and looking to buy goods such as furniture, computers, appliances, mattresses, and phones. Progressive lured consumers into unconscionable lease-to-own contracts with deceptive representations: "90 days same as cash!" This claim was false. In fact, most consumers paid significantly more than the item's cash price, and far too many consumers paid *twice* the cash price. Because these installment contracts are structured as "rent-to-own" rather than traditional credit financing, they do not trigger most state's usury laws, even though their functional interest rates amount to well over 100%.[3] At almost every turn, this $8.5 billion industry escapes regulatory oversight.[4]

FTC staff investigated this pernicious conduct and ultimately negotiated today's settlement that provides significant relief to those whom Progressive victimized: $175 million. Staff's comprehensive investigation and aggressive negotiation are commendable. The conduct here, however, is so egregious and its cumulative impact on families so corrosive that I do not believe the complaint and order are sufficient. For these reasons, I respectfully dissent.

In analyzing the Progressive complaint and order, I considered whether it adequately remediates harm and whether it achieves both specific and general deterrence.[5] I found that the complaint and order came up short in three areas: (1) the monetary relief does not adequately remediate harm; (2) the lack of individual accountability diminishes the order's specific and general deterrence; and (3) the FTC's failure to charge the full range of law violations in its complaint is a failure to maximize general deterrence.

National Association of Consumer Advocates, National Consumers League, Open Markets Institute, and U.S. PIRG, and describing the ways in which "RTO transactions are plagued by unfairness and deception").

[3] Usury laws limit the amount of interest that lenders charge on loans and other lines of credit, but,because rent-to-own contracts have a different structure than most debt instruments, usury laws often do not apply. *See, e.g., Blair v. Rent-A-Center, Inc.*, No. C 17-02335 WHA, 2019 U.S. Dist. LEXIS 21988 (N.D. Cal. Feb. 11, 2019) (finding that a rent-to-own contract did not constitute a lease and so was not subject to California's usury law). Only in a few, limited examples have states allowed usury laws to cover rent-to-own contracts. *See Perez v. Rent-A-Center, Inc.*, 892 A.2d 1255 (N.J. 2006). Most states instead carve out rent-to-own contracts from consumer protection laws, thereby enabling these usurious rates. Brian Highsmith & Margot Sanders, Nat'l Consumer Law Center, *The Rent-to-Own Racket: Using Criminal Courts to Coerce Payments from Vulnerable Families*, at 6 (Feb. 2019), https://www.nclc.org/images/pdf/criminal-justice/report-rent-to-own-racket.pdf.

[4] Federal statutes provide no better protection than state laws: Rent-to-own contracts also fall outside federal laws that are designed to require clear and conspicuous disclosures to consumers about payment terms and total cost, such as the Truth in Lending Act and the Consumer Leasing Act.

[5] As I laid out in detail in my dissenting statement in *FTC v. Facebook*, the FTC uses its law enforcement authority to achieve two goals: remediate harm and deter future law violations. If a defendant will not agree to terms that adequately remediate harm and deter future law violations both specifically and generally, the Commission should reject the proposed settlement and vote instead to litigate. Dissenting Statement of Comm'r Rebecca Kelly Slaughter, In the Matter of *FTC v. Facebook* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf.

Monetary Relief

From 2016 to 2018, Progressive's revenues exceeded $4.5 billion.[6] We know that Progressive's deceptive conduct began as early as 2016 and continued until at least August 2019.[7] We also know that in 2018 Progressive conducted a review of its retailers and found that 18% of them used the false claim "90 Days Same as Cash" in their marketing.[8] Finally, we know that most consumers who signed up for Progressive's financing did so through an online application platform that emphasized the store's cash price, hid the total price a consumer would ultimately pay, and was programmed to auto-scroll past key disclosures to a final signature line.[9]

By law, the FTC is entitled to seek the total amount Progressive charged consumers over the cash price—an amount that would well exceed one billion dollars.[10] Calculations of harm that seek to depart significantly from total revenue may effectively incentivize law violations by failing to include a deterrent value. The law, however, is clear: When you deceive consumers, you are presumptively on the hook for the total amount you collected in connection with the deception.[11] Taken together, the facts and the law are more than sufficient for me to conclude that $175 million falls far short of the injury Progressive inflicted upon consumers.

Individual Accountability

In evaluating a proposed settlement, the combined terms must address harm and achieve specific and general deterrence of future law violations. In this matter, I believe the proposed monetary relief by itself will neither adequately remediate harm nor incentivize future compliance. Monetary relief, however, is only one part of a proposed settlement and is certainly not the only

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[6] *See Aaron's, Inc. Reports Fourth Quarter and Year End 2017 Results*, PRNewsWire.com (Feb. 15, 2018), https://www.prnewswire.com/news-releases/aarons-inc-reports-fourth-quarter-and-year-end-2017-results-300599225.html; *Aaron's, Inc. Reports Fourth Quarter Results and Provides 2019 Annual Outlook*, PRNewsWire.com (Feb. 14, 2019), https://www.prnewswire.com/news-releases/aarons-inc-reports-fourth-quarter-results-and-provides-2019-annual-outlook-300795478.html. The monetary relief that Progressive agreed to pay is a tiny fraction of that amount, less than 4%.

[7] *See* Compl. ¶¶ 34, 51.

[8] *Id.* ¶ 21.

[9] *See id.* ¶¶ 26–38.

[10] In this case, the FTC alleges that Defendant misrepresented that consumers would pay the cash price to purchase the merchandise. *See id.* ¶¶ 55–56. The FTC is entitled to seek restitution in the total amount of the defendant's unjust gain, which is measured by "the defendant's net revenues, not the defendant's net profits." *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 427 (9th Cir. 2019) (quoting *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016)). Thus, in this case, the FTC would be entitled to seek the total amount Progressive charged consumers over the cash price. *See, e.g.*, *FTC v. AMG Servs.*, No. 2:12-cv-00536-GMN-VCF, 2016 WL 5791416, at *12–13 (D. Nev. Sept. 30, 2016), *aff'd*, 910 F.3d 417 (9th Cir. 2019) (defendants represented that their payday loans would cost one finance charge, but charged most consumers multiple finance charges; the district court ordered, and the Ninth Circuit affirmed, monetary relief at summary judgment in the full amount that all consumers paid above the stated loan cost—$1,317,753,577).

[11] There is a "two-step burden-shifting framework . . . for calculating restitution awards under § 13(b)." *Commerce Planet*, 815 F.3d at 603. The FTC must first set forth a reasonable approximation of restitution. *See id.* "If the FTC makes the required threshold showing, the burden then shifts to the defendant" to show that the approximation is overstated. *Id.* at 604. "Any risk of uncertainty at this second step fall[s] on the wrongdoer whose illegal conduct created the uncertainty." *Id.* (internal quotation marks omitted).

way to achieve specific and general deterrence. Another way in which a settlement can have a significant deterrent effect is if it effectively increases corporate accountability. Where the facts provide a legal basis to do so, naming senior leaders in a complaint and including them as parties to a consent order can go a long way towards increasing accountability and achieving a deterrent effect.[12]

To establish individual liability, the FTC must show that the individual defendant participated directly in the illegal practices or had authority to control them. Based on the facts uncovered in our investigation, I believe that Progressive's CEO met this legal standard. In many cases, we have facts that support naming an individual executive, but the decision to do so is fact- and case-specific and subject to discretion. Sometimes I have supported settlements that do not name an individual, even where I thought doing so would be appropriate, because the totality of the settlement terms convinced me that the FTC was achieving general and specific deterrence. The scope of the total settlement and the facts of this case simply do not support the Commission's decision to excuse Progressive's CEO.

In considering whether naming senior leaders is necessary for a settlement to achieve specific and general deterrence, I am particularly interested not only in the evidence of the leaders' involvement and knowledge but also in the extent to which the alleged law violations permeated a core aspect of the business and whether the corporate culture is one of compliance. In this matter, Progressive's deceptive tactics, as well as its reliance on charging a significant subset of its customers two times the value of basic consumer goods, was not a small or hidden part of its business—it was the entire business model. Progressive was well aware that its tactics were deceptive; it received tens of thousands of complaints from consumers who were misled about Progressive's terms and charges.[13] Even some retailers flagged concerns.[14] And the deception was carried on through multiple aspects of Progressive's business: sales training, marketing, and the application and agreement. In sum, the facts in this case lead me to conclude that the wrongdoing permeated the business such that there is no basis upon which to excuse senior leaders.[15]

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[12] My colleague, Commissioner Wilson, worries that "routinely" imposing individual liability might arise from a source "of personal vindictiveness and vilification of successful businessmen" and not a desire to obtain effective relief. I disagree. Enforcing the law is not personal, nor is the FTC's exercise of every lever to ensure that future law violations are rare—not routine.

[13] *See* Compl. ¶¶ 47–48.

[14] *See id.* ¶ 51.

[15] Commissioner Wilson offers a different view of how facts might weigh in favor of or against naming an individual senior leader, and she emphasizes that facts demonstrating CEO engagement and compliance efforts should weigh against naming an individual. While I certainly consider such facts, engagement and efforts cannot erase outcomes. Where significant law violations continue unabated until intervention from law enforcement, I find it difficult to credit subsequent "compliance initiatives" such that they universally erase the need for binding accountability. Further, I do not share Commissioner Wilson's concern that holding leaders accountable might send a message to CEOs that they are better off disengaged. The argument that some leaders would seek to avoid liability by avoiding knowledge is not new and is not persuasive. The legal concept of knowledge includes reckless indifference or intentional avoidance of the truth; in other words, leaders cannot avoid responsibility by willfully turning a blind eye to bad acts. I am also unpersuaded by the argument that increased accountability will deter conscientious individuals from serving as CEOs at risky firms. If adding liability risk created the disincentive Commission Wilson posits, we would expect to see substantial evidence of firms struggling to fill executive roles in the wake of Sarbanes Oxley, which imposes significant accountability on CEOs and CFOs; I have not seen such evidence.

Finally, I consider whether the proposed settlement will significantly alter corporate culture such that the defendant is deterred from future law violations without individual accountability. Progressive's parent company, Aaron's Inc., has been the subject of two prior FTC actions within the last seven years.[16] This history raises concerns for me about the corporate culture and the ability of our order to effect specific deterrence against future law violations if we fail to impose individual accountability for senior leadership.

Underpleading Diminishes General Deterrence

Whenever the Commission files a complaint, we have an opportunity to send a signal to industry regarding what conduct we consider to be a law violation. When a complaint is paired with a proposed settlement that will resolve the matter, how we plead the complaint can advance our enforcement goal of general deterrence. Often the same underlying conduct constitutes multiple law violations. But the FTC does not always charge defendants with the full range of law violations that arise from the same body of facts. I believe we should.[17]

In this action, Progressive's failure to disclose material terms of the payment arrangement, including the total price and number of payments, not only violated Section 5 of the FTC Act but also plainly violated the disclosure requirements of the Restore Online Shoppers' Confidence Act (ROSCA). ROSCA makes it "unlawful for any person to charge or attempt to charge any consumer for any goods or services sold in a transaction effected on the Internet through a negative option feature" unless the person clearly and conspicuously discloses all material terms of the transaction before obtaining the consumers billing information.[18] To enter the Progressive rent-to-own agreements, consumers proceeded through an online application, were presented with (inadequate) information about terms online, signed the agreement online, and made an initial payment online—in all aspects, this was an Internet transaction.[19] Upon signing the agreement, the consumer was enrolled in a payment plan that renewed automatically for recurring regular payments that were automatically debited from the consumer's bank account unless they took an

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[16] *See* Press Release, Fed. Trade Comm'n, Aaron's Rent-To-Own Chain Settles FTC Charges That it Enabled Computer Spying by Franchisees (Oct. 22, 2013), https://www.ftc.gov/news-events/press-releases/2013/10/aarons-rent-own-chain-settles-ftc-charges-it-enabled-computer; Press Release, Fed. Trade Comm'n, Rent-to-Own Operators Settle Charges that They Restrained Competition through Reciprocal Purchase Agreements (Feb. 21, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/rent-own-operators-settle-charges-they-restrained-competition.

[17] There are times when litigation strategy and efficiency may militate in favor of pleading fewer law violations. But, as a general matter, I believe that the FTC misses the opportunity to provide guidance to industry and deterrence to would-be lawbreakers when we "underplead." For example, I recently wrote separately regarding the Commission's initiation of an action against Vyera Pharmaceuticals to support the addition of an unfairness count to the Commission's anticompetitive-conduct counts regarding drug pricing for a life-saving, off-patent drug with no therapeutic alternatives. *See* Concurring Statement of Commissioner Rebecca Kelly Slaughter, In the Matter of Vyera Pharmaceuticals (Jan. 27, 2020), https://www.ftc.gov/system/files/documents/public_statements/1564517/2020_01_27_final_rks_daraprim_concurring_statement.pdf.

[18] 15 U.S.C. § 8403.

[19] *See* Compl. ¶¶ 26–41. Progressive also offers its services for some online retailers. *See id.* ¶ 9. Moreover, while it is true that many Progressive transactions began in brick-and-mortar stores, they were not *Progressive* storefronts; they were third-party retailers.

affirmative step to cancel[20]—the very definition of a negative option[21]—yet the proposed complaint fails to include a count alleging this violation of ROSCA.[22]

When I considered the shortcomings of the complaint and order in total—the limitations on the amount of monetary relief for consumers, the lack of individual accountability, and our failure to use our full pleading authority—I concluded that the resolution of this case does not sufficiently meet our enforcement goals.

I want to end on a larger plea to our advocates, partners, and lawmakers. A former Best Buy assistant store manager had this to say about Progressive's tactics of "charging more than $2,000 for a $1,000 product"—"It feels abusive and gross."[23] I agree. The FTC was able to stop Progressive's deception, which is critical. It is difficult, however, to see a clear path for the FTC to stop the abusive practice of charging consumers as much as 150% interest on basic household goods. Defenders of this business model contend that it provides a valuable choice for consumers whose only credit options are equally bad or worse. But I cannot believe that our only options for ensuring access to alternative financing for consumers who deserve full economic inclusion is to permit such abusive "choices." Today, Progressive chooses not to operate in states that afford additional protections to consumers and caps on interest rates, but other rent-to-own businesses do.[24] If such protections were expanded, I do not believe that the players in an $8.5 billion industry would simply take their ball and go home—my bet is they would find a way to offer their products for a little less profit and a lot less harm.

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[20] *See id.* ¶ 42.

[21] ROSCA incorporated the definition of a negative-option feature set forth in the Telemarketing Sales Rule: "a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(w).

[22] Commissioner Wilson expressed concern that applying ROSCA to Internet transactions, even ones that occur while a customer visits a brick-and-mortar store, would extend ROSCA to virtually all negative-option transactions in the modern age. She is correct; the Internet is of course ubiquitous and Congress was prescient in its recognition that such transactions would become an integral part of daily life and should be subjected to ROSCA's very basic requirements of clear disclosures of material terms. In the Senate Commerce Committee Report accompanying the legislation, which passed in 2010, the Committee noted that it was responding to the "aggressive sales tactics" of many third-party sellers in web-based transactions. Even a decade ago, Congress thought this was an area ripe for legislative action because of the rapid growth of the web-based transactions, which had already become "an integral part of the daily life of millions of Americans." Senate Report No. 111-240 (2010), https://www.congress.gov/congressional-report/111th-congress/senate-report/240/1?q=%7B%22search%22%3A%5B%22Pub.+L.+No.+111-345%22%5D%7D&r=3&overview=closed.

[23] *See* Bhattarai, *supra* note 1.

[24] *See* Bruce Speight & Greg Hart, WISPIRG Foundation, Rent-to-Own Ripoff: Why Wisconsin Shouldn't Exempt the Predatory Rent-to-own Industry from Consumer Protection Laws (2013), https://wispirg.org/sites/pirg/files/reports/The%20Rent-to-Own%20Ripoff.pdf ("While some 46 states have enacted industry-friendly laws. . . a few states, including New Jersey, Wisconsin, Minnesota and Vermont, enforce tough consumer protection laws.") Progressive does not offer services in Minnesota, New Jersey, Vermont, or Wisconsin. But other rent-to-own companies do. For example, Rent-A-Center, Inc. has branded stores in New Jersey and Vermont. *See Locations*, RentACenter.com (last visited Apr. 1, 2020), https://locations.rentacenter.com/. Rent-A-Center also operates wholly owned subsidiaries in Wisconsin and Minnesota. *See Company Overview*, HomeChoiceStores.com (last visited Apr. 1, 2020), https://www.homechoicestores.com/about/company-overview/; *Company Overview*, GetItNowStores.com (last visited Apr. 1, 2020), https://www.getitnowstores.com/about/company-overview/.