IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re	)	Bankruptcy Case No. 83C-02216
ROBERT LEE ZUSPAN and CHERIE JEAN ZUSPAN,	)	Not Published
Debtors.	)	MEMORANDUM OPINION

Appearances: Phillip L. Foremaster, St. George, Utah, for Builder's Mortgage Loan Association; Daniel R. Boone, Salt Lake City, Utah, for debtors.

FACTS AND PROCEDURAL BACKGROUND

This matter came on for a hearing on January 31, 1984, to consider the motion of Builder's Mortgage Loan Association for an order declaring Builder's to be a secured claimant and terminating the automatic stay to permit Builder's to foreclose its lien. The court received evidence, heard argument, took the matter under advisement, and now issues this memorandum opinion.

On February 23, 1983, approximately six months before debtors' chapter 13 filing, Mr. Orin Barrett, a sales agent for North American Builders, Inc.,[1] visited debtors in their home.

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1 North American Builders was acting as a credit arranger for Builders' Mortgage Loan Association and as the supplier and installer of the siding.

After a 2-1/2 to 3 hour discussion, debtors agreed to have North American Builders install vinyl siding on their home.

The same day, debtors signed five documents:

(1) A contract under which North American Builders would install the siding for a cash price of $8,200.00 and debtors would pay to North American Builders 96 monthly installments of $176.96 (exhibit 4);

(2) A promissory note under which debtors would pay to Builder's Mortgage Loan Association 96 monthly payments of $176.96 to pay the $8,200.00 with 21 percent interest (exhibit 3);

(3) A document entitled "Builders Mortgage Loan Association Loan Disclosure Statement in Compliance With Federal Truth in Lending Regulations" which made certain disclosures, including disclosures that the amount financed would be $8,200.00, the finance charge would be $8,766.16, the annual percentage rate would be 21 percent, and there would be 96 monthly payments of $176.96 (exhibit 5);[2]

(4) A mortgage form with all of the information left blank (exhibit 6); and

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2 These disclosures constitute the "material disclosures" referred to in Regulation Z, Section 226.23(a)(3) note 2: "The term 'material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule."

(5) A document entitled "Notice to Customer Required by Federal Law" (exhibit 1). The notice says, among other things, that a transaction has been entered into on February 23, 1983, and that the transaction may be cancelled by notifying North American Builders at 3785 So. 500 W., Salt Lake City, Utah by mail or telegram sent not later than midnight of February 28, 1983.

Mr. Barrett testified that when he was in debtors' home on February 23, 1983, he told them that a mortgage would be necessary and that they would need to give him a legal description of their property. He testified that he told debtors that exhibit 6 was a mortgage when they signed it. He said that debtors later gave him the legal description. The signed mortgage form was later filled out to provide that debtors granted a mortgage on their home to Builder's Mortgage Loan Association to secure an indebtedness of $16,988.16. The mortgage was recorded on March 14, 1983.

Mr. Zuspan agreed with Mr. Barrett's testimony. He added that he had a discussion with Mr. Barrett about whether the interest rate would be 18 percent or not. Given the fact that exhibits 3 and 5 clearly state that the interest rate would be 21 percent and Mr. Zuspan's testimony that he signed them on February 23, 1983, the court finds that although they hoped to modify the agreement to reflect a lower interest rate, debtors agreed on a 21 percent interest rate.

February 23, 1983, was a Wednesday. On the following morning, Thursday, February 24, 1983, workers from North American Builders came to debtors' home to begin work on the siding. Mr. Zuspan told the workers he was having second thoughts about the deal and wasn't sure whether or not he wanted to go through with it. He invited the workers in and they discussed the deal for 2-1/2 to 3 hours. Mr. Zuspan asked the workers about the interest rate but they said they couldn't discuss it and said Mr. Barrett would contact him. Mr. Zuspan was convinced and the workers went outside and began work.

The siding was installed. On March 9, 1983, debtors signed a document entitled "Borrower's Completion Certificate and Authorization." This document indicated that the work had satisfactorily been completed. All of the blanks on the form, however, were left blank.

Debtors filed a petition for relief under chapter 13 on August 15, 1983. On October 17, 1983, Builder's Mortgage filed a motion for an order declaring Builder's to be a secured claimant and terminating the stay. Debtors make two arguments: first, the 21 percent rate of interest charged in this transaction was higher than that permitted by Utah law and second, this transaction was conducted in such a manner as to violate debtors' rescission rights under state and federal law.

THE RATE OF INTEREST

Based upon the regulations and laws in effect on February 23, 1983, a 21 percent interest rate for this transaction was lawful. See 1C UTAH CODE ANN. § 7-1-306 (1982); Order from the Commissioner of the Department of Financial Institutions, Richard L. Burt, Acting Commissioner (March 8, 1982) ("[I]n all instances where Title 70B limits the maximum finance charge on loans and sales to eighteen percent (18%), the maximum finance charge shall continue to be, and hereby is, set at twenty-one (21%)").

Moreover, it appears that the calculations of the monthly payments were current. See 5B BENDER'S U.C.C. SERVICE, Appendix B, Annual Percentage Rate Tables at 9-210.443 (1982).

FEDERAL RESCISSION RIGHTS

Debtors' rescission rights are governed by state and federal law. Section 1635(a) of Title 15, U.S.C., provides:

> Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third

> business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so.

This statute became effective October 1, 1982. Pub. L. 96-221, Title VI, § 612(a)(1), Mar. 31, 94 Stat. 175, 176. Pursuant to 15 U.S.C. § 1604, the Board of Governors of the Federal Reserve System is authorized to prescribe regulations to carry out the purposes of Section 1635(a). Such a regulation was promulgated, as a part of Part 226 of the Code of Federal Regulations commonly known as Regulation Z, effective April 1, 1981. See 12 C.F.R. § 226.23. Although Section 226.23 was effective April 1, 1981, compliance was optional until October 1, 1982.

Thus, this transaction, which was entered into on February 23, 1983, is governed by 15 U.S.C. § 1635 and 12 C.F.R. § 226.23 as amended in 1981. Section 1635 and Section 226.23, as amended, made significant changes in the law governing the right of rescission in consumer credit transactions. The form of notice given to debtors in this case was an outdated form which was proper under former 15 U.S.C. § 1635 and former 12 C.F.R. § 226.9 but which was made obsolete by the 1981 amendments to Section 1635 and the new regulations placed at 12 C.F.R. § 226.23.

Former 12 C.F.R. § 226.9 actually prescribed the words to be used to disclose to consumers their rescission rights under 15 U.S.C. § 1635. Present 12 C.F.R. § 226.23 does not prescribe any particular words, but requires that the notice identify the transaction and clearly and conspicuously disclose the following:

> (1) The retention or acquisition of a security interest in the consumer's principal dwelling.
> (2) The consumer's right to rescind the transaction.
> (3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.
> (4) The effects of rescission, as described in paragraph (d) of this section [Section 226.23].
> (5) The date the rescission period expires.

12 C.F.R. § 226.23(b). The Official Staff Commentary to Regulation Z, at Paragraph 23(b)(3) provides that the notice "must include all of the information outlined in § 226.23(b)." (emphasis added).

The notice given to debtors is deficient under these requirements. First, it does not disclose the retention or acquisition of a security interest in debtors' home. The notice given to debtors merely says that "You have entered into a transaction on 2/23/83 which may result in a lien, mortgage, or other security interest on your home." (emphasis added). The use of the word "may" is insufficient. This conclusion is supported by the language of Section 226.23(b), which requires notice that a security interest is being retained or acquired and by the language of Rescission Model Form H-8 in appendix H to

Regulation Z, which says "you are entering into a transaction that will result in a [mortgage/lien/security interest] [on/in] your home." (emphasis added).

Second, the notice given to debtors is deficient because it fails to disclose the effect of rescission described in Section 226.23(d). The notice in this case says that the customer who rescinds is not liable for "any finance or other charge." Section 226.23(d) provides that the customer is not liable for "any amount, including any finance charge." The notice in this case says that the creditor has 10 days to return money or property after receipt of a notice of rescission. Section 226.23(d) gives the creditors "20 calendar days." The notice in this case says that the creditor has 10 days to take possession of the property after tender by the customer. Section 226.23(d) gives the creditor "20 calendar days." Compare O'Neil v. Four States Builders & Remodelers, Inc., 484 F. Supp. 18 (D.C. E.D. Pa. 1979) (notice said 20 days, regulation allowed only 10 days, notice held insufficient.)

Although these two deficiencies may seem de minimus, the court is not free to disregard any of the provisions of the Truth in Lending Laws. See Villanueva v. Motor Town, Inc., 619 F. 2d 632 (7th Cir. 1980). The law requires the notice to disclose five items and the notice in this case fails to disclose properly two of them.

As a consequence of the defective notice given to the debtors in this case, debtors' right of rescission has not yet expired. 15 U.S.C. § 1635(a) ("the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later." (emphasis added). Section 1635(a) requires notice of rescission to be given in accordance with Regulation Z. Regulation Z, § 226.23(a)(2) provides that "to exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication." Debtors' written reply to the motion of Builder's Mortgage is hereby deemed to be written notice of the debtors' exercise of their right to rescind the transaction. Debtors clearly expressed at the hearing on this matter their desire to rescind. Requiring a written notice would be an empty exercise. Moreover, in view of the court's power to modify the procedures governing the effect of rescission, a written notice would be meaningless. Finally, the rescission form given to the debtors is now contained in the court's file as an exhibit.

The rights of the parties after rescission are governed by 15 U.S.C. § 1635(b), which provides:

> When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other

> charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

Because of the nature of vinyl siding, return of the property in kind would be impracticable. Therefore, debtors should instead be obligated for the reasonable value of the siding.

Having determined that debtors have effectively exercised their right to rescind this transaction, the court, as provided in 15 U.S.C. § 1635(b) and 12 C.F.R. § 226.23(d)(4), may enter an order governing the effect of the rescission. That order shall provide that:

(1) within 20 days of the entry of the court's order based on this memorandum opinion, Builder's Mortgage shall

take all actions necessary to reflect the termination of its mortgage, including filing any documents necessary to reflect the termination in the public record; and

(2) Builder's Mortgage need not return any money given to it by debtors; and

(3) Builder's Mortgage shall have an allowed unsecured claim in the amount of $8,200.00, which debtors stipulate to be the reasonable value of the siding, less any payments made by debtors to either North American or Builder's Mortgage; and

(4) Debtors shall treat the unsecured claim of Builder's Mortgage in their plan.

Although debtors argue that the Federal Trade Commission Rule on Home Solicitation Sales applies in this case, that rule excludes from its coverage sales governed by Truth in Lending rescission rights. See FTC Trade Regulation Rule Section 421.1, Note 1: Definitions, (a)(2).

STATE RESCISSION RIGHTS

Sections 70B-2-502 and 70B-5-204, Utah Code Ann., provide a basis for cancelling this transaction similar to that provided in the Truth in Lending statute and Regulation Z. Because Sections 70B-2-502 and 70B-5-204 add nothing to the parties' rights and

remedies already provided by 15 U.S.C. § 1635, they need not be discussed further except to note that they are a separate basis for the rescission. The court notes that the 1983 amendments to those sections did not become effective until May 10, 1983, after this transaction was consummated. See Laws of Utah 1983, Ch. 343.

THE DELAY OF PERFORMANCE PROBLEM

This transaction is tainted not only by the defective notice given to debtors of their rescission rights, but also by the violation by North American Builders of § 12 C.F.R. 226.23(c), which provides:

> Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

Assuming for the moment that the deadline for rescission in this case was midnight of February 28, 1983, the evidence is uncontroverted that North American performed services and delivered materials on February 24, 1983. By rushing to debtors' home the day after debtors signed the contract and beginning to install the siding, North American effectively deprived debtors of their right to a cooling off period.

Section 226.23(c) of Regulation Z was derived from Section 226.9(c) of former Regulation Z. This provision does not come from the Truth in Lending statute but was drafted by the Federal Reserve Board to implement the purposes of 15 U.S.C. § 1635. See Federal Reserve Board Letter No. 1001, February 12, 1976, published at CCH CONSUMER CREDIT GUIDE, Transfer Binder, Truth in Lending Special Releases, Correspondence, May 1974 to December 1977, ¶ 31,337. The Board felt that a delay of performance rule would protect the independence of the decision of consumers with regard to the right of rescission.

Neither Section 226.23(c) nor its predecessor Section specifies a remedy for a violation of the delay of performance rule. The staff of the Federal Reserve Board, however, has consistently expressed the view that a violation of the delay of performance rule, although it might subject the offender to civil and/or criminal penalties and/or administrative action, does not invalidate either the transaction or the security interest. See Public Position Letters of the Federal Reserve Board, Numbers 34 (July 9, 1969), 98 (September 2, 1969) and 871 (February 13, 1975), published in Clontz, TRUTH IN LENDING MANUAL, Volume II (3d ed. 1973) and Clontz, TRUTH IN LENDING MANUAL (Cumulative Supp. to 3d Ed. 1975); See also Letter No. 1001, supra. While statements of the Federal Reserve Board and its staff interpreting former Regulation Z have been superseded by the Official Staff Commentary to Regulation Z, the Official Staff Commentary

on Section 226.23(c) does not address the question of the effect of a violation of Section 226.23(c). Thus, the former interpretations have some value in this uncharted area. See generally Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980); Morris, "Judicial Deference to the Federal Reserve Board in Construing Regulation Z and the Truth in Lending Act," 88 COMM. L. J. 141 (1983). Based upon the consistent line of Federal Reserve Board staff interpretations cited above, the court concludes that the violation of Section 226.23(c) in this case does not provide a basis for avoiding the transaction or the mortgage. Debtors have not filed a civil proceeding to assert any rights to civil remedies they may have for the violation of Section 223.26(c) in this case. Thus, those issues are not before the court.

CONCLUSION

Based upon the foregoing, the court concludes that debtors have, and have exercised, a right to rescind this transaction under both state and federal law. Debtors' counsel shall prepare an appropriate order, including provisions embodying the procedural consequences of rescission outlined above.

DATED this 31 day of March, 1984.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE