

**Concurring Statement of Commissioner Christine S. Wilson**  
***FTC v. Progressive Leasing, LLC***  
File No. 182 3127

April 20, 2020

The settlement announced today resolves the FTC’s allegations that Progressive Leasing, LLC (“Progressive”) violated Section 5 of the FTC Act in conjunction with its offering of rent-to-own (“RTO”) payment arrangements. This settlement provides the relief needed to protect consumers from the alleged deceptive practices and includes \$175 million in monetary relief that will enable the Commission to provide meaningful redress to consumers.

For decades, the FTC has worked to protect consumers from deceptive practices in the RTO industry.<sup>1</sup> While the RTO plans of Progressive Leasing have significant utility for a material portion of the U.S. population, I agree with the allegations in the complaint that Progressive deceptively marketed its plans. This order remedies that deception by requiring Progressive to disclose the material terms of the plan, including the total cost, before the consumer provides payment information and agrees to the plan.

The order also includes a substantial monetary judgment that will enable the Commission to provide redress to Progressive consumers. To evaluate monetary relief in Commission matters, our Bureau of Economics (“BE”) conducts a careful analysis of the injury inflicted on a proposed defendant’s customers. As a matter of course, BE’s analysis takes into account the number of consumers affected, whether consumers were deceived by the alleged practices, the types of alleged violations, and the harm arising from those violations. The analysis presented to me in this matter was robust and sound, and the monetary relief that we imposed comports with BE’s analysis of the facts at issue in this case. Commissioner Slaughter asserts the relief is insufficient, arguing that the consumer harm resulting from Progressive’s alleged deceptive practices equals Progressive’s total revenues.<sup>2</sup> But dislike of the business model does not provide a legitimate basis for imposing equitable monetary relief untethered from a principled economic analysis of consumer injury.

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<sup>1</sup> Press Release: FTC Halts Computer Spying; Secretly Installed Software on Rented Computers Collected Information, Took Pictures of Consumers in Their Homes, Tracked Consumers’ Locations (Sept. 25, 2012) <https://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying>; Prepared Statement of the Federal Trade Commission before the Financial Institutions and Consumer Credit Subcommittee, House Financial Services Committee, on Rent-to-Own Transactions (July 26, 2011), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-rent-own-transactions/110726renttoowntestimony.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-rent-own-transactions/110726renttoowntestimony.pdf); Prepared Statement of the Federal Trade Commission before the Financial Institutions and Consumer Credit Subcommittee, House Financial Services Committee, on Rent-to-Own Transactions (July 12, 2001), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-rent-own/rtotestimony.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-rent-own/rtotestimony.pdf).

<sup>2</sup> Although federal courts have recognized that net revenues are a reasonable approximation of ill-gotten gains, courts often do not order full restitution and have determined, based on fact-specific analysis, that the consumer harm in a given case is less than all net revenues. See e.g., *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603-04 (9<sup>th</sup> Cir. 2016) (determining that defendants’ evidence demonstrated that consumer harm equaled less than all net revenues).

Commissioner Slaughter also argues that we should have held the Chief Executive Officer of Progressive individually liable for wrongdoing because he meets the legal standard for liability and because Progressive's parent company, Aaron's, has been subject to prior FTC actions.

To seek injunctive relief with respect to a CEO, the Commission must show that the individual "participated directly in the deceptive practices *or* had authority to control those practices."<sup>3</sup> This broad standard effectively could enable the Commission to hold individually liable the CEOs of most companies against which we initiate enforcement action. But the Commission traditionally has exercised its prosecutorial discretion and considered a variety of factors when deciding whether to name a CEO or principal, including whether individual liability is necessary to obtain effective relief. In some instances, for example, the CEO *is* the company – many FTC cases involve fraudulent or deceptive conduct by small, closely held companies that essentially serve as the alter egos of their CEO or principal. In other instances, fraudsters open and shutter companies to stay one step ahead of law enforcement, or undertake unlawful practices using multiple companies that operate as a common enterprise. In these circumstances, I support naming the CEO or principal because doing so is necessary to obtain effective relief and protect consumers going forward.

In contrast, naming the CEO or principal of a large, established company will only rarely be necessary to obtain effective relief. The currently popular (and populist) notion of routinely imposing individual liability<sup>4</sup> appears more consistent with personal vindictiveness and vilification of successful businesspeople than with an objective desire to obtain effective relief and instill effective deterrence. This is not to say that I view individual accountability as unimportant – in the FTC's settlement with Facebook, I championed Sarbanes-Oxley type provisions that would require CEO Mark Zuckerberg and Facebook's incoming Chief Privacy Officer personally to attest to the company's compliance with its order obligations.<sup>5</sup> But there, the Commission was grappling with an order violation and a seemingly non-existent culture of compliance. Few cases present those kinds of extraordinary circumstances.

In other cases, when evaluating whether naming the CEO or other principal is needed for effective relief, I evaluate the degree of that individual's participation in the challenged practices. In larger companies, the number of issues crossing a CEO's desk is substantial and the CEO often is not directly supervising or managing the infinite details pertaining to many aspects of the

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<sup>3</sup> *FTC v. Ross*, 743 F.3d 886, 892-93 (4th Cir. 2014) (adopting the test for individual liability used by other federal appellate courts, including the First, Seventh, Ninth, Tenth, and Eleventh Circuits). The Commission also can establish liability for monetary relief by showing the defendant "had actual knowledge of the deceptive conduct, was recklessly indifferent to its deceptiveness, or had an awareness of a high probability of deceptiveness and intentionally avoided learning the truth." *Id.*

<sup>4</sup> Levin, Bess. "Elizabeth Warren Wants To Make It Easier To Throw C.E.O.S In Prison," *Vanity Fair* (Apr. 3, 2019), <https://www.vanityfair.com/news/2019/04/elizabeth-warren-wants-to-make-it-easier-to-throw-ceos-in-prison>.

<sup>5</sup> Remarks of Commissioner Christine S. Wilson at the Global Antitrust Institute: *FTC v. Facebook* (Dec. 12, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1557534/commissioner\\_wilson\\_remarks\\_at\\_global\\_antitrust\\_institute\\_12112019.pdf](https://www.ftc.gov/system/files/documents/public_statements/1557534/commissioner_wilson_remarks_at_global_antitrust_institute_12112019.pdf); Prepared Remarks of Commissioner Christine S. Wilson Facebook, Inc. Press Event (July 24, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1557534/commissioner\\_wilson\\_remarks\\_at\\_global\\_antitrust\\_institute\\_12112019.pdf](https://www.ftc.gov/system/files/documents/public_statements/1557534/commissioner_wilson_remarks_at_global_antitrust_institute_12112019.pdf).

business. Thus, in many instances, the CEO may have little to no involvement, and in some cases no direct knowledge, of the practices that are the subject of an FTC investigation.

In addition, I evaluate whether the CEO took steps to ensure that the company's activities were undertaken in compliance with all relevant laws and regulations. My decades in the private sector have taught me that a culture of compliance must begin at the top; a CEO committed to legal compliance drives accountability throughout the organization. Accordingly, I consider the CEO's role in fostering compliance at the relevant company. Where a CEO prioritizes compliance initiatives to the extent that he personally is engaged in developing and implementing a comprehensive and robust compliance program, naming the individual is not necessary to ensure effective relief; neither is it necessary for deterrence.

In fact, naming a CEO in those circumstances could send the message that it is better for a CEO to be uninvolved and disengaged – clearly a suboptimal outcome given that a culture of compliance is strongest when compliance is prioritized by the CEO. Alternatively, naming a CEO in those circumstances could send the opposite message – that the CEO himself is ultimately responsible for all failings even if he has undertaken objectively reasonable measures to ensure that his company follows the law. At the margins, this outcome could incentivize CEOs to devote an inefficient amount of time to compliance, at the expense of core business issues. In either scenario, CEO positions at firms posing the greatest risk will be the least appealing, deterring qualified and conscientious CEOs from accepting employment at the firms that need them most.

When the FTC declines to seek individual liability for a CEO, the agency is by no means rendering the CEO unaccountable. As noted above, although the FTC did not name Mark Zuckerberg in its 2019 settlement with Facebook, it is indeed holding him accountable for the previous privacy missteps of the company and for rigorous order compliance going forward. He personally must certify, on a quarterly basis, that Facebook is complying with the revised and augmented order. More broadly, CEOs are accountable to their Boards of Directors (which typically establish senior management compensation), to their shareholders and the market, and to their many stakeholders, including employees and customers.

Regarding Progressive Leasing's relationship with Aaron's, its parent company, Aaron's is a different company, run by different management. I have been given no reason to believe that violations by Aaron's are linked culturally to the present allegations against Progressive, or even that the companies are culturally linked, such that a change in corporate culture would remediate the problem. Commissioner Slaughter presents no basis to conclude that naming Progressive's CEO would achieve the cultural change she seeks, or how that change would impact the behavior at issue in this case. I do not agree that we should punish this CEO for the wrongdoing of another company. Applying all of these considerations in this matter, I concluded that naming the CEO was unnecessary.

In terms of the relief in this case generally, it is important to note that the payment plans Progressive offers to consumers are legal payment arrangements that provide options to consumers who have few, if any, credit alternatives. In fact, an FTC survey of customers who

undertook transactions with RTO stores found that most customers are satisfied.<sup>6</sup> In a recent issue of the *Journal of Consumer Affairs* focused on economically vulnerable families, researchers concluded – contrary to claims that the RTO industry is exploitative – that the embedded options and bundled services justify associated financing costs.<sup>7</sup>

Even the news article Commissioner Slaughter cites for its descriptions of concerns about Progressive features positive customer feedback. For example, the article describes one consumer’s comments: “She said she’s used the program before — to buy a refrigerator at Lowe’s and two fireplaces and a bed at Big Lots — and likes the ease of weekly payments that are automatically deducted from her bank account. ... ‘Who has that much cash on them? Certainly not I.’”<sup>8</sup> Further, as the complaint here explains, Progressive consumers who pay the item off within 90 days avoid most fees.<sup>9</sup> In addition, there is no allegation that Progressive engaged in abusive collection practices.

Research in this industry has shown that more than a quarter of RTO customers have exercised an option to purchase their merchandise for the cash price during the first 90 days of their rental, and more than 28 percent have exercised an early purchase option that allowed them to purchase by paying 50 percent of the remaining rental payments.<sup>10</sup> In addition, according to research, three of the top four reasons RTO customers provide for using RTO plans with an early termination option include: the ability to obtain use of the product without incurring debt; the ability to try a product out before purchasing it; and the ability to “return it when I want.”<sup>11</sup>

Commissioner Slaughter argues that the conduct challenged here was so egregious and its effect on consumers so corrosive that the proposed relief is inadequate. She suggests, in a footnote, that in such circumstances we should litigate. Pursuing litigation for additional relief in this matter would be a dereliction of our responsibility to steward effectively the public resources entrusted to the Commission. I support committing FTC resources to litigation when necessary to protect consumers fully and effectively. But because this settlement fully remedies the alleged deception and provides meaningful redress to consumers, I see no need to litigate here.

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<sup>6</sup> Press Release: FTC Issues Staff Report on a Survey of Rent-To-Own Customers (April 4, 2000), <https://www.ftc.gov/news-events/press-releases/2000/04/ftc-releases-staff-report-survey-rent-own-customers>

<sup>7</sup> Sanjiv Jaggia, Hervé Roche and Michael H. Anderson, “Rent-to-Own Pricing: Theory and Empirical Evidence,” *The Journal of Consumer Affairs*, Fall 2019. See also J. Howard Beales, Jeffrey A. Eisenach and Robert E. Litan, “Consumer Welfare Implications of Regulating Rent-to-Own Transactions,” May 2012 (“critics of the RTO business argue that RTOs exploit their customers... This criticism, however, ignores both the installation, delivery and service components of the RTO bundle and the option value of RTO contracts, which are important features valued by many consumers who engage in these transactions.”). The authors also find that “[t]he RTO business is highly competitive, with low barriers to entry. These conditions make it impossible for RTO dealers to charge supra-competitive rental fees or earn monopoly rents.”

<sup>8</sup> 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/>.

<sup>9</sup> Compl. ¶¶ 44-45.

<sup>10</sup> America’s Research Group, APRO’s 2009 Rent-to-Own Customer Satisfaction Survey Results: Part 2, 9-10 (2009).

<sup>11</sup> *Id.* at 12.

Commissioner Slaughter also frames her statement by referencing parents who seek to purchase items for their children in the midst of the current coronavirus pandemic. I commiserate with all victims of this disease – including families who have lost loved ones, small business owners who have lost their livelihoods, employees who have lost their jobs, students who have lost the opportunity to engage face-to-face with their teachers and peers, cherished elders in nursing homes who must forego visitors to preserve their health, and all who struggle daily with dashed expectations about what this season of their lives was supposed to hold. That said, the staff’s investigation of Progressive’s practices began, and the settlement was negotiated before, the current public health crisis touched our shores.

Although Commissioner Slaughter acknowledges her good fortune to be able to purchase tablets for her children using traditional credit, her concerns about RTO plans reflect a fundamental misunderstanding of the market for consumer credit. In the memoir *Hillbilly Elegy*, author J.D. Vance described the value of alternative financing programs for credit-challenged consumers like himself and his family.<sup>12</sup> While attending The Ohio State University, Vance worked as a staffer in the Ohio State Senate as restrictions on payday lending were debated. Vance observed that the “senators and policy staff debating the bill had little appreciation for the role of payday lenders in the shadow economy that people like me occupied,” and described an instance in which a payday loan enabled him to make a rent payment on time. He closed the anecdote with a lament that “[p]owerful people sometimes do things to help people like me without really understanding people like me.”<sup>13</sup> More than anecdotal evidence supports this assertion: it has been established empirically that the Credit Card Accountability Reliability and Disclosure (CARD) Act of 2009 has limited the supply of unsecured credit to borrowers with greater credit risks.<sup>14</sup>

In 2017, approximately 8.4 million U.S. households were “unbanked” – no one in the home had a checking or savings account.<sup>15</sup> Even those who qualify to obtain consumer loans from commercial banks present substantial risk for lenders, especially during a recession; 4.85% of all such loans became delinquent in Q2 2009.<sup>16</sup> The Consumer Financial Protection Bureau reports that of the U.S. adult population, 6% have subprime credit scores; another 13% have “deep subprime” credit scores; 11% have credit histories too thin or stale to be usable in scoring; and another 11% are “credit invisible” – they lack any credit history at all.<sup>17</sup> For the vast majority of these consumers, RTO plans like those offered by Progressive Leasing make the difference in

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<sup>12</sup> J.D. Vance, *HILLBILLY ELEGY: A MEMOIR OF FAMILY AND CULTURE IN CRISIS* (2016).

<sup>13</sup> *Id.* at 185.

<sup>14</sup> Han, Song, Benjamin Keys, and Geng Li (2015). “Information, Contract Design, and Unsecured Credit Supply: Evidence from Credit Card Mailings,” Finance and Economics Discussion Series 2015-103. Washington: Board of Governors of the Federal Reserve System, <http://dx.doi.org/10.17016/FEDS.2015.103> (available at <https://www.federalreserve.gov/econresdata/feds/2015/files/2015103pap.pdf>).

<sup>15</sup> 2017 FDIC National Survey of Unbanked and Underbanked Households, Oct. 2018. An even larger number of U.S. households are estimated to lack access to credit. (“About one in five households likely have little or no credit history.”) (available at [https://economicinclusion.gov/downloads/2017\\_FDIC\\_Unbanked\\_HH\\_Survey\\_Report.pdf](https://economicinclusion.gov/downloads/2017_FDIC_Unbanked_HH_Survey_Report.pdf))

<sup>16</sup> Board of Governors of the Federal Reserve System (US), Delinquency Rate on Consumer Loans, All Commercial Banks [DRCLACBS], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/DRCLACBS>, March 20, 2020.

<sup>17</sup> Bureau of Consumer Financial Protection, “The Consumer Credit Card Market,” Aug. 2019, [https://files.consumerfinance.gov/f/documents/cfpb\\_consumer-credit-card-market-report\\_2019.pdf](https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2019.pdf).

whether they can replace an appliance or bring home a tablet computer.<sup>18</sup> Commissioner Slaughter appears to concede this point but contends that Progressive Leasing’s practices were so “abusive and gross” that not only should the Commission should have sought far more extensive relief – but also that lawmakers should take action to curtail the industry. While this issue falls outside the FTC’s bailiwick, I encourage those who would heed Commissioner Slaughter’s call to action to consider the wisdom of J.D. Vance.

Finally, Commissioner Slaughter asserts that the facts in this matter would have supported charging the defendant with a violation of the Restore Online Shoppers Confidence Act (“ROSCA”). But a careful reading of the key elements of ROSCA reveals that the statute is inapplicable here. Congress designed ROSCA to ensure that consumers are not subject to misleading sales tactics in Internet purchases using negative option features, resulting in payments for goods and services they do not expect or want.<sup>19</sup> Applying ROSCA to the type of transaction described in the Commission’s complaint – namely, an in-store transaction involving a face-to-face conversation between a customer and a retail salesperson – merely because the paperwork is completed via an electronic portal potentially would extend ROSCA to virtually any transaction in the modern age. In addition, the Progressive consumer accepts the lease offer at the start of the term and agrees to the recurring charges for the length of the lease.<sup>20</sup> These facts do not support a characterization of the Progressive lease as an automatically renewing contract subject to ROSCA.

The Commission should ensure, in every matter, that the counts pleaded and relief sought are tailored carefully to the facts in the matter before us. At all times, the Commission should be cognizant of the fact that while it enjoys the full heft and weight of the federal government, prudence and institutional integrity – not to mention justice – demand restraint when pleading. Even if one were to accept its application to the facts here, ROSCA does no work in this case to improve the lot of consumers. Using our authority in a measured and calibrated manner, as we did in this case, is the appropriate course in which to proceed.

For these reasons, I support this settlement.

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<sup>18</sup> The *Washington Post* article regarding Progressive’s payment plans cited in n. 4 also includes commentary on delayed-payment and lease-to-own programs, “which experts say have picked up in the past decade as new credit card accountability rules have made it more difficult for consumers — particularly those with spotty or no credit histories — to qualify for credit cards. Many of these programs don’t charge interest or fees right away, though that can change if consumers fall behind.” Bhattarai, A Best Buy Program Is Doubling the Price of Items for Some Customers, *Wash. Post*, *supra* n. 4.

<sup>19</sup> The Act prohibits the sale of goods and services over the Internet using a “negative option feature” unless the seller discloses the material terms and conditions, obtains the consumer’s express informed consent, and provides a simple mechanism to stop recurring charges. 15 U.S.C. § 8403(1)-(3). ROSCA adopts the definition of “negative option feature” from the FTC’s Telemarketing Sales Rule (“TSR”) – “an offer or agreement to sell or provide any goods or services, 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).

<sup>20</sup> The contract does include language regarding the automatic renewal of the agreement after each scheduled payment. I do not believe this language contradicts the plain language of the offer presented to consumers of a fixed-term lease with regularly scheduled payments.