

Syllabus

IN THE MATTER OF

INDEPENDENT DIRECTORY CORP. ET AL.

COMPLAINT, FINDINGS, AND ORDER, WITH SUPPORTING AND DISSENTING
OPINIONS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT
OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5486. Complaint, Feb. 26, 1948¹—Decision, July 19, 1950

The Commission was created by the Congress to protect the right of consumers—who rarely have the immediate services of lawyers, accountants, economists, and other experts—to an honest and fair market place, and it is the Commission's obligation to protect not only the discerning public against deceptive advertising, but also to protect the casual or negligible or ignorant, and to make certain, insofar as its authority extends, that that day, long past, when the consumer was required to submit to the dictum that "the buyer must beware," shall not return.

There can be no quibbling or hair splitting on the part of a Government agency such as the Commission, in the carrying out of its duties and responsibilities within its sphere of authority for the protection of fair competition and the public interest, and if good will can be restored to its rightful place in a free economy, as being the greatest asset any business can have, or should have, then there is no justification for tolerating contract forms and other methods which may well deceive the least literate of consumers.

Those who make use of artfully designed contracts, with their plethora of deceitful fine print, must assume the burden of proof that the fine print is not in fact a well designed and unlawful trap for the unwary, and the fact that deceit or other forms of misrepresentation may take place within the technical confines of a written instrument does not strip the act of its true character, whether it be honest or dishonest, it being, in essence, still a matter of intent and conscience, with logical moral and legal consequences, regardless of legal hair splitting.

Where two corporations, the principal offices of which were located in New York City and Chicago, respectively, and the two individuals who were directors and officers of both and managed their operation as a family affair, engaged in the publication of directories of manufacturers, wholesalers, jobbers, distributors and business services, which classified them under commercial headings as to product or service, listing address and telephone number, paid for or free, at respondents' option, and carrying advertisements paid for by the advertisers, and which, published by one or the other of said corporations for numerous eastern, southern, and mid-western states, and variously captioned as Classified Telephone Directory, Interstate Industrial Register, Manufacturers' Business and Industrial Buyers' Guide, Industrial Classified Telephone Directory and Classified Industrial Register, were distributed without charge to the advertisers and listees, and their prospective purchasers;

¹ Amended.

Syllabus

47 F. T. C.

In soliciting contracts for paid advertisements or listings by mail (as distinguished from personal contact by salesmen), through sending proposed mail order contract forms accompanied by return envelopes but no duplicate for the recipient's retention, to prospects, including those who had carried unique or distinctive advertisements in their local telephone directories for many years and in some cases in no other publication, who had never had any dealing with respondents or any association with their corporate name, and who had been queried, in a number of instances, by unidentified salesmen as to whether they wished to renew their telephone directory advertising or listing, and informed that a contract therefor would shortly come in the mail—

Pasted in the blank space provided by their said contract forms, immediately above the place for the prospect's signature and following a printed authorization to insert representations similar thereto in the next issue of the directory in question, the prospect's advertisement clipped from his local telephone directory or other publication;

With the result that prospects who received such forms by mail, signed and returned them in the belief that they were renewing their own prior advertisements or listings in their local telephone directories or other publications, and some thereby bought and paid for advertising space for which they had no use and which they did not desire; and

Continued said practice for a number of years after becoming aware of the results thereof, as above indicated, and insisted upon payment in those cases in which such advertisers claimed their signing was the result of a mistake, upon learning, as was usually the case, upon the receipt of their bills months later, just before the publication of the directory and too late for cancellation, that they were dealing with said corporations; and, while canceling contracts in those relatively few cases where the directory had not been set up in type and in which such a complaint was made, sued to enforce payment in the others:

Held, That such acts and practices, under the circumstances set forth, were to the actual and potential prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

In the aforesaid proceeding, while the contract forms eventually omitted the words "telephone" and "directory," and set forth along with advertising rates and other matter, and in legible type, that the attached copy appeared in another publication and that the contract was not a renewal or proof, but was an authorization to publish said matter in respondent's directory—from the covers of which said words were also ultimately removed—and contained the names, The Independent Directory, and The Independent Directory Corporation, and stated that the latter was not connected with any telephone company—statements and disclaimers which, if carefully read by the prospect, probably precluded any mistake as to the identity of the respondent publishers or the publication in which the advertisement attached to the form would appear—their practice of attaching to their said forms advertisements from other publications nevertheless did actually deceive many of the prospects to whom the forms were sent; and it was the Commission's opinion in view of all the circumstances above indicated, that said practice in that respect carried the definite potentiality of deceiving

Complaint

others in similar fashion, regardless of such cautions, disclaimers, and explanations, and that the appropriated advertisements might so arrest a prospect's eye, and so insulate him with such familiarity and certainty that even a cursory examination of the form appeared useless and time wasting; and that, therefore, such statements, explanations and disclaimers did not effectively remove the likelihood of deception.

While a number of the individuals and firms that signed said mail order contracts under the circumstances set out were engaged in businesses which were local, either by nature or by choice, and did not knowingly advertise in any publication of interstate circulation, there was no substantial evidence in the record to sustain the allegations made in the complaint that most of respondents' advertisers did only a local business or a business confined to an area much less than that covered by respondents' publication, or that the majority of respondents' advertisements were of little or no value to local advertisers.

The Commission was also of the further opinion, as respects the charge in the complaint that respondents' salesmen secured advertising contracts from prospects by representing directly or by implication that such advertisers were merely renewing their advertisements for another year in the publication from which respondents had taken the advertisements displayed by the salesmen, that the record contained no substantial evidence to sustain said charge, it appearing, among other things, that it was the salesmen's practice, following agreement with the prospect, to sign the contract along with the prospect and return the same to respondents, and that thereafter a duplicate was immediately returned to the prospect by registered mail, together with a statement of the cost.

Before *Mr. Webster Ballinger* and *Mr. Frank Hier*, trial examiners.
Mr. DeWitt T. Puckett for the Commission.

Hays, St. John, Abraham & Schulman and *Mr. Jacob Steinfeld*, of New York City, for respondents.

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Independent Directory Corp., an Illinois corporation, Independent Directory Corp., a New York corporation, New Jersey Directory Corp., a corporation, William Oleck Advertising Corp., a corporation, and William Oleck, David Oleck, and Maury Oleck, individually and as officers of aforesaid corporations, hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint, stating its charges in that respect as follows:

Complaint

47 F. T. C.

PARAGRAPH 1. Respondent, Independent Directory Corp., of Illinois, is an Illinois corporation with its principal office at 608 South Dearborn Street, Chicago, Ill.

Respondent, Independent Directory Corp., of New York, is a New York corporation with its principal office at 152 West Forty-second Street, New York, N. Y.

Respondents New Jersey Directory Corp. and William Oleck Advertising Corp. are New York corporations with offices at 152 West Forty-second Street, New York, N. Y.

Respondents William Oleck, David Oleck, and Maury Oleck, are officers of the aforesaid corporations and have their principal offices at the above-stated New York address.

In performing the acts and practices hereinafter complained of, the aforesaid corporations have been under the management, control and direction of the above-named individual respondents.

PAR. 2. The aforesaid respondents are now and for several years last past have been engaged in publishing a Classified Telephone Directory and Buyers' Guide. The publication contains a free classified listing of manufacturing, industrial, and other business concerns with their addresses and telephone numbers, and also paid advertisements of such concerns.

Respondents cause their said publication to be transported through the United States mails, and otherwise, from the points of publication thereof, or from one or more of the above-stated addresses, to the subscribers to or purchasers of said publication at their respective points of location in various States of the United States, including States other than the States of Illinois and New York, and in the District of Columbia. Respondents maintain and during all the time mentioned herein have maintained a course of trade in said publications in commerce between and among various States of the United States.

PAR. 3. Respondents' method in securing names, addresses, and telephone numbers for use in their said publications, and also the classified advertisements to be inserted therein, is to clip advertisements from various local telephone and other directories and to paste or otherwise attach said advertisements to their own contracts or order forms. Said contracts are then mailed to the persons or firms whose advertisements are attached thereto with a request that if any corrections are to be made or additional listings desired, to make the necessary notation on said contracts and return the documents to the respondents. In some instances respondents' salesmen present the aforesaid documents to the advertisers in person and secure the advertisers' signa-

13

tures
adve
year
was c
and f
offices
subsc
PAR.
contr
which
ogniz
placed
scruti
not a
contra
the ad
large
to wha
spicuo
on the
directo
receive
said ad
in the
respon
said ad
pay the
sue for
instanc
not stat
PAR.
in New
circulat
ents' ad
an area
Hence, t
value to
PAR. C
spondent
implicat
soliciting
such firm

tures thereon by representing, by implication or otherwise, that the advertisers are merely renewing their advertisements for another year in the same publication from which the attached advertisement was clipped. In many instances advertising space is sold to persons and firms located in States other than the State in which respondents' offices are located and from which said publication is shipped to subscribers thereof.

PAR. 4. AS a rule, the advertisement attached to the respondents' contract is clipped from the telephone directory of the locality in which the advertisers' business is located. Each such advertiser recognizes the advertisements submitted to him as being one previously placed by him with the local telephone or other directory. Without scrutinizing the proffered contract closely and ascertaining that it is not a renewal of an advertisement in the local directory, but is a new contract for an advertisement to be inserted in respondents' directory, the advertiser signs respondents' contract. Said contract features in large print the words "telephone directory" and the explanation as to what the contract really is appears in much smaller and less conspicuous type, not in immediate conjunction or connection with, but on the contrary substantially removed from, the words "telephone directory." It is usually weeks or months before said advertiser receives a bill or request from respondents for payment for the afore-said advertisement that such advertiser is apprised of the true facts in the case. If the advertiser raises any question about the matter, respondents furnish him with a photostat copy of the contract which said advertiser has signed. If the advertiser then fails or refuses to pay the bill, respondents threaten to sue and in some instances do sue for collection of the amount specified in the contract. In some instances the amount of the bill or charge for the advertisement is not stated in the contract at the time it is signed by the advertiser.

PAR. 5. Respondents' said Directory and Buyers' Guide is published in New York, Chicago, and Los Angeles, and each publication thereof circulates over wide areas, usually in many States. Most of respondents' advertisers do only a local business or a business confined to an area much less than that covered by respondents' publication. Hence, the majority of respondents' advertisements are of little or no value to the local advertisers using them.

PAR. 6. By and through the aforesaid acts and practices, the respondents falsely represent and have represented directly and by implication, to business firms and individuals that respondents are soliciting advertising space from, and giving telephone listings to, such firms and individuals, to be placed in the telephone directory used

Findings

47 F. T. C.

in the community in which such firms are doing business, when such is not the fact.

PAR. 7. As a result of the aforesaid deceptive acts and practices on the part of respondents and the false and misleading statements and representations employed by them in connection with the use of said acts and practices, and in many instances as a result of suits for collection or threats of such suits, many firms have bought and paid for and are now buying and paying for advertising space in respondents' aforesaid publication, such purchases having been made and now being made in the erroneous and mistaken belief that space in their local telephone directory was or is being purchased.

PAR. 8. The aforesaid acts, practices, and methods of respondents as alleged herein are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on March 11, 1947, issued and subsequently served upon the respondents named in the caption hereof, except the respondent Independent Directory Corp., a New York corporation, its complaint in this proceeding, charging said respondents with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. The respondents named in said complaint filed their separate answers thereto on March 31, 1947. Certain testimony and other evidence in support of and in opposition to the allegations of the complaint were thereafter introduced before a trial examiner of the Commission theretofore designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission.

Acting upon a motion filed December 9, 1947, by counsel in support of the complaint and assented to by the counsel for the respondents, the Commission, by order dated February 25, 1948, directed that the complaint be amended to include as a party respondent the Independent Directory Corp., a New York corporation, and on February 26, 1948, it issued and thereafter served upon the respondents, including said Independent Directory Corp., a New York corporation, its amended complaint, charging said respondents with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of the aforesaid act. The Commission, in its order of February 25, 1948, further directed that the testimony and other evidence

theretofore introduced be adopted and treated as having been taken under said amended complaint. After the filing of the respondents' answers to said amended complaint, further testimony and other evidence were introduced before the original trial examiner and a substitute trial examiner of the Commission designated by the Commission's order of April 29, 1949, and such testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission upon the amended complaint, the respondents' answers thereto, the testimony and other evidence, the trial examiner's recommended decision and exceptions thereto, and briefs and oral argument of counsel; and the Commission, having duly considered the matter and having entered its orders disposing of the exceptions to the recommended decision of the trial examiner, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Independent Directory Corp., of Illinois, is a corporation organized in 1935 under the laws of the State of Illinois, having its principal office located at 608 South Dearborn Street, in the city of Chicago, State of Illinois.

PAR. 2. Respondent Independent Directory Corp., of New York, is a corporation organized in 1939 under the laws of the State of New York, having its principal office located at 152 West Forty-second Street, in the city of New York, State of New York.

PAR. 3. Respondent New Jersey Directory Corp. is a corporation organized under the laws of the State of New York. From the date of its incorporation in November 1924 until sometime between 1936 and 1940 this corporation published classified telephone directories for various areas in New Jersey, but has not engaged in publication since that time. It maintains offices at 152 West Forty-second Street, in the city of New York, State of New York, from which it manages two pieces of property in the Borough of Brooklyn, State of New York, and at which it employs from one to a dozen employees at different times who engage in compiling, circularizing, checking, and addressing for the general public, and also, when needed, for respondents independent directory corporations. At times it mails out order or contract forms for the independent directory corporations and clips advertisements from other directories for them, but it does not take

Findings

47 F. T. C.

orders for listings or other advertising in the directories published by the independent directory corporations. It has no other connection with, and performs no other functions for, the other respondents herein.

PAR. 4. Respondent William Oleck Advertising Corp. was incorporated under the laws of the State of New York in 1921, was solely a newspaper advertising agency, and was not connected in any way with the publications of the other respondents in this proceeding. It was dissolved December 15, 1944.

PAR. 5. Respondent William Oleck has been and is the president and a director of each of the corporate respondents.

PAR. 6. Respondent Maury Oleck has been and is the secretary and treasurer and a director in each of the corporate respondents.

PAR. 7. Respondent David Oleck is assistant secretary of Independent Directory Corp., of New York, and assistant treasurer of Independent Directory Corp., of Illinois. He is not a director in any of the corporate respondents.

PAR. 8. Respondents William Oleck and Maury Oleck are brothers, and they, together with Blanche Oleck, constitute the board of directors of Independent Directory Corp., of New York, and Independent Directory Corp., of Illinois, and New Jersey Directory Corp. These corporations are operated as a family affair, and the management, control, and direction thereof are by the respondents William Oleck and Maury Oleck. Respondent David Oleck exercises no control over their policies or management. None of the individual respondents have, since 1941, published or distributed any directories individually.

PAR. 9. Respondent William Oleck began the publishing and distribution of directories in 1921 with William Oleck's Green Book for Hudson County, N. J. This consisted of listings and advertisements of the names, addresses, and telephone numbers of various business, commercial, and professional persons and concerns in that area, together with some listings and advertisements from the New York metropolitan area. The advertisements and some of the listings were paid for and the distribution of the books was free to all industrial and professional telephone subscribers in the area. This was the first such book issued in that area and was issued after a survey thereof.

PAR. 10. Thereafter books of similar character were published and distributed by William Oleck and various corporations under his direction, including respondents Independent Directory Corp., of New York, and Independent Directory Corp., of Illinois, some of which covered local areas and others which covered areas of several States.

PA
are n
ing
and b
uct o
vertis
direc
Inter
trial
Class
an a
categ
The
at le
adve
PA
and
sin,
Virg
Lou
edit
Jers
Rho
Virg
P
pub
from
Chi
cha
loca
of C
and
and
bet
I
wel
tim
em
Ne
sin
26

PAR. 11. Respondents described in paragraphs 1, 2, 5, and 6 above are now, and for several years last past have been, engaged in publishing directories of manufacturers, wholesalers, jobbers, distributors, and business services classified under commercial headings as to product or service, listing address and telephone number and carrying advertisements of products or services for sale by the advertisers. These directories are variously captioned as Classified Telephone Directory, Interstate Industrial Register, Manufacturers' Business and Industrial Buyers' Guide, Industrial Classified Telephone Directory, and Classified Industrial Register. The listings therein consist mainly of an address and telephone number placed under a product or service category; some are paid for, some are free at the option of respondents. The advertisements are paid for by the advertisers. Circulation of at least 50,000 is guaranteed for each directory and is free to each advertiser and listee therein. A few directories are sold for \$10 each.

PAR. 12. Independent Directory Corp., of Illinois, compiles, edits, and publishes a directory for the States of Illinois, Indiana, Wisconsin, Iowa, Minnesota, Michigan, Ohio, western Pennsylvania, West Virginia, Kentucky, Missouri, Tennessee, Mississippi, Arkansas, and Louisiana. Independent Directory Corp., of New York, compiles, edits, and publishes a directory for the States of New York, New Jersey, eastern Pennsylvania, Delaware, Maryland, Connecticut, Rhode Island, Massachusetts, New Hampshire, Vermont, Maine, Virginia, North and South Carolina, Georgia, Florida, and Alabama.

PAR. 13. These directories, when published, are transported by the publishers thereof through the United States mails and otherwise from the points of publication thereof, namely, New York City and Chicago, Ill., to individuals, institutions, and others interested in purchasing from the advertisers therein at their respective points of locations in the various States of the United States and in the District of Columbia. Respondents Independent Directory Corp., of Illinois, and Independent Directory Corp., of New York, have maintained and do maintain a course of trade in said publications in commerce between and among the various States of the United States.

PAR. 14. Advertisements and listings for respondents' directories were solicited prior to 1938 almost entirely by salesmen, but since that time solicitation has been by mail and also by salesmen. Respondents employ one salesman in the Chicago area and seven salesmen in the New York area for this purpose. Mail solicitation has increased since 1938 until for the past 5 years it accounts for approximately 26 to 30 percent of respondents' revenue.

Findings

47 F. T. C.

PAR. 15. When respondents' salesmen solicit advertising they clip out a prospect's advertisement from any publication in which they can find one, paste it on a copy sheet and present this, together with a contract to advertise in the next edition of respondents' directory, to the prospect. Appointment for this call may or may not have been previously made by telephone. If no advertisement of the prospect can be found, respondents sometimes will sketch a suggested advertisement on the copy sheet. In other instances, the salesman simply takes a blank copy sheet along with the contract, and works out an advertisement thereon with the prospect, if the latter is interested. If the prospect agrees to subscribe, both he and the salesman sign the contract, which is returned to respondents by the salesman. Respondents immediately send a duplicate of the contract to the prospect by registered mail, together with a statement of the cost.

PAR. 16. In soliciting by mail, respondents Independent Directory Corp., of Illinois, and Independent Directory Corp., of New York, send to various prospects proposed contracts for paid advertisements or paid listings. Each such contract, as printed, has a large blank space immediately above the place for signature. On this blank space is pasted by respondents an advertisement which the prospect has carried in his local telephone directory or some other publication, which advertisement respondents have cut out from the publication in which it appeared for the purpose of attaching it to their own contract.

PAR. 17. These proposed mail order contracts state on their face, immediately above the attached advertisement so appropriated, that the attached copy appears in another publication and that the contract is not a renewal or proof, but if signed and returned is an authorization to publish an advertisement in respondents' directory. Such contract forms also contain the name The Independent Directory and Independent Directory Corp. and state that the latter is not connected with any telephone company. Such contract forms contain a detailed statement of the States in which respondents' directory is to be distributed, a printed statement of advertising space rates, in the case of advertising contract forms, and the price of listings in the case of listing forms. Each such contract form also carries the statement immediately preceding the line printed for the signature of the prospective advertiser, that the latter authorizes the respective respondents, Independent Directory Corporations, to insert representations similar to the attached advertisement in the next issue of respondents' Industrial Classified Telephone Directory or Classified Industrial

Directory or Classified Industrial Register. Some forms also carry pictures of respondents' directories.

PAR. 18. Respondents' forms used in 1941, 1942, 1943, and 1944 had the words "telephone directory" or "phone directory" in the largest and most conspicuous type on the form with the above-described disclaimers and cautions in smaller, less conspicuous but nevertheless plain type, substantially removed in some instances from the larger type. Since 1944 or thereabout, however, the words "telephone" and "phone" have been omitted from the heavy type heading and do not appear except in the authorization immediately above the signature line. For the past several years the words "telephone" and "directory" have been entirely removed from these forms by respondents. Respondents have recently removed from their directory covers the words "telephone" and "directory."

PAR. 19. The proposed mail-order contract form is accompanied by a return envelope bearing the printed name and address of the respective Independent Directory Corporation, but no duplicate of a proposed mail order contract form is enclosed for retention by the prospect. Respondents Independent Directory Corporations, of Illinois and New York, occasionally send with such proposed contract forms to prospective advertisers a mimeographed sales letter or reproductions of appreciative correspondence from users of the directory.

PAR. 20. The record in this proceeding shows that because of the presence of their advertisements on respondents' contract forms a representative number of prospects receiving such forms by mail have signed and returned the same to respondents without reading, or without reading thoroughly, in the belief that they were renewing their advertisements or listings carried by them in their local telephone directories or other publications.

PAR. 21. Most of these prospects who have so signed under such misapprehensions had never had any dealing with respondents and the name "Independent Directory Corporation" meant nothing to them. They had advertised in their local telephone directory for many years, ranging up to 35 years, and a number of them advertised in no other publication. In a number of such instances the clipped advertisement was unique or distinctive to the prospect or to the telephone directory in which it appeared because of drawings, type of print, make-up, and the distinctive yellow paper used in most classified advertising sections of telephone directories. In other instances the advertisement was distinctive because of branded merchandise handled, or handled exclusively, by the prospect or because of trade-marks of the prospect.

Findings

47 F. T. C.

PAR. 22. In a number of instances the prospect had, shortly before receiving respondents' mail order contract form with his telephone directory advertisement pasted thereon, been visited by or telephoned by unidentified salesmen inquiring whether the prospect wished to renew his telephone directory advertising or listing and informing him that the contract therefor would shortly come in the mail. In other instances the blanks on respondents' contract forms for classification, amount of space, and cost of advertising, were still blank when the prospects signed them.

PAR. 23. When respondents solicit advertising by salesmen a copy of the contract secured, together with the amount called for therein, is always sent by respondent to the prospect immediately after the contract is turned in by the salesman. When respondents solicit by mail only one copy of the contract to be signed is sent to the prospect and he is not thereafter furnished with a copy unless he, after receipt of a bill therefor, raises a question of his liability therefor.

PAR. 24. Respondents do not send out bills for listings or advertisements in their directories to those who sign their mail order contract forms until just before publication of the directory. This may be extended as long as 8 months after the contracts have been signed. Usually by the time the advertiser has been sent his bill it is too late for him to cancel his advertisement because the directory has gone to press, and this is usually the first time those who have signed, in the belief that they were renewing their advertising or listing in their local telephone directory, become aware that they were, in fact, dealing with respondents.

PAR. 25. For a number of years respondents have been aware of the fact that their practice of pasting onto their mail order contracts appropriated telephone directory advertisements of the prospects has caused a number of those prospects to sign their contracts in the mistaken belief that they were renewing the appropriated advertisement in their local telephone directory, but the respondents have nevertheless continued this practice.

PAR. 26. In cases in which advertisers who have signed respondents' contracts claim that their signing was the result of a mistake, it is respondents' practice, where the directory has not been set up in type, to cancel the contracts. In all other cases it is the respondents' practice to insist upon payment and if it is not made to sue for enforcement thereof.

PAR. 27. A number of the individuals and firms that have signed respondents' mail order contracts under the circumstances set out above have been engaged in businesses which are local, either by na-

ture or by choice, and such individuals and firms would not knowingly advertise in any publication of interstate circulation. There is no substantial evidence in the record, however, to sustain the allegation made in the complaint that most of respondents' advertisers do only a local business or a business confined to an area much less than that covered by respondents' publication, or that the majority of respondents' advertisements are of little or no value to local advertisers.

PAR. 28. The Commission is of the further opinion that the record contains no substantial evidence to sustain the charge in the complaint that respondents' salesmen secure advertising contracts from prospects by representing directly or by implication that such advertisers are merely renewing their advertisements for another year in the publication from which respondents have taken the advertisements displayed by the salesmen.

PAR. 29. As the Commission has found, the contract forms used by respondents in soliciting advertising by mail for their publications contain a number of statements and disclaimers which, if carefully read by a prospect to whom the forms are sent, would probably preclude any misunderstanding on the part of such prospect as to the identity of the publisher from whom the contracts were received or the publication in which the advertisement attached to the forms would appear. The record shows, however, that respondents' practice of attaching to their contract forms advertisements appropriated from local telephone directories and other publications has actually deceived many of the prospects to whom such forms have been sent into the mistaken belief that they were simply renewing their advertisements in the publications from which the advertisements were taken, and it is the Commission's opinion, in view of all the circumstances, as herein set forth, that respondents' practice in this respect carries the definite potentiality of deceiving others in similar fashion, regardless of the cautions, disclaimers, and explanations printed on the forms. In such circumstances, the appropriated advertisement may so arrest a prospect's eye and so insulate him with such familiarity and certainty that to him even cursory examination of the form appears useless and time wasting. The Commission is of the opinion, therefore, and finds, that the statements, explanations, and disclaimers on the forms used by respondents are not effective to remove the likelihood of deception which may result from respondents' practice of attaching to such forms advertisements from other publications.

PAR. 30. As a result of respondents' acts and practices, some individuals and firms have bought and paid for advertising space for

Order

47 F. T. C.

which they had no use and which they did not desire, to their damage and injury. Such damage and injury is likely to reoccur and to continue.

CONCLUSION

The acts and practices of the respondents named in paragraphs 1, 2, 5, and 6 hereof, as herein found, are to the actual and potential prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Commissioner Mason dissenting.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint introduced before trial examiners of the Commission theretofore duly designated by it, the trial examiner's recommended decision and exceptions thereto, and briefs and oral argument of counsel, and the Commission, having disposed of the exceptions to the trial examiner's recommended decision and having made its findings as to the facts and its conclusion that the respondents, Independent Directory Corp., of New York, Independent Directory Corp., of Illinois, William Oleck and Maury Oleck, have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondents, Independent Directory Corp., a New York corporation, and Independent Directory Corp., an Illinois corporation, and their officers, and the respondents, William Oleck and Maury Oleck, and said respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of advertising in telephone, industrial, commercial, or other directories or registers, or in any other publication, do forthwith cease and desist from using in the solicitation of such advertising by mail, advertisements which have been physically clipped or removed by or for the respondents from any publication issued by others than the respondents.

It is further ordered, for reasons appearing in the Commission's findings as to the facts in this proceeding, That the complaint herein be, and it hereby is, dismissed as to the respondents, New Jersey Directory Corp., William Oleck Advertising Corp., and David Oleck,

said dismissal being without prejudice, however, to the right of the Commission to institute a new proceeding against these respondents or to take such further or other action against them at any time in the future as may be warranted by the then existing circumstances.

It is further ordered, That the respondents, Independent Directory Corp., a New York corporation, Independent Directory Corp., an Illinois corporation, William Oleck and Maury Oleck, shall within 60 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Commissioner Mason dissenting.

OPINION OF THE COMMISSION

CARSON, *Commissioner*:

The Independent Directory Corp. et al., is before us in this case, docket No. 5486, to answer to a complaint that it violated section 5 of the Federal Trade Commission Act. The charges in the complaint can be made very simple for the benefit of the layman or consumer for whom the law was written. Consumers are rarely organized. They rarely have the immediate services of lawyers and accountants and economists and other experts. But this Commission was created by the Congress to protect their right to an honest and fair market place. Upon the Commission is placed the obligation to protect not only the discerning public against deceptive advertising, but also to protect the casual, or negligent, or ignorant.

The facts in this case are as follows:

The Independent Directory Corp. published books in which were listed the names and advertisements of various business organizations. It offered to sell that service to such organizations. It made its offers through direct solicitation by salesmen, and also through use of the postal service. In making its offers, it often made it a practice to clip an advertisement from the publication of another company, pasting that advertisement on a contract form and then submitting the form to a prospective customer.

The complaint was made that prospective customers thought they were merely signing a contract for renewal of their obligation to advertise in the publications of the organizations from which the advertisements were appropriated. The original contract forms were so designed that the unwary prospective buyer could have been deceived, and the evidence discloses that various purchasers were deceived into believing they were only executing a contract for renewal of prior agreements to advertise. The contract forms were, in fact,

entirely capable of causing the prospective customer to commit error, so much so that it is difficult to believe there was any marked concern on the part of the company to protect some, at least, of its prospective customers against being deceived.

It is true that the contract forms were modified to remove some of the more flagrant traps to which the unwary customer was exposed. But modification of the contract forms was not sufficient, especially in view of the disregard by the company of its original obligation to protect the consumer. The day when the consumer must submit to any dictum that "the buyer must beware" is long passed, and it is the duty of this Commission to make certain, insofar as its authority extends, that that day shall not return. Those who make use of artfully designed contracts, with their plethora of deceitful fine print, must assume the burden of proof that the fine print is not in fact a well-designed and unlawful trap for the unwary. If "good will" can be restored to its rightful place in a free economy, as being the greatest asset any business can have, or should have, then there is no justification for tolerating contract forms and other methods which may well deceive the least literate of consumers.

The Commission, in fairness to the respondents, has held that there was no evidence to the effect that anyone was deceived when the practice was used in connection with personal visits by salesmen, and the Commission's prohibitions have been limited, therefore, to the practice of attaching to respondents' contract forms advertisements which have been physically removed from publications issued by others than the respondents in the use of such advertisements in the respondents' solicitation of advertising by mail. Thus, this limitation by the Commission leaves untouched the respondents' personal solicitation business. The Commission's findings as to the facts and conclusion, together with its order, tells the full and complete story of the facts and circumstances upon which the majority of the Commission members reached their conclusion.

The sole issue herein is the character of circumstances surrounding the solicitation of business by respondents by mail, expressly excluding the nondeceptive character of personal and salesmen's solicitation of respondents' business. It should be noted, further, that customers often received no copy of respondents' contract for their files, received no bill, received no information to put them on notice as to solicitation by a new and different advertising medium than the one they had used. Some prospective customers, before receiving respondents' contract forms, already had been contracted by unidentified salesmen, creating the impression that such salesmen were tele-

phone company representatives inquiring about the renewal of such advertisements in the telephone directories. There can be no doubt, from careful reading of the record, that many such customers were misled and deceived by reason of the respondents' method of soliciting business.

Truth, Honesty, and the Law

There can be no quibbling or hair-splitting on the part of a government agency such as this, in the carrying out of its duties and responsibilities within its sphere of authority for the protection of fair competition and the public interest. The legal authorities are overwhelmingly in support of such an obvious truism, and one would have to seek assiduously to establish a legal exception to the general rule. To do so, one would have to argue speciously that a thing or practice is partly legal because it is partly good and only partly bad.

To cite only briefly from the long list of legal authorities supporting the Commission's conclusion and order, the courts repeatedly have held that the law is not made for experts but to protect the public—that vast multitude, which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze but who are often governed by appearances and general impressions, *Florence Manufacturing Co. v. Dowd*, 178 F. 73. Advertisements are not intended to be carefully dissected with a dictionary at hand, but rather, to induce an impression upon prospective purchasers (*Newton Tea and Spice Co. v. United States*, 288 F. 475). Impressions are the primary target of the ad writers (*Stanley Laboratories, Inc., et al. v. Federal Trade Commission*, 138 F. (2d) 388) [37 F. T. C. 801; 3 S. & D. 596].

Even the exact truth may not save a respondent from the consequences of his act where there is a duty to do more than to maintain mere silence, a duty to put the purchaser on notice of the true character of the transaction. Although the printed text of an advertisement may be literally true, its form, color, or print may be designed to mislead the casual reader. In such case, the advertiser attempts to appeal to the eye of the reader and direct his attention to an offer or advertisement which, under ordinary circumstances, he might not have noticed (*United States v. 95 Barrels of Vinegar*, 265 U. S. 438; *Bockenstette v. Federal Trade Commission*, 134 F. (2d) 369) [36 F. T. C. 1106; 3 S. & D. 539].

Advertisers, like other purchasers, may be compelled by circumstances to trust to the integrity, capacity, and diligence of others, and

Opinion

47 F. T. C.

laws are made to protect the trusting as well as the suspicious (*Federal Trade Commission v. Standard Education Society*, 302 U. S. 112) [25 F. T. C. 1715; 2 S. & D. 429]. Such consumers have a right to assume that fraudulent advertising traps will not be laid to ensnare them (*Donaldson v. Read Magazine*, 333 U. S. 179). It is the Commission's function, in protecting the public against deceptive advertising, to protect the casual, even the negligent, reader, as well as the vigilant and more intelligent and discerning public (*Parker Pen Co. v. Federal Trade Commission*, 159 F. (2d) 509 [43 F. T. C. 1190]; *Belmont Laboratories, Inc. v. Federal Trade Commission*, 103 F. (2d) 538 [28 F. T. C. 1941; 3 S. & D. 97]. A fair test may be reasonably made by the ultimate impression upon the mind of the reader resulting from the sum total of what he reads and what is reasonably implied (*Aronberg v. Federal Trade Commission*, 132 F. (2d) 165) [35 F. T. C. 979; 3 S. & D. 647]. Advertisements must be considered in their entirety as they would be read by those to whom they appear (*Ford Motor Co. v. Federal Trade Commission*, 120 F. (2d) 175) [33 F. T. C. 1781; 3 S. & D. 378].

On the question of securing signatures to contracts by misrepresentation, it has been held consistently that securing signatures in haste or by other trickery to contracts, of whose terms, nature, and effect the signer is ignorant, is prohibited by the laws administered by the Commission. Appropriating values created by a competitor's ingenuity, labor, or expense is prohibited (*Orient Music Roll Co.*, 2 F. T. C. 176, (1919) D. 304). False, unfair, or deceptive acts defined in the Federal Trade Commission need not be such as would constitute fraud as that term is ordinarily understood in law (*D. D. D. Corp. v. Federal Trade Commission*, 125 F. (2d) 679 (CCS-7) 1942) [34 F. T. C. 1821; 3 S. & D. 455]. It is unlawful under the Federal Trade Commission Act for a respondent to fail affirmatively to disclose the material fact where appearances may be deceptive (*Haskelite Mfg. Corp. v. Federal Trade Commission*, 127 F. (2d) 765 (CCA-7) 1942) [34 F. T. C. 1855; 3 S. & D. 485]. Where a respondent has used confusing order blanks and has taken advantage of customers who did not understand them, the Commission may require the preparation of orders in a manner so clear as readily to be understood even by the ignorant, the unthinking and the credulous (*Dorfman v. Federal Trade Commission*, 144 F. (2d) 737, 739 (CCA-8) 1944) [39 F. T. C. 700].

The fact that deceit or other forms of misrepresentation may take place within the technical confines of a written instrument does not strip the act of its true character, whether it be honest or dishonest. It is, in essence, still a matter of intent and conscience, with logical moral and legal consequences, regardless of legal hair-splitting.

The findings and order, as herewith presented for Commission action, should be approved and entered.

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON

In this matter I join with my colleagues in the findings. These clearly set forth the facts surrounding the instant controversy.

I am not only in agreement with their findings and their views regarding the law on false and misleading advertising but am also in complete accord in their effort to rely on case law as established by the courts when deciding issues before us. It is this adherence to the accumulated wisdom of centuries of judicial trial and error that keeps our law merchant from slipping back into the law of the jungle. The day of caveat emptor is past.

With this brief but earnest salute to the high ideals expressed in the majority opinion, I must still say that in my opinion the order in this case is no good.

I believe we are not here dealing with false and misleading advertisements such as the cases cited by the majority refer to. We are dealing with contracts which it is alleged deceived the customers who signed the contracts in question but didn't read them. This latter sentence is intended to sound as incongruous as it does. For how can one be deceived by what one does not observe.

I do not think we should tell the merchant, the businessman, or the public, that no matter how explicit a written contract is and no matter if the same is properly executed by the customer appending his name to the document, the written terms of the contract are of no moment; that it is impressions and not the written words that count. If this be so, I sense a feeling that nothing people do is to be stamped with the importance of self-responsibility. Shall a contract be void if my mood is at variance with its words? Shall we invalidate the highest form of business obligation (written instruments) by finding the nuances and overtones surrounding it are not in accord with what is actually nominated in the bond? Will we have to psychoanalyze the complexes of all parties as they affix their signatures to make a debenture or other written instrument legal?

The Federal Trade Commission is the protector of the public interest, but we are not guardians ad litem to the Mortimer Snerds who can read but won't, who don't have to sign contracts but do, nor do I believe we forward the public interest by clouding the validity of contracts no court would condemn.

The respondents are told in the cease and desist order that they must no longer clip out others' advertisements and paste them in their own contractual proposals if the offer is to be made by mail.

Opinion

47 F. T. C.

I could think of a lot nicer ways of earning a living than clipping and pasting someone else's ads. There is something about the process that is distasteful to me, but matters of good taste are not yet on our agenda. The law, not Emily Post, still must guide our actions.

The majority appear to agree with me that clipping and pasting is not per se illegal or deceptive because under the order respondents are allowed to clip and paste if a salesman carries the written contract to a purchaser but not if it is mailed. If the prohibition were imposed the other way around, it might have some justification for I can imagine a salesman bludgeoning a prospect into signing a contract under such circumstances as would amount to fraud, but when a purchaser bludgeons himself with no one else around I can see no way for us to protect him against his own unwillingness to be protected.

A written contract is a bilateral transaction which the respective parties ratify by their signatures. Their subscribed names are certification to the world that the terms of the contract insofar as they are explicit are understood and agreed to. Respondents' contracts fully disclose all the terms and conditions of the transaction. There was no fine print such as banks and insurance companies often use. (See findings of fact issued by the majority to which I also concur.) Those who misapprehended the terms of the contract were people who did not read what they signed. (Also see above findings.)

The law has been settled as far back as Touchstone (1648): "If a party that is to seal the deed can read himself and doth not, or being illiterate or blind, doth not require to hear the deed read or the contents thereof declared, in these cases albeit the deed is contrary to his mind, yet it is good and unavoidable." In language not quite so quaint, we repeated this principle * * * adding that one who so signs a document 'is guilty of supine negligence, which * * * is not the subject of protection, either in equity or at law.' We have never deviated from this ruling * * *." *Reed et al. v. Kellerman* (U. S. Dist. Court, E. D. Pa., June 30, 1941). 40 F. Supp. 46.

Can we protect a man against buying a pig in a poke? I doubt if the standards, basis, and reasons supporting our authority to ban false and misleading advertising justify the condemnation of written sales contracts which clearly advise the purchaser in detail of the commodity he is buying, just because the purchaser did not read what he signed. Here we are dealing with written instruments, in the instant case, voluntarily signed, executed, and mailed by prospective purchasers to the respondents.

The law is well stated by Mr. Justice Hunt in *Upton, Assignee v. Tribilcock*: "That the defendant did not read * * * was his own fault. It will not do for a man to enter into a contract, and when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." 91 U. S. 45, 23 L. Ed. 203.

In *Poe v. Illinois Central R. Co.*, 99 S. W. 2d 82, the Supreme Court of Missouri said: "While the law affords every one reasonable protection against fraud, it does not go to the romantic length of establishing the relation of parent and child or guardian and ward between courts and adults managing their affairs, in full possession of their faculties and unrestrained in action, and indemnify them when dealing at arm's length against the consequences of their own indolence, listless inattention, or unwarranted credulity in the transaction of business affairs."

In a recent opinion, *Vargas v. Esquire, Inc.*, Circuit Judge Kerner reaffirmed this age-old rule of law in this language: "It is a rule universally recognized that a written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs it. And in the absence of fraud, which must be proved by clear and convincing evidence a man in possession of all his faculties who signs a contract, cannot relieve himself from the obligations of the contract by saying he did not read it when he signed it, or did not know or understand what it contained." (C. C. A. 7th, Feb. 27, 1948) 166 F. (2d) 651. Cert. Den. 335 U. S. 813, 93 L. Ed. 18, 69 S. C. 29. See also: *Hickman v. Sawyer et al.* (C. C. A. 4th, May 26, 1914) 216 F. 281, 132 C. C. A. 425, *Ford Motor Co. v. Pearson* (C. C. A. 9th, May 5, 1930) 40 F. (2d) 858, *G. L. Webster Co. Inc. v. Trinidad Bean & Elevator Co.* (C. C. A. 4th, Sept. 27, 1937) 92 F. (2d) 177, *Hayes v. Travelers Insurance Co.* (C. C. A. 10th, Nov. 24, 1937) 93 F. (2d) 568, 12 Am. Jur. 628, # 137.

While the Commission is the businessman's court and a mere citation is lacking in the enlightenment that a direct quotation gives, it is interesting to note that literally hundreds of opinions from every State and Federal court of record in this country that has passed on this question affirm this principle, basic in the law, and I have found none to the contrary.

I am against the order in this case.

IN THE MATTER OF
L. HELLER & SON, INC. AND THE HELLER DELTAH CO.,
INC.

COMPLAINT, FINDINGS, ORDER, AND OPINION IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5358. Complaint, July 25, 1945—Decision, Aug. 25, 1950

The protection of the public interest, as respects the duty of the Commission under the statute, is a practical and flexible conception which must be adapted to fit the various needs of the public interest as they may appear in particular circumstances, since the necessary corollary of the statutory direction to the Commission to issue its complaint where it has reason to believe that an unfair or deceptive act or practice is being used in commerce if it appears to it that a proceeding by it in respect thereof would be to the interest of the public, is that the Commission should terminate a practice after proceeding against it only where it appears that such action would be to the interest of the public—a corollary which requires the Commission to apply its judgment and experience realistically in determining what, if any, remedy is needed to protect the public interest in the particular circumstances of a case presented to it for decision.

As respects a remedy sought by counsel supporting the complaint and recommended by the trial examiner in the instant matter, namely, the required disclosure of foreign origin of cultured pearls contained in necklaces and other articles of jewelry, which would establish a principle of the widest application, as to which it would be highly uncertain where a line of reasonable distinction could be drawn; the Commission was of the opinion that if so broad a principle was to be applied, it should be done in an atmosphere in which the showing of public interest rested upon a broader base than was found in the proceeding in question; and in so deciding the Commission exercised a broad discretion in withholding a remedy which, in its opinion—even though it was also of the opinion that the record would support such a remedy if it were imposed—would afford little protection to the public interest, and would place unnecessary burdens upon normal business practices.

With regard to the question as to whether or not disclosure of foreign origin of certain products is necessary to avoid deception of the public, and the contention that certain imported products become commingled with like domestic products and are thereafter indistinguishable so that it would be prohibitively burdensome to keep them separate—though no such difficulty appeared in the case of a comparable more expensive product—difficulties which may be involved in keeping imported products separate from domestic products, for purposes of identification, must be met by businessmen when necessary to avoid deception of the public.

As respects the question as to whether or not failure to disclose foreign origin of ingredients in products constitutes misrepresentation and an unfair and deceptive practice, it is to be recalled that, as stated in *Segal v. Federal Trade*