

forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF
BANKERS SECURITIES CORPORATION

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 7039. Complaint, Jan. 15, 1958—Decision, Dec. 1, 1960

Order requiring the corporate operator of Snellenbergs, a Philadelphia retail department store, to cease advertising in newspapers fictitious prices for its rugs and carpets through use of the abbreviation "Reg." and the word "usually" followed by amounts falsely represented thereby as its regular selling prices.

Mr. Ames W. Williams for the Commission.

Wolf, Block, Schorr & Solis-Cohen, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint herein charges the respondent, Bankers Securities Corporation, a corporation, with violation of the Federal Trade Commission Act by engaging in false, misleading and deceptive advertising as to the regular and usual retail price of rugs and

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carpets offered for sale or sold by Snellenburgs, a retail department store operated by said respondent. The respondent was duly served with the aforesaid complaint according to law and, within the required time, filed answer thereto denying the pertinent charges of violation.

On the issues thus joined the matter proceeded to trial during the course of which certain testimony was had, and exhibits received in evidence, all of which testimony was stenographically reported and, together with the exhibits, duly filed of record in the Office of the Commission in Washington, D.C., as required by law.

Subsequent thereto, both parties were accorded an opportunity, of which they availed, of filing with the hearing examiner their respective Proposed Findings of Fact and Conclusions of Law, those deemed proper to be admitted having been incorporated herein, and those rejected being ignored, as a reading of this Initial Decision may indicate.

FINDINGS AS TO THE FACTS

1. Respondent Bankers Securities Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. Respondent has its office and principal place of business at 1315 Walnut Street, Philadelphia, Pennsylvania.

2. Respondent is engaged primarily in the real estate business, but operates, as a division, separate and distinct from all its other activities, a retail department store in Philadelphia known as "Snellenburgs."

3. In the course and conduct of its operation of Snellenburgs, a retail department store, the respondent now causes, and has caused, rugs and carpets, when sold, to be transported from its establishment in Philadelphia, Pennsylvania, to purchasers located in other states of the United States. It was stipulated that on the basis of 12 representative test days in 1956, 9.1 percent of Snellenburgs' sales were made to out of state customers. In the record as Commission Exhibits 6, 7, 8 and 9 are four "Cut Slips" indicating sales of carpets or rugs to be sent, and in some instances installed, by respondent for customers located in New Jersey, on dates and in amounts as follows:

9-10-56: \$1,257.83
10-29-56: \$196.78
9-18-56: \$847.60
9-22-56: \$708.32

The respondent has maintained a substantial course of trade in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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4. Respondent at all times mentioned herein has been in substantial competition with other persons, partnerships and corporations engaged in the retail sale of rugs and carpets in commerce between and among the various states of the United States.

5. On September 10, October 28 and November 4, 1956, respondent inserted Snellenburgs' full page advertisements in the Sunday Morning issues of The Philadelphia Inquirer, a Philadelphia, Pennsylvania newspaper, having interstate circulation in which statements were made respectively as follows:

SUPER-CARVED WILTON OR 5-PLY WOOL TWIST; 10.89 sq. yd.: Reg.
15.95-16.95

SUPER-CARVED WILTON OR 5-PLY WOOL TWIST; 10.96 sq. yd.: Reg.
15.95-16.95

5-PLY SUPER TWISTWEAVE OR LUXURY CARVED WILTON; Usually
15.95-16.95 Sq. Yd. 10.96 sq. yd.

6. Respondent, through the use of the abbreviation "Reg." and the word "Usually" accompanied by price figures, represented that said figures were the prices at which the merchandise referred to had been regularly and usually sold by respondent and that the difference between such figures and the price at which the merchandise was offered for sale represented savings to a purchaser.

7. Respondent agreed by stipulation that the rugs described in the advertisements hereinabove referred to and quoted from had not been sold by Snellenburgs for prices of \$15.95-16.96 per square yard. Respondent urges that by such advertising Snellenburgs "intended * * * to inform the public that \$15.95-16.95 was the regular and usual price in the Philadelphia area for the quality of rugs which Snellenburgs was advertising for sale at \$10.89-10.96 per square yard." In support of that theory it was stipulated by Commission's counsel and counsel for respondent, subject to the right of objection as to relevancy, materiality and competency "that rugs of identical quality and pattern may have been sold—and were being offered for sale—by competitors at prices of \$15.95-16.95 during the relevant period involved."

8. Respondent's argument and the foregoing stipulation raise the conformity with the Commission's decisions and the rulings of the terms "regular" and "usually." Upon this issue the Commission has spoken frequently and consistently to the effect that the terms refer to and mean the prices at which the advertiser has regularly and usually sold the merchandise referred to. The interpretation of respondent's advertising as given in paragraph 6 above is in conformity with the Commission's decision and the rulings of the courts. In *Mandel Brothers, Inc. v. F.T.C.*, decided by the U.S. 7th

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Cir. Ct. of Appeals, 4-1-58, (Commission Docket 6434—7th Cir. No. 12128) the court said:

Petitioner's contention that the issue here is not the regular and usual price of the specific garments sold by Mandel but the regular and usual price of similar or comparable garments fails inasmuch as the customer would make no such distinction.

In the Fair case, Docket 6822, the Commission interpreted the term "usually," when used in advertising to describe prices, as meaning prices at which the merchandise had been regularly or usually sold by respondent in the recent regular course of its business and ordered respondent to cease and desist from representing:

That the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business.

9. Respondent's advertisements, therefore, are found to be false and deceptive in that in fact and by admission the rugs described therein had not been sold regularly and usually by respondent at the prices described as "reg." and "usually." The fact that rugs of identical quality and pattern "may have been sold" or "were being offered for sale" by competitors at the prices described in respondent's advertisements as "reg." and "usually" is immaterial and irrelevant.

10. The use by the respondent of false, misleading and deceptive statements has the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that such statements are true and into the purchase of substantial quantities of respondent's carpets and rugs because of such mistaken and erroneous belief. As a result thereof, substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has been done to competition in commerce.

ORDER

It is ordered, That the respondent, Bankers Securities Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of carpets, rugs, or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing in any manner that certain amounts are the regular and usual retail prices of merchandise when such amounts are in excess of the prices at which such merchandise is usually and regularly sold by respondent at retail, in the recent regular course of its business.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The complaint in this matter charges respondent with violation of Section 5 of the Federal Trade Commission Act by misrepresenting the usual and regular prices of carpets and rugs offered for sale and sold by Snellenburgs, a department store operated by respondent in Philadelphia, Pennsylvania. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and included an order to cease and desist. Respondent has appealed from this decision.

The record discloses that the representations challenged by the complaint appeared in advertisements published in the Philadelphia Inquirer during the latter part of 1956. The following are typical of such representations:

Super-Carved Wilton or 5-Ply Wool Twist; 10.89 Sq. Yd.: Reg. 15.95-16.95
5-Ply Super Twistweave or Luxury Carved Wilton: Usually 15.95-16.95 Sq.
Yd.: 10.96 Sq. Yd.

The complaint alleges and the hearing examiner found that respondent had represented through use of these statements that the advertised merchandise was usually and customarily sold by Snellenburgs at the prices designated "Reg." and "Usually" and that the difference between these prices and the prices at which the merchandise was offered for sale represented a savings to the purchaser. Respondent has stipulated that the carpets and rugs featured in the advertisements had not been sold by Snellenburgs at the designated higher prices. It contends, however, that the above-quoted language from the advertisements has been taken out of context and that each of the advertisements when read in its entirety clearly reveals that Snellenburgs had never before sold the advertised merchandise. Consequently, respondent maintains that the advertisements could not be construed by the public to mean that Snellenburgs had reduced the prices at which it had previously sold such merchandise.

Respondent claims that the following statements in the advertisements placed the purchaser on notice that the merchandise offered for sale was not merchandise ordinarily carried by Snellenburgs:

MILL AND DISTRIBUTOR PART COMPANY \$397,400 STOCK TO SELL
FOR \$207,400!
FAMOUS MAKERS MUST CLEAR WAREHOUSE STOCKS . . . WE HAVE
\$346,000 WORTH FOR \$137,000!

While there can be no doubt that these statements convey the impression that Snellenburgs made a special purchase of carpets and rugs, such information does not negate, nor is it in any way inconsistent with, the impression created by the words "Reg." and

"Usually," in conjunction with price figures, that Snellenburgs had formerly sold the same merchandise at the higher prices. Since Snellenburgs had not sold carpets and rugs identical to those advertised at the prices designated "Reg." and "Usually," or at any other price, the hearing examiner was correct in holding that the representations were deceptive.

Respondent also contends that no showing has been made that the practice challenged by the complaint was an unfair or deceptive act or practice in commerce within the meaning of the Federal Trade Commission Act. It argues in this connection that the record does not support the finding that Snellenburgs' advertisements were circulated in commerce or the finding that sales of the advertised rugs were made in commerce.

We think the latter finding is amply supported by documentary evidence showing sales of carpets and rugs by respondent to purchasers in New Jersey. Respondent has also admitted that "it arranges through independent contractors for the delivery of rugs to the homes of purchasers, the great majority of whom are in Pennsylvania." It is, of course, implicit in this statement that respondent arranges for the delivery of rugs to the homes of some purchasers located outside the State of Pennsylvania. While several of the aforementioned documents show that respondent itself had delivered the advertised rugs to out-of-state purchasers, it is not important whether respondent delivered the rugs or whether it arranged for their delivery. In either event, it is clear that possession of the merchandise passed to the customer outside of the State of Pennsylvania. The sales, therefore, were not consummated in Pennsylvania, but were in fact transactions in commerce.

With respect to the finding that respondent's advertisements were circulated in commerce, respondent argues first of all that the hearing examiner should not have taken official notice that the newspaper in which respondent's advertisements were placed is circulated in interstate commerce. We find no merit in this contention. Certainly a hearing examiner may take notice of the fact that a well known metropolitan newspaper such as the Philadelphia Inquirer is distributed outside of the state in which it is published. Similar notice was taken with respect to the circulation of the same publication in the matter of *American Broadloom Carpet Co.*, 53 F.T.C. 239 (1956). Moreover, respondent in this case was afforded an opportunity to contest the noticed fact but failed to do so. The argument on this point is rejected.

Respondent next contends that the mere fact that persons out of the state might read the Philadelphia Inquirer is not sufficient

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to establish interstate commerce. This argument ignores other evidence of record, however. In addition to the fact that respondent's advertising appeared in a newspaper having interstate circulation, the record discloses that respondent is doing business in a trading area which extends at least into the State of New Jersey. In this connection, Snellenburgs is located in a Pennsylvania city bordering on the State of New Jersey, and has in fact made sales to residents of that State. The record also contains a stipulation to the effect that a survey prepared for local taxing authorities showed that 9.1% of Snellenburgs' sales were made to out-of-state customers. Consequently, Snellenburgs' advertising was not only read by persons who happen to reside outside of the State of Pennsylvania, it was read by persons outside the state who were prospective customers of respondent and placed respondent in business intercourse with such persons. The purpose of the advertising was to secure customers for respondent's merchandise and we have no doubt that in the circumstances shown to exist the advertising disseminated in commerce was likely to secure customers from outside the State of Pennsylvania. It is our opinion, therefore, based on this complaint and this record that the advertising was a trade or business practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. *United States v. Canfield Lumber Co.*, 7 Fed. Supp. 695 (1934); *State v. Packer Corp.*, 297 P. 1013 (S.Ct. Utah, 1931); *Progress Tailoring Co. v. Federal Trade Commission*, 153 F.2d 103 (1946). And compare the opinion accompanying order ruling on interlocutory appeal issued November 18, 1960, *In the Matter of S. Klein Department Stores, Inc.*, Docket No. 7891. The Commission interpreted that complaint as resting jurisdiction solely on "interstate disseminations of advertising for inducing purchases of merchandise" and held that the statute's coverage extends to such disseminations.

Respondent next contends that the order to cease and desist is too broad in that it pertains not only to rugs and carpets but to all other merchandise which it sells. Relying on *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385 (1959), and *The Fair v. Federal Trade Commission*, 272 F.2d 609 (7th Cir. 1959), respondent argues that while the Commission has the authority to issue an order covering merchandise not mentioned in the complaint, it may exercise this authority only in those cases where numerous violations have been found. Neither of the cases cited by respondent support this argument. The issue in *Mandel* was not whether the order should be limited to certain types of products but whether the Commission could extend the order prohibiting misbranding of fur

products to include a form of the practice as to which there was no evidence of violation. In *The Fair*, the respondent was also charged with unfair practices in connection with the sale and offering for sale of fur products. The order in that case which prohibited future violations of specific provisions of the Fur Products Labeling Act would necessarily apply only to products coming within the purview of that statute.

The Commission's authority to issue orders proscribing an unfair method of competition or an unfair trade practice, rather than merely the acts by which such unfair method or practice has been manifested, is too well established to require further discussion. *Hershey Chocolate Corporation v. Federal Trade Commission*, 121 F.2d 968 (1941); *Federal Trade Commission v. Ruberoid Company*, 843 U.S. 470 (1952); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337 (7th Cir. 1960).

Respondent's argument that the order should be limited to its operation of Snellenburgs is also rejected. Snellenburgs is not a separate corporation, but is merely an operating division of respondent. Consequently, there can be no question as to the corporation's responsibility for the acts and practices of this division. The cases cited by respondent on this point relate to the individual liability of corporate officers and clearly have no application to the question of a corporation's responsibility for the acts and practices of its officers or employees.

Respondent argues rather ingeniously, however, that if this proceeding is against Bankers Securities Corporation in all of its activities, counsel supporting the complaint has failed to prove his case since there is no evidence that the carpets and rugs advertised by Snellenburgs were not sold at the designated usual and regular prices by other stores directly or indirectly controlled by respondent. Such evidence, however, would not be relevant to any of the issues raised by the charge herein. While the complaint is directed against Bankers Securities Corporation, the unfair trade practice alleged therein relates only to representations made with respect to the usual and regular prices of certain carpets and rugs sold by one of respondent's operating divisions, Snellenburgs. The complaint alleges, therefore, that respondent misrepresented Snellenburgs' prices, not the prices by some other store.

The hearing examiner properly ruled in this connection that the terms "Usually" and "Reg." refer to and mean the prices at which the advertiser, in this case Snellenburgs, has regularly and usually sold the merchandise referred to. Consequently, a showing that the merchandise advertised by Snellenburgs had been sold at the desig-

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nated usual or regular prices by other stores, including stores directly or indirectly controlled by respondent, would have no bearing on whether the pricing claims made in Snellenburgs' advertising were misleading or deceptive. The order to cease and desist in the initial decision, however, does not specifically require that the terms "Usually" and "Regularly" refer only to the advertiser's former prices. Since respondent controls or operates stores other than Snellenburgs, the order should prohibit it from using representations concerning the usual or regular prices of merchandise sold by any of these stores unless such prices are in fact the prices at which such merchandise is usually and regularly sold by that particular store. The order to cease and desist will be modified accordingly.

Respondent's appeal is denied and the initial decision, modified to conform with this opinion, will be adopted as the decision of the Commission.

Commissioner Mills did not participate in the decision herein for the reason he did not hear oral argument.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the initial decision:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondent, Bankers Securities Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of carpets, rugs, or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing in any manner that certain amounts are the regular and usual retail prices of merchandise sold by any store operated or controlled by respondent when such amounts are in excess of the prices at which such merchandise has been usually and regularly sold by that store at retail, in the recent regular course of its business.

It is further ordered, That the initial decision of the hearing examiner, as so modified, be and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, Bankers Securities Corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth

