
IN THE MATTER OF

MONTGOMERY WARD & CO., INCORPORATED

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

Docket 8617. Complaint, Feb. 19, 1964—Decision, July 26, 1966*

Order requiring a large mail order and chain store retailer to cease deceptively guaranteeing certain of its merchandise by failing to disclose the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform.

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 Montgomery Ward & Co., Incorporated, a corporation, hereinafter referred to as respondent, has 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 complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Montgomery Ward & Co., Incorporated, is a corporation organized, existing and doing business

*Reported as amended by hearing examiner's order of January 15, 1965.

under and by virtue of the laws of the State of Illinois with its principal office and place of business located at 619 West Chicago Avenue in the city of Chicago, State of Illinois.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of automotive equipment and other articles of merchandise to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, said merchandise, when sold, to be shipped from its numerous mailing facilities and stores to the purchasers thereof located in the various States of the United States, other than the States from which such shipments, originate, and, further, respondent now causes, and has caused, advertising and promotional material to be prepared at its central offices and distributed therefrom to its stores located in States other than the States in which said central offices are located, so that respondent thereby maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business as aforesaid and for the purpose of inducing the sale of its said merchandise, respondent has made certain statements and representations in advertisements inserted in newspapers with respect to the nature and extent of the guarantees offered in connection therewith.

Typical and illustrative of such representations but not all inclusive thereof are the following:

(a) Remanufactured engines.

* * * * *

Guaranteed 90 days or 4,000 Miles.

(b) Shock absorbers installed on all 4 wheels—GUARANTEED 15,000 miles.

PAR. 5. By and through the use of the aforesaid statements and others of similar import, respondent represented, directly or by implication, that its said merchandise is guaranteed without condition or limitation.

PAR. 6. In truth and in fact, respondent's guarantees of the said merchandise are not unconditional but are subject to limitations and conditions which are not revealed in their advertising of said guarantees.

Therefore, the advertisements and representations referred to

in Paragraphs Four and Five were and are false, misleading and deceptive.

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. Frank P. Dunn for the Commission.

Mr. Frederick M. Rowe, Mr. Charles J. Barnhill, Mr. Narcisse A. Brown, and Mr. Ronald J. Wilson for respondent.

Kirkland, Ellis, Hodson, Chaffetz & Masters, Washington, D.C., of counsel.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER
MARCH 29, 1965

This proceeding was initiated by formal complaint filed by the Commission on February 19, 1964, charging respondent Montgomery Ward & Co., Incorporated, with violation of Section 5 of the Federal Trade Commission Act by certain newspaper advertisements of its products.¹ In pertinent part, the Commission's complaint alleged that respondent was engaged in commerce through the retail sale of merchandise at various locations throughout the United States, and in connection with such merchandising prepared advertising and promotional materials at its central offices for distribution to its local retail stores.

The complaint further alleged as follows:

¹ The complaint was amended by the Hearing Examiner on January 15, 1965, after stipulation by the parties, to correct technical misnomers and errors in the original complaint.

PAR. 4: In the course and conduct of its business as aforesaid and for the purpose of inducing the sale of its said merchandise, respondent has made certain statements and representations in advertisements inserted in newspapers with respect to the nature and extent of the guarantees offered in connection therewith.

Typical and illustrative of such representations but not all inclusive thereof are the following:

(a) "Remanufactured engines."

* * * * *

"Guaranteed 90 days or 4,000 Miles."

(b) "Shock absorbers installed on all 4 wheels—GUARANTEED 15,000 miles."

PAR. 5: By and through the use of the aforesaid statements and others of similar import, respondent represented, directly or by implication, that its said merchandise is guaranteed without condition or limitation.

PAR. 6: In truth and in fact, respondent's guarantees of the said merchandise are not unconditional but are subject to limitations and conditions which are not revealed in their advertising of said guarantees.

Therefore, the advertisements and representations referred to in Paragraphs Four and Five were and are false, misleading and deceptive.

In addition, the complaint alleged that

PAR. 8: The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's merchandise by reason of said erroneous and mistaken belief.

PAR. 9: The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

The complaint also carried the customary declaration that a proceeding by the Commission in respect to the aforesaid allegations "would be in the public interest."

The respondent moved on March 24, 1964, for a more definite statement and a particularization of the charges in the complaint. Specifically, the motion requested particularization of "the merchandise concerning which false misrepresentations are charged to be made," "the time and place of the advertisements complained," "what representations are relied upon" as being allegedly deceptive, and the alleged limitations and conditions demonstrating the alleged representations as being false, misleading, or deceptive. By answer of March 25, 1964, complaint counsel volunteered to furnish to the respondent the requested particulars on

or before April 6, 1964. In view of complaint counsel's answer, Hearing Examiner Abner E. Lipscomb, originally assigned to the case, issued an order on March 31, 1964, granting respondent's motion for a more definite statement. In accordance with the Examiner's direction, complaint counsel on April 3, 1964, submitted a list of his proposed evidence, consisting of five advertisements of automotive products, published in the Washington Post and Star at various dates from November 15, 1962, to March 20, 1963; two advertisements of water heaters in the Washington Star on October 18, 1960, and March 26, 1961; and fifteen advertisements for sewing machines, some undated and others appearing in various newspapers on December 17, 1957, February 13, 1958, April 9, 1958, and September 23, 1960.

Following such particularization by complaint counsel, respondent filed its answer on April 13, 1964. In pertinent part, respondent's answer pointed out the misnomer in the complaint's designation of its corporate name, admitted the general allegations pertaining to the general nature of its business and advertising procedures, and denied "that the representations quoted in Paragraph 4 are typical representations"; "that where the quoted statements were used, respondent will and does guarantee, the products therein described without condition or limitation"; and "that as to purchasers relying in said statements or those induced to purchase the merchandise therein described, respondent's guarantees are unconditional and are not subject to limitations and conditions not revealed in its advertising." Respondent's answer further denied the other allegations of the complaint.

On July 6, 1964, the respondent filed a motion requesting an order dismissing the complaint for lack of "public interest," which was denied by Examiner Lipscomb on December 15, 1964. Based upon an understanding with counsel at prehearing conferences held on July 7, 15 and 17, 1964, Examiner Lipscomb issued an order on July 17, 1964, which stated in part:

2. That on or before July 24, 1964, counsel supporting the complaint shall furnish copies of all documents to be proffered in evidence herein to opposing counsel;

3. That on or before August 28, 1964, counsel for the respondent shall furnish counsel supporting the complaint copies of all documents to be proffered in evidence herein, and, as far as reasonably possible, the names and addresses of all witnesses that respondent expects to call to testify.

On July 22, 1964, Examiner Lipscomb issued an explanatory prehearing order providing

that the documents listed in the subpoena duces tecum dated July 22, 1964 and addressed to Mr. Charles W. Wood, Vice President, Montgomery Ward & Co., shall be deemed, for the purpose of proffering those documents in evidence, to have been timely called to the attention of counsel for the respondent and within the spirit and purpose of the prehearing order of July 17, 1964.

The directives of the prehearing order were complied with by counsel for the parties.

Various interlocutory appeals and rulings by the Commission ensued. At respondent's instance, the Commission on September 24, 1964, modified the subpoena duces tecum by striking Paragraph (h), relating to Montgomery Ward's policy statement pertaining to its representation SATISFACTION GUARANTEED OR YOUR MONEY BACK and other guarantee claims. The Commission's order stated that "the subpoena in question evidences an attempt to broaden the proceeding beyond the original intentions of the Commission in issuing the complaint," and expressed "the Commission's desire that this proceeding be expedited and kept within manageable proportions." Subsequently, the Commission on October 15, 1964, issued an order denying complaint counsel's request to file an interlocutory appeal from the Hearing Examiner's order of September 29, which had denied complaint counsel's motion to broaden the proceeding with additional advertisements, and reiterated its previously expressed "desire that this proceeding be expedited and kept within manageable proportions." On November 6, 1964, the Commission denied a motion by complaint counsel to amend and enlarge the complaint, stating that "Complaint counsel's request to broaden the complaint by adding a charge unrelated to those contained in the original complaint is inconsistent with the Commission's previous rulings limiting the scope of this proceeding and with its continuing desire that this proceeding not be unduly broadened and protracted."

Thereafter, by order of the Director of Hearing Examiners dated December 16, 1964, the undersigned Hearing Examiner was designated and appointed to take testimony and receive evidence in this proceeding in place of Abner E. Lipscomb.

Hearings on the complaint were held at Washington, D.C., on January 11, and 12, 1965, at which time there were received in evidence ninety exhibits offered by complaint counsel. There were also received in evidence seventeen exhibits offered by the respondent. All of the exhibits were within the scope and limitations of the prehearing order. Copies of the precise exhibits of the respon-

dent were served upon complaint counsel on August 28, 1964, pursuant to the prehearing order, coupled with a request, under the provisions of Section 3.13² of the Commission's Rules of Practice, "to admit the genuineness of each document, and also the truth of the relevant matters of fact therein contained." No reply to such request was filed by complaint counsel (T. 65-68). The only witness called by complaint counsel was John A. Barr, Chairman of the Board of Montgomery Ward, who testified only briefly with respect to financial information concerning the respondent. There was no oral testimony with respect to any of the substantive allegations of the complaint or to explain or connect any documentary exhibits received in evidence. After complaint counsel rested his case, the respondent presented and argued a motion to dismiss based upon an alleged failure to establish a prima facie case on which the Examiner, pursuant to Rule 3.6(e) of the Commission, elected to defer ruling until the close of the case for the reception of evidence (T. 155-56). Respondent elected not to proceed further with a defense and to stand on the record as made (T. 157). On January 12, 1965, the record was closed for the reception of evidence, and February 11, 1965, and February 26, 1965, were the dates fixed for the filing of proposed findings and replies thereto, respectively. Proposed findings of fact and replies were timely filed by counsel for the parties.

The Hearing Examiner has given consideration to the proposed findings filed by the parties hereto and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

Respondent, Montgomery Ward & Co., Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal office and place of business located at 619 West Chicago Avenue, in the city

² "§ 3.13 *Admissions as to facts and documents.*—(a) At any time after answer has been filed, any party may serve upon any other party a written request for the admission of the genuineness of any relevant documents described therein, or the admission of the truth of any relevant matters of fact set forth in such documents.

"(b) Each requested admission shall be deemed made unless, within ten (10) days after service of the request, or within such shorter or longer time as the hearing examiner may allow, the party so served serves upon the party making the request, with a copy to the Secretary of the Commission, either (1) a sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them

"(c) Admissions obtained pursuant to this procedure may be used in evidence to the same extent and subject to the same objections as other admissions."

of Chicago, State of Illinois (Complaint, Par. 1; Answer, Par. 1). Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of automotive equipment and other articles of merchandise to the public (Complaint, Par. 2; Answer Par. 2). Founded in 1872 as a partnership pioneering in the mail order business (RX 16H), Montgomery Ward has grown to become the third largest national retailer of general merchandise in the United States. Its annual sales have exceeded \$1,000,000,000 in each of the past eight years. For the year ended January 1964, its sales were \$1,500,111,708 (Barr, Tr. 126, 127, 131). This selling is done through almost 600 retail stores, 9 mail order houses and 267 catalog order offices (RX 16K)³, which offer for sale substantially more than 100,000 items of merchandise (RX 1C). In the course and conduct of its business, respondent now causes, and for some time last past has caused, said merchandise, when sold, to be shipped from its numerous mailing facilities and stores to the purchasers thereof located in the various States of the United States, other than the States from which such shipments originate, and, further, respondent now causes, and has caused, advertising and promotional material to be prepared at its central offices and distributed therefrom to its stores located in States other than the States in which said central offices are located, so that respondent thereby maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act (Complaint, Par. 3; Answer, Par. 3).

The case-in-chief consists of 29 advertisements by respondent in newspapers in five cities (Chicago, Illinois; Washington, D.C.; Kansas City, Missouri; Fort Worth, Texas; and Baltimore, Maryland) appearing at various dates between 1957 and 1964 (CX 1-3, 20-27, 29-41, 44-48); a series of 13 so-called "basic ads" for sewing machines, which were prepared by respondent's advertising department in its Chicago offices for use by all of its retail stores in 1958, 1959 and 1960 (CX 5-7, 9-15, 17-19); a series of "sample guarantees" for each product depicted in the advertisements and involved in this proceeding, which were delivered to the customers on the sale of the products in the years 1960 to 1964 (CX 50-76); and various excerpt pages from respondent's catalogs for 1960 through 1964 showing the guarantees for the products involved (CX 77-91). In addition, the record contains certain corre-

³ Tabulation for the year 1954. Record does not reveal current number of outlets.

spondence between the respondent and the Commission on various dates between 1958 and 1964 (CX 4, 8, 16, 42, 43) and the Commission's GUIDES AGAINST DECEPTIVE ADVERTISING OF GUARANTEES adopted on April 26, 1960 (CX 49).

Five of the questioned advertisements in the record concern "remanufactured engines," a product which is specifically mentioned in the complaint. Of these, one is an advertisement from the Chicago Sun-Times dated March 13, 1962 (CX 31A-B), which states:

Every installation is guaranteed by the factory. . . . Every motor is guaranteed 4,000 miles with new car service. . . .

One from the Chicago Sun-Times, dated February 21, 1961 (CX 32), states:

4000 mile guarantee

One from The Washington Post, dated November 15, 1962 (CX 33), states:

4,000 MILE OR 90 DAY GUAR. . . . guaranteed.

One from The Washington Sunday Star, dated January 20, 1963 (CX 34), states:

90-GUAR.—4,000 MILES

One from The Washington Evening Star, dated February 6, 1963 (CX 35), states:

for Cars & Trucks . . . Guaranteed 90 Days or 4,000 Miles

A purchaser of a remanufactured engine is given a guarantee certificate (Tr. 105), which contains conditions and limitations not disclosed in the advertisement. A sample guarantee for remanufactured engines (CX 73A) states:

FOR A PERIOD OF NINETY DAYS from date installed or four thousand miles (whichever occurs first) we warrant this rebuilt assembly for passenger car service against defects in material and factory workmanship provided our installation and operating instructions are followed. If this assembly is used in truck or commercial installation, it is warranted for thirty days only.

Any part of this rebuilt assembly which under such conditions fails because of defective parts or factory workmanship during the period of warranty, may be exchanged for new parts without charge, provided old parts are returned. On such failures occurring within thirty days, we will also refund reasonable labor cost. After thirty days (on passenger cars) the warranty is limited to exchange of parts only.

This warranty does not apply to any motor which has not been installed by

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Wards Authorized Installer, or customer does not return to Installer for the 500 mile check-up, or fails because of defects or inefficiency of parts or units (carburetor, air cleaner, fuel pump, etc.), not furnished with the motor. Nor does it cover motors subjected to misuse or accident, or operated under conditions causing greater than normal wear, or used for purposes for which it was not originally designed (such as in a boat, stationary power unit, etc.).

The obligations assumed under this warranty are in lieu of all warranties or guarantees expressed or implied.

This warranty is not valid unless the Certificate of Installation is properly filled in and returned to the Mail Order House or Retail Store from which motor was purchased.

The record contains newspaper advertisement concerning twenty-one other products, together with sample guarantee certificates referring to each such product. In each instance, the guarantee certificate contained conditions and limitations which were not disclosed in the newspaper advertisement.

There is no evidence in the record that any customer did in fact purchase any of the products advertised in the questioned advertisements, that any customer made any claim under any guarantee involved in this proceeding, or that respondent failed to satisfy any claim under any of its guarantees. Therefore, the record cannot support a finding that any of the foregoing advertisements for any of the products were misleading or deceptive, or subject to any undisclosed conditions or limitations by the respondent.

It is concluded that the motion of the respondent to dismiss the complaint should be allowed for the reason that the evidence offered in support of the complaint fails to establish a prima facie case.

ORDER

It is ordered, That the complaint herein be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

JULY 26, 1966

BY JONES, *Commissioner*:

This matter is before the Commission on the appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the complaint. The Commission issued its complaint in the matter on February 19, 1964, charging Montgomery Ward & Co., Incorporated, a national retailer of general merchandise making with false and misleading representations and engag-

ing in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act by failing to disclose in certain of its newspaper advertisements that the guarantee claims made therein were subject to certain conditions and limitations. Respondent in its answer denied that these advertisements referred to in the complaint were typical and asserted that respondent will and does guarantee its products without condition or limitation. After full evidentiary hearings the hearing examiner found that complaint counsel had failed to establish a prima facie case and ordered the complaint dismissed. The examiner was of the view that even though the guarantee certificates given to the purchasers of the advertised products contained conditions and limitations which were not disclosed in such advertisements, counsel had failed in his proof because he had not offered any evidence that respondent invoked these conditions and limitations when claims were filed with it by purchasers or had ever failed to satisfy any claim under any of its guarantees (I.D., pp. 60-61).

I

The evidence of record establishes that respondent, Montgomery Ward & Co., Incorporated (Wards), is a corporation engaged in the sale of merchandise to the public in interstate commerce. Wards is one of the largest national retailers of general merchandise with annual sales in excess of \$1 billion. It operates over 500 retail stores which sell more than 100,000 separate items of merchandise. Newspaper advertising is admittedly Wards' principal medium for stimulating the sale of its merchandise (RX 16(z) (1)).

In order to establish the deceptive nature of respondent's newspaper advertising, complaint counsel offered into evidence some 43 newspaper advertisements by various Wards' stores, containing guarantee representations for products as diverse as sewing machines, drills, automotive parts and shrubbery. These advertisements appeared in local newspapers in a number of cities at various dates between 1957 and 1964. As to each of these guaranteed items complaint counsel offered into evidence sample guarantee certificates which were supplied to customers purchasing the advertised product during the year in which advertisement was placed. These sample guarantee certificates had been obtained from respondent in response to a request for the certificate covering a particular item in a specified year. Counsel's case consisted entirely of a comparison of the guarantees as advertised and the

terms and conditions set forth on the actual guarantee certificates delivered by Wards to the purchaser at the time of sale. Counsel also offered into evidence the Commission's Guides Against Deceptive Advertising of Guarantees adopted April 26, 1960 (CX 49), which provide *inter alia* that when guarantees are advertised they must clearly and conspicuously disclose all of the terms and conditions imposed upon such guarantees.

Respondent's evidence was entirely documentary in nature and related almost exclusively to its internal company policies and procedures applicable to its advertising and guarantees. Respondent's documents demonstrate that respondent maintains at its headquarters an advertising department to aid its local stores in their advertising. This department sends to each local Wards Outlet a book of ad formats from which a complete newspaper advertisement can be prepared locally by store employees for insertion in local newspapers. This advertising material is periodically checked by respondent's law department prior to circulation to the local stores. Respondent's policy as expressed in some of its internal company memoranda circulated to its employees is "to be truthful and fully informative in all advertising" (RX 15 and 17). Respondent constantly reminded its employees in its memoranda to comply with the Commission's guides on guarantees (RX 7a).

In support of its contention that in fact Wards fully performed the guarantee as advertised, respondent offered into evidence a letter from its General Counsel to the Commission, sent during the course of consent negotiations with respect to the instant complaint, in which its policy with respect to honoring guarantees is set forth. In this letter, respondent's General Counsel advised the Commission staff that:

When Wards states a guarantee, whether or not it is an approved Company guarantee, the Company expects to and will live up to the printed text of the guarantee. Therefore, any customer who purchases an item of merchandise can expect the guarantee to be fulfilled in accordance with the printed terms appearing in advertisements without regard to whether it correctly states the Company's usual guarantee for that item of merchandise. (RX 1b-c)

Furthermore,

. . . the Company must not only adequately state in its advertising the applicable guarantees (and their limitations) but more important must fulfill the terms of its guarantees in whatever form they appear. (RX 1c)

However, the record contains no company documents prepared

in the regular course of Wards' business prior to the issuance of the complaint in this matter enumerating such an asserted policy respecting the honoring of guarantees as advertised regardless of the terms of the actual guarantees themselves. Nor did Wards introduce any evidence of actual performance of any of the advertised unlimited guarantees on which complaint counsel's case was based. Moreover, there was no showing by respondent that at the time of the challenged advertisements any such internal company policy of honoring guarantees as advertised which the General Counsel's letter asserts existed was ever communicated to any Wards customer, either generally or in any particular instance.¹

In addition to this general defense, based on Wards' internal store policies, Wards also defended against two of the specific advertisements relied on by complaint counsel (CX 34 and 35) by denying that they had been authorized or approved. Respondent offered affidavits executed by its company officials for the purpose of this litigation which stated that the two advertisements in question were prepared in disregard of the company-prepared formats which were available to the Wards store, that the advertisements had been locally prepared and they did not represent the general practice or conduct of the respondent company (RX 1b).

The hearing examiner found from the record evidence that as to the remanufactured engines and 21 other products (unnamed in the decision) the guarantee certificates given to the purchaser of such products contain conditions and limitations not disclosed in the newspaper advertisements (I.D., pp. 60-61). However, he ordered that the complaint be dismissed on the ground that:

There is no evidence in the record that any customer did in fact purchase any of the products advertised in the questioned advertisements, that any customer made any claim under any guarantee involved in this proceeding, or that respondent failed to satisfy any claim under any of its guarantees

He concludes, therefore, that:

. . . the record cannot support a finding that any of the foregoing advertisements for any of the products were misleading or deceptive, or subject to any undisclosed conditions or limitations by the respondent.

Complaint counsel takes issue in his appeal with the hearing examiner's conclusion that actual evidence of respondent's failure to satisfy the advertised guarantee claims is required to support a

¹ Subsequent to oral argument in this matter respondent submitted copies of advertisements which it placed throughout the country in which it is stated that "whenever Wards advertises a guarantee for a particular product . . . the company will live up to the guarantee as advertised."

finding that respondent's questioned advertisements are misleading or deceptive.

Respondent, on the other hand, supports the position taken by the examiner and asserts that deception has not been established since the record shows that in fact Wards fully performs its advertised guarantees and disregards any specific limitations in these guarantees which are contained in the guarantee certificates accompanying the merchandise.

From our analysis of the evidence of record in this proceeding and the prevailing legal precedent, we believe that the hearing examiner's decision is in error. We therefore specifically reject his conclusion as to the absence of evidence of violation and find, for the reasons set out in this opinion, that the allegations of the complaint have been sustained in law and in fact.

II

Although respondent did not appeal from the hearing examiner's decision, it asserted in its brief (p. 16) that complaint counsel had failed in its proof that the challenged advertisements differed from the guarantee accompanying the merchandise. The hearing examiner specifically found that there was a discrepancy between the challenged advertisements and the guarantee certificates given to the purchaser of these advertised products and that the certificates contained conditions and limitations not disclosed in the newspaper advertisements (I.D., pp. 60-61).

We agree with the hearing examiner and believe that the record amply demonstrates that the guarantee certificates in question were in fact supplied to the consumer with the advertised merchandise² and that they contained terms and limitations not found in the advertisements.³

We have no doubt, and indeed so find, that respondent has an internal company policy that all of its advertising must be truthful and specifically that its advertising of guarantees must be legal and conform to the Commission's Guides Against Deceptive Advertising of Guarantees. However, the existence of this policy to abide by the law does not thereby immunize respondent's advertisements from challenge under Section 5 if in fact they are false and deceptive. This is equally true even if the advertisement

² Complaint counsel offered no direct evidence to connect the sample guarantee certificates with the specifically challenged advertisement. Respondent supplied these guarantee certificates to Commission counsel in response to a request for certificates applicable to the advertised merchandise at the time the advertisement was placed. Respondent offered no evidence purporting to show that these certificates were not applicable to the advertised products.

³ A brief summary of this evidence is attached as Appendix A.

in question was not in fact approved by respondent. Such alleged absence of approval, such as is claimed by respondent for two of the challenged advertisements, might be relevant with respect to the nature and scope of the remedy, but cannot serve as any defense to the legality of the advertisement in question.

The issue before us can be simply stated. Can a company advertise a product as guaranteed, attach to the product the actual text of the guarantee which covers that product and which contains numerous limiting terms and conditions not disclosed in the advertisement and then defend a proceeding brought by the Federal Trade Commission against these deceptive advertisements by asserting that as a matter of company practice not disclosed to its customers it would in fact honor the advertised guarantee if claims were presented to it which fell outside the limitations fixed by the specific guarantee certificate? We believe that the decided cases and the basic purpose of the Federal Trade Commission to outlaw unfair methods of competition in general and deceptive advertising in particular require that in the circumstances presented on this record, this question be answered in the negative.

Deceptive advertising of guarantees has long been established as constituting an unfair method of competition subject to the prohibitions of Section 5 of the Federal Trade Commission Act. *Parker Pen Co. v. F.T.C.*, 159 F. 2d 509 (7 Cir. 1946). An advertised guarantee is misleading in those instances where it fails to fully and adequately disclose any terms or conditions imposed on the represented guarantee, for as the Seventh Circuit pointed out in *Parker Pen Co.*, *supra* "A guarantee *per se* negatives the idea of a further consideration." It is almost a truism that a purchaser is deceived where what he receives from respondent is less than what he thought he would be receiving in the way of guarantee coverage.

Here, however, respondent argues that the falsity of the advertisement is immaterial and does not constitute deception because in practice if a customer makes a claim in reliance on the guarantee as advertised respondent will honor such a claim. We do not agree. It is well established that under the Federal Trade Commission Act it is the capacity to deceive and not actual deception which is the criterion by which the legality of practices is to be tested. *Stauffer Laboratories, Inc. v. F.T.C.*, 243 F. 2d 75 (9 Cir. 1965); *Abel Goodman t/a Weavers Guild v. F.T.C.*, 244 F. 2d 584 (9 Cir. 1957).

The gravamen of the deception caused by an incomplete de-

scription in an advertisement of the guarantee offered with the sale of a product was well summarized in the hearing examiner's initial decision *In the Matter of Western Radio Corporation*, Docket No. 7468, July 25, 1962 [63 F.T.C. 882, 893]. There, the hearing examiner pointed out that:

Since the magazine advertisements which the public first saw induced the purchase, this first impression of the prospective purchaser is the determining factor upon the question of deception with reference to the guarantee. It is now well established "that a guarantee per se negatives the idea of a further consideration" (*Parker Pen Co. v. F.T.C.* (C.C.A. 7, 1946), 159 F. 2d 509, 511). This case and many cited therein, as well as numerous subsequent cases, have established beyond question the principle that the Commission's duty is to protect the uninformed, casual or negligent reader from deception by false advertising. Therefore belatedly revealing the true facts to the purchaser concerning all conditions and limitations attached to such guarantee does not alleviate the first deception, nor absolve the advertiser from responsibility for his original false representations. Since the original statement of guarantee was absolute and without any qualification, it is therefore necessarily found that respondents have falsely and deceptively represented that their Radi-Voc is unconditionally guaranteed for one year, in violation of Section 5 of the Federal Trade Commission Act.

In the *Western Radio* case, respondent had advertised that the radio carried a "one-year service guarantee" whereas in fact the guarantee certificate supplied with the radio at the time of purchase disclosed that the guaranteed service was subject to a \$1.50 service charge to cover postage and handling and that respondent had reserved the right to determine whether the radio had been properly maintained so as to justify the guaranteed service. On the basis of these facts alone the Commission affirmed the finding of the hearing examiner that the advertisement was deceptive. There was no evidence in the case as to whether respondent actually exercised its right to determine if proper maintenance had been performed or imposed the undisclosed service charge. The Seventh Circuit affirmed ordering enforcement of the order requiring clear and conspicuous disclosure of all terms and conditions of any advertised guarantee. *Western Radio Corp. v. F.T.C.*, 339 F.2d 937 (7 Cir. 1964).

The Commission has consistently followed this interpretation of the law and has regularly held advertisements of guarantees deceptive and illegal which omitted to state significant terms and limitations without requiring additional proof that the advertised guarantees were not in fact honored. *Parker Pen Co. v. F.T.C.*, 159 F. 2d 509 (7 Cir. 1946) (representation of a "Lifetime Guar-

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antee" held misleading because the statement of a 35-cent service charge was not made with equal prominence in the advertisement). *Clinton Watch Co. v. F.T.C.*, 291 F. 2d 838 (7 Cir. 1961), *cert. denied*, 368 U.S. 952 (1962) (representation of a "Lifetime Guarantee" without a clear disclosure that a service charge is imposed held misleading). *Baldwin Bracelet Corp.*, Docket No. 8316, December 18, 1962 [61 F.T.C. 1345], *aff'd*, 325 F. 2d 1012 (D.C. Cir. 1963) (broad guarantee claim on a display card held misleading where conditions and limitations were set out on the back of cards to which the product was attached). See also to same effect: *Coro, Inc. v. Federal Trade Commission*, 338 F. 2d 149 (1 Cir. 1964); *Helbros Watch Co. v. Federal Trade Commission*, 310 F. 2d 868 (D.C. Cir. 1962); and *Benrus Watch Co. v. Federal Trade Commission*, 352 F. 2d 313 (8 Cir. 1965).

Thus, respondent's argument here that its advertisement of an unlimited guarantee cannot be held to be deceptive despite its admission that the specific guarantee accompanying the merchandise contained limitations merely because complaint counsel failed to offer proof that respondent did not honor its guarantees as advertised cannot be sustained. An uncommunicated policy of honoring the advertised guarantee rather than imposing the limitations set out in the certificate accompanying the merchandise does not eliminate the capacity to deceive inherent in the advertisement. It is clear that misrepresentation and consumer deception occurs at the time the advertisement is read and the Commission and the courts have refused to require that proof be offered either that any particular consumer in fact read the advertisement or was in fact deceived.

Such a conclusion is highlighted by the fact that respondent has conceded that advertising constitutes its principal marketing tool. Advertising thus plays a major role in the consumer's decision to patronize Wards as against some other retailer. Since a substantial portion of Wards' business is conducted by mail order, there will be many instances where the consumer purchases Wards' merchandise solely on the basis of Wards' advertisement and may not even see the merchandise until after the sale has been consummated and the merchandise delivered and unpacked. It is only then that he learns of the specific conditions to be imposed upon the guarantee which may have been instrumental in his decision to purchase the Wards' item.

Respondent, however, argues that our recent decision in *Brite Manufacturing Co.*, Docket No. 8325, decided June 18, 1964, 65

F.T.C. 1067, *affirmed on other grounds*, 347 F. 2d 477 (D.C. Cir. 1965), in effect overruled this solid line of cases and is controlling.⁴ We do not agree.

The Brite Manufacturing Company could in no sense be regarded as similar to respondent in this case. There was no evidence that advertising was Brite's principal marketing tool. Moreover, the type of advertising questioned in *Brite* involved point of sale material presumably examined by the customer when he was in the store. Brite had placed the words "Guaranteed" or "Fully Guaranteed" on certain cardboard strips attached to its watchbands. On the reverse side of these cardboard strips various limitations on the guarantee were stated, such as the fact that the guarantee was limited to 30 days after purchase and in some instances that a 50-cent service charge was imposed. Respondent in *Brite* introduced in defense the uncontradicted testimony of its principal officer that no charge was in fact imposed and the 30-day limitation was not adhered to. Complaint counsel offered nothing to rebut this testimony respecting respondent's practice and policy. The hearing examiner dismissed the guarantee charge on the basis that there was "no substantial evidence establishing that respondent's watchbands are not fully guaranteed" (I.D., p. 14) [65 F.T.C. at 1079], and we affirmed on the same basis, noting that there was affirmative evidence in the record demonstrating that respondent honored the guarantee without qualification.

In the instant case we are confronted with an entirely different factual situation and with an entirely different factual record. Wards is a large national retailer doing a substantial mail order business and depending almost exclusively on national advertising to achieve its sales. The deceptive representations concerning guarantees challenged here did not involve point of sale material but rather were contained in Wards' extensive newspaper advertisements. The challenged advertisements here represented unequivocally that the products were unconditionally guaranteed. It was not until after the customer either came to the store to examine the merchandise or actually received delivery of the merchan-

⁴ Respondent has also cited in support of its position the cases of *John Surrey, Ltd.*, Dkt. 8605, March 16, 1965 [67 F.T.C. 299]; *House of Marbet, Inc.*, Dkt. 8578, September 24, 1964 [66 F.T.C. 787]; *J. B. Williams Co.*, Dkt. 8547, September 28, 1965 [68 F.T.C. 481]; and *Scott Mitchell House*, Dkt. 8591, September 24, 1964 [66 F.T.C. 830]. However, these cases stand for the proposition that if complaint counsel fails to establish that undisclosed or inadequately disclosed limitations on advertised guarantees actually existed then the complaint must fail for want of deception. This is not in issue here for the hearing examiner found, and we agree, that a discrepancy existed between the guarantee as advertised and the text of the actual guarantee certificate accompanying the product.

dise, if the sale was executed on the basis of an order received by mail, that the limitations in the guarantee were disclosed.

Thus, we do not agree that *Brite* is in any way relevant to or dispositive of the instant case. Nor do we agree with the hearing examiner that complaint counsel's failure to adduce affirmative evidence that respondent in fact failed to honor the guarantee as advertised is fatal to his proof of deception here. Respondent concededly approved the bulk of the challenged advertisements which represented unequivocally that the products in question were unconditionally guaranteed. It strains credulity to believe that Wards intended to engage in an entirely vain and futile act, adding substantially to its costs of sale, in printing up these precise and limited guarantee certificates unless it also intended that these limited guarantee certificates were to carry weight with the purchasers and hopefully would demarcate the outer limits of its warranty liability. There is little doubt that the terms of the guarantee certificate which accompanied the merchandise was the guarantee text which respondent hopefully intended was to be observed by its customers. Respondent cannot now be heard to say that it never intended its customers to pay any attention to these printed guarantee certificates. Certainly, we cannot disregard the existence of these certificates in determining whether any customer was deceived by the misleading guarantee representations contained in Wards' advertisements, which by definition are the mechanism used by Wards to induce the sale of the products in question. In its defense Wards in effect is telling us that if one of its customers complained and sought to invoke the unlimited guarantee contained in the advertisement and persisted long enough in his efforts to get "satisfaction," Wards ultimately would honor the general guarantee as advertised. But we cannot base our conclusion as to whether deception exists or not on the persistency with which Wards' customers press their claims for we are under a duty to protect the gullible and credulous, as well as the cautious and knowledgeable (see *e.g. Charles of the Ritz Distributing Corp. v. Federal Trade Commission*, 143 F. 2d 676 (2 Cir. 1944)).

In the instant case, respondent's internal policy honoring guarantees as advertised cannot dissipate the deception caused by the advertisement. This is especially true here where there is absolutely no evidence that this internal policy of Wards' to honor all guarantees as advertised was ever communicated to Wards' customers or was ever known or understood by them. Nowhere in any of res-

pondent's documents or in the affidavits or correspondence submitted by respondent in the record in this case is there any indication that Wards has ever advised its customers of the construction which it tells us it places as a matter of practice on any conflicts which may appear between its advertised guarantees and the terms of the guarantee certificates accompanying the merchandise. Nowhere is there a single document or any evidence of any kind that any Wards' customers understood that this internal policy of Wards' of honoring guarantees as advertised superseded and indeed cancelled out any inconsistent or more limited guarantees affirmatively offered with the products containing specific limiting terms and conditions. Indeed, the implication is quite clear that when a product was in fact specifically guaranteed, the guarantee would not be honored except under the precise terms and conditions stated in the guarantee certificate. It is doubtful that it would even occur to a customer that Wards would offer more in the way of guarantee coverage than that provided for in the specific guarantees attached to particular products.

Respondent, subsequent to its oral argument in this proceeding, submitted samples of its newspaper advertisements during August and September 1965, which contain a statement over the name of Wards' president stating that the company will live up to any product guarantee as advertised. We do not believe that such a statement in any way affects the outcome of this proceeding nor do we believe that even if it had been in existence prior to the date of this complaint, it in any way cures the capacity to deceive inherent in attaching specific and limited guarantees to products which are then advertised without limitation. The inconsistency creating the deception is still present. We have little doubt that none but the most aggressive and sophisticated customers will either recall or retain the advertisement which originally led them to consider the purchase, nor will the average customer persist in his demands that Wards disregard the specific guarantee certificate and honor claims under the broader guarantee originally advertised. Customers would most likely be inclined to retain only the formal guarantee certificate and consequently would be unsure of what was represented to them in the way of guarantee coverage in the advertisement, or would tend to believe that they had been mistaken about the original guarantee offered since it would seem to them unlikely that a store such as Wards would in fact offer inconsistent guarantees. It is highly unlikely that pur-

chasers will press demands on respondent for anything greater than what they have before them in black and white on their certificate.

Thus, irrespective of what Wards' policy may in fact be in honoring guarantees, Wards' practice here of having advertised a broad guarantee and furnishing the customer with a limited guarantee is deceptive and has the capacity to deceive regardless of whether or not respondent stands ready to perform as advertised.

The challenged advertisements, in addition to being misleading and deceptive as respects Wards' customers also constitute unfair methods of competition condemned by Section 5 of the Federal Trade Commission Act as respects Wards' competitors. In this age of mass production and large-scale retailing the offer of guarantee coverage is an important instrument of competition. See Barnes, "False Advertising," 23 *Ohio State L.J.* 598, 633 (1962). If respondent or indeed any other company can be free to make whatever exaggerated guarantee claims it wants to in its advertising and then avoid any liability by reliance on an internal storewide policy of honoring all customer claims, it has a substantial and unfair advantage over its competitors who do not wish to adopt a policy of this type of irresponsible advertising. If respondent is allowed to continue such a practice protected by a policy of honoring these broader claims only where demand is made, competition would no longer exist in the amount of guarantee services offered customers, but rather in the degree to which performance can be warded off by firm but tactful salesmen and complaint departments.

We do not believe, therefore, that respondent should be allowed to continue to make misleading guarantee claims merely because it asserts—without specific evidence of any practice in this regard—that it has a policy of honoring the guarantees as advertised. The deception created by the existence of a discrepancy between the advertisements and the guarantee certificates does not disappear as a result of such a policy. The capacity to deceive in a very material sense continues to be present and requires that we conclude that the challenged advertisements are violative of Section 5 of the Federal Trade Commission Act.

Accordingly, we shall enter an order which will require respondent to cease and desist from representing that any of its merchandise is guaranteed unless all conditions and limitations thereon are clearly and conspicuously disclosed.

Commissioners Elman and Reilly dissented and have filed dissenting opinions.

APPENDIX A

The following is a summary of the evidence offered by complaint counsel in support of the allegation that respondent's advertised guarantee representations failed to disclose all of the terms, conditions and limitations which were stated on the guarantee certificate supplied with the merchandise:

1. *Sewing machine* advertisements

Complaint counsel offered into evidence five advertisements for sewing machines obtained from local newspapers (CX 1-3, CX 20 and CX 45), and 13 representative advertisements for the years 1958-1960 which had been supplied to the Commission by the respondent (CX 5-7, 9-15, 17-19). Each of these advertisements contains a statement that the sewing machine is "guaranteed 20 years" or words of similar import.

A guarantee certificate for sewing machines was offered into evidence by complaint counsel (CX 50). This guarantee says in pertinent part that Wards will repair or replace any defective part for one year from the date of purchase and that for 19 years thereafter Wards will replace any casting or drive mechanism which fails. Charges for labor and transportation were also required by the guarantee certificate.

2. *Water heater* advertisements

The record contains four newspaper advertisements concerning guaranteed water heaters. These advertisements were placed during the years 1960 through 1962 and stated that the advertised water heater is "guaranteed for 10 years," or in one instance "for 15 years" (CX 21, 26(b), 30(b) and 39). The sample water heater guarantee certificates (CX 53, 55 and 66) state that the guarantee on the water heater tank is prorated during the last half of the guarantee period and that only the tank is guaranteed after the first year. Charges for labor and installation are to be paid by the customer and the customer must adhere to certain maintenance requirements.

3. *Automotive products* advertisements

The record contains seven newspaper advertisements for automotive products. Four of these advertisements contain a statement that Wards' remanufactured engines are "guaranteed 4,000 miles" or "4,000 miles or 90 days" (CX 31(b), 32, 33 and 35).

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The sample guarantee for Wards' rebuilt engines states that Wards warrants that any part which fails within 90 days or 4,000 miles may be exchanged for new parts without charge provided the old parts are returned. The warranty does not apply unless the motor has been installed by Wards' authorized installer and the customer returns to the installer for the 500-mile checkup. A certificate of installation must be returned by the customer to respondent. There are also certain requirements as to the type of vehicle in which the engine can be used and the type of use to which that vehicle can be put for the guarantee to be effective.

Two advertisements contain the statement that Wards' brake shoes are "guaranteed 25,000 miles" (CX 36-37). Such advertisement fails to disclose that the actual guarantee requires a nominal labor installation fee of \$2 per wheel and is applicable only if the brake shoe should fail due to defects in material or workmanship. The guarantee runs only to the person for whom the original installation was performed and applies only where the customer has obtained a complete brake overhaul (CX 74).

An advertisement in the *Washington Star* of January 20, 1963 contains statements that Wards' shock absorbers are "guaranteed 15,000 miles," that Wards' brake shoes are guaranteed for "25,000 miles," that Wards' remanufactured engines are guaranteed for a "90-day 4,000 miles" period and that Wards' batteries are "guaranteed two years" (CX 34). As to the shock absorbers, a sample guarantee contained in a Wards mail order catalog states that if a shock absorber should fail within the guarantee period Wards will replace it, "charging only for the service received" (CX 76). The actual provisions of the motor and brake shoe guarantees have been discussed above. With respect to the battery which is "guaranteed two years" the applicable guarantee certificate states that every battery is fully guaranteed against defects in workmanship for 90 days and thereafter it is guaranteed on an adjusted service basis for specified periods following the purchase date. Passenger car batteries used in commercial service are guaranteed for only half of these periods (CX 75).

4. *Miscellaneous Products*

The record contains 16 newspaper advertisements concerning miscellaneous products (CX 22, 23(b), 24(b), (c), 25(b), 26(b), 27(b), (c), 29(b), 38, 40, 41, 44, 46 and 48), together with a sample guarantee certificate referring to each such product (CX 51,

52, 54, 56-65 and 69-72). These miscellaneous products include items such as freezers, furnaces, gas boilers, cameras, radios, saws, sanders, drills and electric blankets. With respect to all but two of these advertisements (CX 24(b) and 24(c)) the full text of the product guarantee certificates is not set out in the advertisement.

DISSENTING OPINION

JULY 26, 1966

BY ELMAN, *Commissioner*:

I dissent for substantially the reasons stated by Commissioner Reilly. The only unlawful practice with which Wards was charged in the complaint was that of falsely advertising products as unconditionally and unqualifiedly guaranteed when in fact they were not so guaranteed. The evidence is undisputed, however, that whenever Wards advertised a product as unconditionally or unqualifiedly guaranteed, it fully honored the guarantee as advertised. There is no evidence whatsoever that any customer making a purchase in reliance upon such an advertised guarantee did not get exactly what was represented: a product guaranteed as advertised and backed up by Wards' established policy of "Satisfaction Guaranteed or Your Money Back." On these facts, none of the challenged advertisements can be found to be false or deceptive; no customer was misled by any of the advertisements; and the complaint was properly dismissed by the hearing examiner because its allegations were not supported by the proof.

To be sure, on some products that it sells Wards also gives its customers a specific product guarantee, the terms and conditions of which are set forth in a certificate. The evidence is undisputed that these specific product guarantees were in addition to, and not in lieu of, and did not supersede or modify either an advertised unconditional guarantee or Wards' general unconditional policy of "Satisfaction Guaranteed or Your Money Back." The notion that Wards distributed these certificates for the purpose of discouraging customers from pressing their unconditional guarantee claims is simply a flight of fancy. If Wards in fact engaged in such a practice, it would indeed be unfair and reprehensible. But the complaint did not charge Wards with following such a practice; there is no evidence of it in the record; and Wards has had no opportunity to defend against such a charge.

Dissenting Opinion

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DISSENTING OPINION

JULY 26, 1966

BY REILLY, *Commissioner*:

While the record in this matter shows that respondent may have been guilty of an unfair or deceptive practice by using conflicting representations concerning the nature and extent of its guarantees, this is not the practice challenged in the complaint.¹

The complaint alleges that respondent has represented that its merchandise is guaranteed without condition or limitation. This allegation has been sustained by the evidence. The complaint further alleges that respondent's guarantees are not unconditional but are subject to limitations and conditions which are not revealed in the advertising. This allegation has not been proven. Insofar as can be determined from this record, respondent fully performs all advertised guarantees in complete accord with the representations in its advertising.

The majority holds however that the showing of a discrepancy between the challenged advertisements and the guarantee certificates received by the purchaser constitutes proof that respondent does not perform under the guarantee as advertised. In other words, in the face of two conflicting representations, each purportedly expressive of Montgomery Ward's guarantee agreement with the customer, but neither of which is deceptive on its face, the majority selects the ad as the deceptive one and relies on the certificate as evidence of this deception.

The fallacy of the majority's reasoning can be easily demonstrated: A seller advertises a garment as "All Wool" and places a label on the garment reading "90% Wool, 10% Rayon." Under these facts, the supplier would be guilty of either false advertising or misbranding. It is of course impossible to decide which claim is false without knowing the fiber content of the garment. If we apply the majority's reasoning however it would be unnecessary to make any inquiry as to the fiber content. We would hold that the advertising is false. And we would adhere to this holding even though the seller could prove that the garment was all wool.

Or to use another example: Suppose a seller falsely claimed in

¹ Respondent advertised certain of its products unqualifiedly as guaranteed. Accompanying some of the products when sold was a certificate setting pre-conditions or limiting respondent's obligation in connection with the guarantee. Such certificates could deter purchasers from making claims under the advertised or unconditional guarantee. Thus, if respondent does in fact honor the unconditional guarantee, the certificates could be misleading. Under these circumstances, the customer could be deceived by the guarantee certificate but not by the advertising.

advertising that his guarantee was unconditional. Suppose also that the certificates accompanying the product also falsely stated that the guarantee was without limitation. Would the fact that there was no discrepancy between the advertising and the guarantee certificate be dispositive of the case? Could the seller rely on the certificate to prove that his advertising was truthful and non-deceptive? Of course not. The issue in such a case would be the same as the issue here—does respondent in fact perform under the guarantee as claimed in the advertising.

The majority states that "In the instant case, respondent's internal policy honoring guarantees as advertised cannot dissipate the deception caused by the advertisement. This is especially true here where there is absolutely no evidence that this internal policy of Wards' to honor all guarantees as advertised was ever communicated to Wards' customers or was ever known or understood by them." The majority thus holds that even if respondent does perform under the guarantee as advertised the deception caused by the advertising that it will so perform is not dissipated. This is indeed strange logic for where is the deception if there is no inconsistency between the representation as to the manner in which respondent will perform under the guarantee and the manner in which it does in fact perform? And in stating that respondent's policy of honoring guarantees as advertised has never been communicated to respondent's customers the majority ignores the fact that it is because respondent did communicate to the public its policy of guaranteeing its products without condition or limitation that we brought this action in the first place. (See Paragraph 5 of the complaint.)

Prior decisions of the Commission cited by the majority are not precedent for this case. To the extent that they are based on evidence establishing that in fact the respondent did not perform unconditionally after an unconditional representation, they are distinguishable from the facts of record here. To the extent that they hold that a subsequent statement of limitation is sufficient to prove the deceptiveness of the original unqualified guarantee, they have been overruled by *Brite Manufacturing Company*, Docket 8325, June 18, 1964 [65 F.T.C. 1067], *aff'd on other grounds*, 347 F. 2d 477 (D.C. Cir. 1965), and the other more recent cases decided by the Commission, *House of Marbet, Inc.*, Docket 8578, September 24, 1964 [66 F.T.C. 787], *Scott Mitchell House*, Docket 8591, September 24, 1964 [66 F.T.C. 830], *John Surrey, Ltd.*, Docket 8605, March 16, 1965 [67 F.T.C. 299], and

J. B. Williams Company, Docket 8547, September 28, 1965 [68 F.T.C. 481].

In *Brite* there were two conflicting representations, one unqualified on the front of the cardboard strip to which the product (watch straps) was attached, the other setting forth conditions on the reverse of the same strip. The Commission in that case took note of affirmative evidence that *Brite* did not insist upon the limitations but its principal reliance was upon the absence of evidence that the respondent in fact insisted upon performance. Contrary to the majority's statement that *Brite* is not "... in any way relevant to or dispositive of the instant case," *Brite* fits this case to a "T."

The points of contrast by which the majority seeks to distinguish this case from *Brite* are entirely formal and accidental. The substantial basis for comparison between the cases is the fact that in each there were conflicting guarantee representations and the Commission was confronted with the necessity for deciding which was misleading. The salient consideration in both cases is sufficiency of proof and in both cases complaint counsel failed to prove which was the deceptive representation.

As stated above, there can be little doubt that the practice of making conflicting or contradictory statements with respect to a guarantee would have the capacity or tendency to mislead the public. But respondent has not been charged with engaging in this practice. It has been charged with misrepresenting in advertising that it guarantees its products without condition or limitation. The record does not sustain this charge. It does not show that the advertised guarantee claims are false or deceptive as alleged. In holding that the advertising was false the majority has substituted speculation for proof. I do not agree.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to said appeal; and

The Commission having determined for the reasons stated in the accompanying opinion that the appeal of counsel supporting the complaint should be granted and that certain of the findings and conclusions and the order contained in the initial decision should be modified to conform to the views expressed in the accompanying opinion:

It is ordered, That the initial decision be modified by striking the last sentence of the fourth full paragraph on page 61 and the fifth full paragraph on page 61.

It is further ordered, That the initial decision be modified by striking the order on page 61 and substituting therefor the following:

It is ordered, That respondent Montgomery Ward & Co., Incorporated, 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 any articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication that any of respondent's merchandise is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

It is further ordered, That the hearing examiner's initial decision, as modified by this order and the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondent shall within sixty (60) days after service upon it 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 the order to cease and desist set forth herein.

Commissioners Elman and Reilly dissented and have filed dissenting opinions.
