

Complaint

IN THE MATTER OF

ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC.,
ET AL.

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

Docket 8738. Complaint, June 19, 1967—Decision, Apr. 1, 1969

Order requiring five affiliated companies selling residential aluminum siding and other home improvement products to cease using "bait and switch" tactics and fictitious pricing, falsely guaranteeing and implying that it manufactures its products, and failing to disclose that its sales contracts may be negotiated to a finance company.

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 All-State Industries of North Carolina, Inc., ABC Storm Window Co., Inc., All-State Industries of Tennessee, Inc., All-State Industries, Inc., and All-State Industries of Illinois, Inc., corporations, and William B. Starr, individually and as an officer of said 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 complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent All-State Industries of North Carolina, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 1130 West Lee Street, Greensboro, North Carolina. The afore-said company was originally incorporated and did business at the above address as ABC Jalousie Company of North Carolina, Inc.

Respondent ABC Storm Window Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 1128 West Lee Street, Greensboro, North Carolina.

Respondent All-State Industries of Tennessee, Inc., was origi-

nally incorporated and engaged in business as Starr Industries, Inc. It is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 910 Eighth Avenue, South, Nashville, Tennessee.

Respondent All-State Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 660 Eleventh Street, NW., Atlanta, Georgia.

Respondent All-State Industries of Illinois, Inc., 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 2111 State Street, East St. Louis, Illinois.

Respondent William B. Starr is the principal officer of all of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is 1130 West Lee Street, Greensboro, North Carolina.

Respondent William B. Starr has in the past operated, and in some instances still operates, his business of installing home improvement products through the following corporations: Southern Installers, Inc., 1130 West Lee Street, Greensboro, North Carolina, incorporated in the State of North Carolina to handle North Carolina installations; Northern Installation Company, Inc., 2111 State Street, East St. Louis, Illinois, incorporated in the State of Illinois to handle Illinois installations; Tru-Fit Installation Company, Inc., 910 Eighth Avenue, South, Nashville, Tennessee, incorporated in the State of Tennessee to handle Tennessee installations; and United Installation Company, Inc., 660 Eleventh Street, NW., Atlanta, Georgia, incorporated in the State of Georgia to handle Georgia installations.

Respondent William B. Starr is also the principal officer of Empire Acceptance Corporation, 1130 West Lee Street, Greensboro, North Carolina, a finance company to which certain contracts and instruments are negotiated by companies operated by respondent Starr; and he is the principal officer of Mail-Outs, Inc., of the same address, a company formed to handle the circulation of respondents' direct mail advertising and promotional literature.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and

distribution of residential aluminum siding, storm windows, storm doors and various other home improvement products to the public and in the installation thereof.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, advertising and promotional material, contracts and other business papers and documents to be shipped and transmitted to, from and between their several places of business, located as aforesaid, and to prospective purchasers and purchasers thereof located in various other States of the United States other than the State of organization, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their home improvement products, respondents have made numerous statements and representations, through oral statements made to prospective purchasers by their salesmen or representatives, in newspaper advertisements, and in direct mail advertising circulars and other promotional material, respecting the nature of their offer and their business, price, time limitations, their guarantee and the quality of their products.

Typical and illustrative of respondents' published advertising representations, but not all inclusive thereof, are the following:

SAVE ON SPECIAL OFFER
ALUMINUM SIDING SALE
FOR A LIMITED TIME ONLY
COMPLETELY INSTALLED as low as
\$229.00
NO EXTRAS

* * * * *

BIG SAVINGS TO ALL HOME OWNERS
LIMITED OFFER
ALL ALUMINUM COMBINATION STORM WINDOWS
\$5.55 EACH
Minimum of 8 Windows
BONUS STORM DOOR \$14.95
With purchase of 8 or more windows

* * * * *

ALL-ALUMINUM SIDING SALE!
SAVE ON ALL-STATE'S SPECIAL OFFER
Our Regular \$500
NOW ONLY \$249.00 Completely Installed
NO EXTRAS

Complaint

75 F.T.C.

* * * * *

Save \$251.00 now on our regular \$500.00 Aluminum Siding. This special offer is being made to stimulate business in your area. The sale is limited. First inquiries will receive preference. (Home owners only.)

* * * * *

ALUMINUM PATIOS

3-DAY

AWNINGS

CARPORTS

SALE

We manufacture 17 types of Aluminum and Awnings. All Prices Included Complete Installation And Support Columns!

PATIO ROOFS	PORCH ROOFS	CARPORTS
9' x 10½' \$59.50	8' x 12' \$57.50	8' x 20' \$79.00
* * *	* * *	* * *

BUY DIRECT FROM OUR FACTORY

100% Aluminum—Any Size Up to A

Giant 8 x 20

PATI-O-PORT

FULL PRICE

\$79.00

Installation Included

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning not specifically set out herein, and through oral statements made by their salesmen or representatives, respondents represent, and have represented, directly or by implication, that:

1. The offer set forth in said advertisements is a bona fide offer to sell the advertised products at the prices and on the terms and conditions stated.

2. Respondents' products are being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondents' regular selling prices.

3. Respondents' advertised offer is made for a limited time only.

4. Respondents manufacture the home improvement products which they sell, and respondents sell their home improvement products directly from their factory.

5. Homes of prospective purchasers are specially selected as model homes for installation of respondents' aluminum siding; after installation such homes will be used for demonstration and advertising purposes by respondents; and, as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances, discounts or commissions.

6. Certain of respondents' home improvement products are unconditionally guaranteed or are guaranteed for life.

7. Respondents' siding materials will never require repainting.

PAR. 6. In truth and in fact:

1. Respondents' said advertised offers are not genuine or bona fide offers but are made for the purpose of obtaining leads as to persons interested in the purchase of respondents' products. After obtaining such leads, respondents' salesmen or representatives call upon such persons at their homes and, according to their established mode of operation, they write a contract calling for the sale of the advertised product and the prospective purchaser is permitted to execute that contract. Immediately thereafter, respondents' salesmen or representatives disparage the advertised product and otherwise discourage the purchase thereof and attempt to sell and frequently do sell a different and more expensive product instead of the product for which the customer originally contracted.

2. Respondents' products are not being offered for sale at special or reduced prices, and savings are not thereby afforded purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices but the prices at which respondents' products are sold vary from customer to customer depending on the resistance of the prospective purchaser.

3. Respondents' advertised offer is not made for a limited time only. Said merchandise is advertised regularly at the represented prices and on the terms and conditions therein stated.

4. Respondents do not manufacture the home improvement products which they sell, and respondents do not own a factory from which their home improvement products are shipped directly.

5. Homes of prospective purchasers are not specially selected as model homes for installation of respondents' aluminum siding; after installation such homes are not used for demonstration or advertising purposes by respondents; and purchasers, as a result of allowing their homes to be used as models, are not granted reduced prices, nor do they receive allowances, discounts or commissions.

6. Respondents' home improvement products are not unconditionally guaranteed or guaranteed for life. Such guarantee as may be provided is subject to numerous terms, conditions and

limitations respecting the duration of the guarantee and the extent and manner of performance thereunder.

7. Respondents' siding materials will require repainting.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, as aforesaid, respondents or their salesmen in a substantial number of cases fail to disclose orally at the time of sale and in writing on any conditional sales contract, promissory note or other instrument executed by the purchaser, with such conspicuousness and clarity as is likely to be read and observed by the purchaser, that such conditional sales contract, promissory note or other instrument may, at the option of the seller and without notice to the purchaser, be negotiated or assigned to a finance company or other third party and that if such negotiation or assignment is effected, the purchaser will then owe the amount due under the contract to the finance company or third party and may have to pay this amount in full whether or not he has claims against the seller under the contract for defects in the merchandise, non-delivery or the like.

The aforesaid failure of the respondents or their representatives to reveal said facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the respondents will not negotiate or transfer such documents, as aforesaid, and that legal obligations and relationships will exist only between such respondents and purchasers and will remain unchanged and unaltered, and has the tendency and capacity to induce a substantial number of such persons to enter into contracts or execute promissory notes for the purchase of respondents' products of which facts the Commission takes official notice.

In truth and in fact, respondents frequently and in a substantial number of cases and in the usual course of their business sell, transfer and assign said notes and contracts to finance companies or third parties so as to bring about the aforementioned changes in legal obligations and relationships.

Therefore, the failure of respondents or their representatives to reveal such facts to prospective purchasers, as aforesaid, was and is an unfair and false, misleading and deceptive act and practice.

PAR. 8. In the conduct of their business, at all times mentioned

herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum siding and other home improvement products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents 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 respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' 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. John T. Walker in support of the complaint.

Mr. Joseph J. Lyman and *Mr. Jacob A. Stein* for the respondents.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER¹

AUGUST 14, 1968

The Federal Trade Commission issued its complaint against respondents on June 19, 1967, charging them with violations of Section 5 of the Federal Trade Commission Act. The respondents filed an answer in which they denied that they had violated Section 5 of the Federal Trade Commission Act. The complaint alleged that the respondents had made certain representations in commerce pertaining to their home improvement products—aluminum siding, storm windows, awnings, carports, patios and porch roofs. The complaint also alleged that respondents' claims were false and misleading in several respects considered hereafter.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence, and the proposed findings of fact, conclusions, and briefs filed by counsel for the respondents

¹ During the course of hearings, it was stipulated and agreed that the proper title of the corporation, All-State Industries of North Carolina, Inc., is "All-State Industries of N.C., Inc." It was also stipulated that any order entered against All-State Industries of N.C., Inc., ABC Storm Window Co., Inc. and William B. Starr, individually and as an officer of said corporations, would also be entered against the other corporate respondents named in the complaint.

and counsel in support of the complaint. Consideration has been given to the proposed findings of fact and conclusions and briefs submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected; and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent All-State Industries of N.C., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 1130 West Lee Street, Greensboro, North Carolina. The aforesaid company was originally incorporated and did business at the above address as ABC Jalousie Company of North Carolina, Inc. (Admitted, see Resp. Prop. Finding One.)

2. Respondent ABC Storm Window Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 1128 West Lee Street, Greensboro, North Carolina. (Admitted, see Resp. Prop. Finding One.)

3. Respondent All-State Industries of Tennessee, Inc., was originally incorporated and engaged in business as Starr Industries, Inc. It is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 910 Eighth Avenue, South, Nashville, Tennessee. (Admitted, see Resp. Prop. Finding One.)

4. Respondent All-State Industries, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 660 Eleventh Street, NW., Atlanta, Georgia. (Admitted, see Resp. Prop. Finding One.)

5. Respondent All-State Industries of Illinois, Inc., 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 2111 State Street, East St. Louis, Illinois. (Admitted, see Resp. Prop. Finding One.)

6. Respondent William B. Starr has in the past operated, and in some instances still operates, his business of installing home improvement products through the following corporations:

Southern Installers, Inc., 1130 West Lee Street, Greensboro, North Carolina, incorporated in the State of North Carolina to handle North Carolina installations; Northern Installation Company, Inc., 2111 State Street, East St. Louis, Illinois, incorporated in the State of Illinois to handle Illinois installations; Tru-Fit Installation Company, Inc., 910 Eighth Avenue, South, Nashville, Tennessee, incorporated in the State of Tennessee to handle Tennessee installations; and United Installations, and United Installation Company, Inc., 660 Eleventh Street, NW., Atlanta, Georgia, incorporated in the State of Georgia to handle Georgia installations. (Admitted, see Resp. Proposed Finding One.)

7. Respondent William B. Starr is also the principal officer of Empire Acceptance Corporation, 1130 West Lee Street, Greensboro, North Carolina, a finance company to which certain contracts and instruments are negotiated by companies operated by respondent Starr; and he is the principal officer of Mail-Outs, Inc., of the same address, a company formed to handle the circulation of respondents' direct mail advertising and promotional literature. (Admitted, see Resp. Prop. Finding One.)

8. Respondents deny that there is any substantial evidence in the record that Mr. William B. Starr, the president of all corporate respondents, participated in any of the activities charged in the complaint to be violative of Section 5 of the Federal Trade Commission Act. (See Resp. Prop. Finding Two; Tr. 386.) This contention must be rejected. It was stipulated in the record that Mr. Starr was the president and principal officer and operator of all of the corporate respondents. This was confirmed by the testimony of Mr. Starr (Tr. 43-44, 86-88, 178-179). The record is clear that Mr. Starr personally executed respondents' guarantees of their products (CX 47; Tr. 126) and that he personally supervised the preparation and distribution of respondents' mail-out advertising and newspaper advertising (Tr. 108). In addition, the testimony of two witnesses directly involves Mr. Starr with the activities charged to be violations of the Federal Trade Commission Act (Tr. 190-191, 287-292). The cases cited by respondents, *Flotill Products, Inc. v. FTC*, 358 F. 2d 224 (9th Cir. 1966); *Coro, Inc. v. FTC*, 338 F. 2d 149 (1st Cir. 1964), and *Rayex Corp. v. FTC*, 317 F. 2d 290 (2nd Cir. 1963), are not determinative that the complaint must be dismissed as to Mr. William B. Starr. In none of these cases was there clear-cut evidence tying in individual officers of the corporations there involved to the

illegal activities charged and found. The record in this matter contains ample evidence of Mr. William B. Starr's direct participation in the practices involved in this proceeding.

The respondents insist that their salesmen are independent contractors and not employees of any of the respondent corporations or Mr. William B. Starr and that consequently their sales activity, if it was illegal, cannot form the basis of any findings against the corporate respondents or Mr. Starr (Resp. Prop. Finding Two). Whether the sales force of approximately 25 salesmen (Tr. 229) are employees or independent contractors is immaterial in this proceeding. It is true that respondents do not pay their salesmen a salary but recompense them with a sales commission supplemented by a drawing account if commissions are not high enough (Tr. 255). However, the charges against respondents are based upon allegedly false claims made in "mail-outs" and other promotional material used by the named respondents. In addition, respondents conduct a sales training program in which the salesmen are given extensive training in the use of bait and switch operations and respondents furnish to these salesmen all of the sample cases, contracts, credit applications and other forms used by such salesmen (Tr. 264-265).

There is ample authority that it is a violation of Section 5 of the Federal Trade Commission Act to place in the hands of others, even independent third parties, the means of deception. See for example, *Goodman v. FTC*, 244 F. 2d 584 (9th Cir. 1957).

9. Consequently, it is found that respondent William B. Starr is the principal officer of all of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices herein-after set forth. His business address is 1130 West Lee Street, Greensboro, North Carolina.

10. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution of residential aluminum siding, storm windows, storm doors and various other home improvement products to the public and in the installation thereof. (Admitted, see Resp. Prop. Finding Three.)

11. In the course and conduct of their business, respondents now cause and for some time last past have caused their said products, advertising and promotional material, contracts and other business papers and documents to be shipped and transmitted to, from, and between their several places of business,

located as aforesaid, and to purchasers thereof located in various other States of the United States other than the State of organization; and they maintain and at all times mentioned herein have maintained a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Admitted, see Resp. Prop. Finding Three.)

12. The principal charge leveled at respondents in the complaint is that they have engaged in a bait and switch operation in selling their products, including aluminum siding, storm windows and doors, aluminum patios, porch roofs and carports. Respondents' principal method of advertising products is through mail-outs to people whose names are obtained from telephone directories. Return mail-cards are included in the mail-outs, and when prospective customers fill in the cards and return them to respondents, the cards then become leads and are turned over to the salesmen. Thereafter the salesmen make appointments with the prospective customers and attempt to sell them whatever products they are interested in. The respondents generally have two classes of products that they sell. The first is what respondents term the "ADV" products and the second, the "PRO" products. The "PRO" products are not generally advertised. The "ADV" products are the cheaper products and are extensively advertised. Typical of the advertisements of the "ADV" products are the following:

ALL-ALUMINUM SIDING SALE! * * *
 SAVE ON A B C'S SPECIAL OFFER * * *
 Our Regular \$500.
 NOW ONLY \$249.00 Completely Installed
 NO EXTRAS
 (CX 3, see also CX 1 & 2.)
 ALL-ALUMINUM SIDING SALE! * * *
 SAVE
 ON ALL-STATE'S SPECIAL OFFER
 COMPLETELY INSTALLED
 THIS \$500.00 VALUE
 NOW ONLY 249.00
 COMPLETELY INSTALLED
 NO EXTRAS! ! ! (CX 2.)
 3-DAY SALE
 100% ALUMINUM COMBINATION
 STORM WINDOWS
 As Low As
 \$5.55 Each
 Minimum of 8
 Installation
 Available

Initial Decision

75 F.T.C

All Aluminum Storm Door \$14.95
 With Purchase of 8 or more Windows

(CX 11, see also CX 6, 9.)

Save \$251.00 now on our regular \$500.00 Aluminum Siding. This special offer is being made to stimulate business in your area. The sale is limited. First inquiries will receive preference. (Home owners only.)

(CX 2, 3.)

ALUMINUM PATIOS

3-DAY

AWNINGS

CARPORTS

SALE

We manufacture 17 types of Aluminum and Awnings.

* PATIO ROOFS 8' x 10½' Alum. Installed As Low As \$59.50	* Complete Installation and Support Columns! PORCH ROOFS 8' x 12' Installed As Low As \$57.50	* CARPORTS 8' x 20' Alum. Installed As Low As \$79.00
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(CX 8, 10, see also 70C.)

13. The respondents' sales approach or "pitch" is to sell the "ADV" product and obtain a signed contract (CX 50A-J, 51A-O, 52A-R, 53A-N, 54A-Z2, 56A-R). Along with the contract, the salesman attempts to establish the payment terms for the "ADV" product and obtain a signed note and deed in blank for the price thereof. After obtaining the signed contract with a prospective customer, the salesman then shows the customer samples of the "ADV" product and immediately proceeds to disparage the "ADV" product pointing out all possible deficiencies in the "ADV" product whether real or imaginary. The salesman then produces a sample of the "PRO" product, goes into a lengthy comparison of the two products, and ends up, wherever possible, selling the "PRO" product to the customer in place of the "ADV" product. The respondents also provide a substantial incentive to their salesmen to operate in the fashion outlined above, since the salesmen receive no commission on the "ADV" product but do receive their regular commission on the "PRO" product (Tr. 248-254). The respondents do, however, install the "ADV" product if a customer insists or demands its installation in compliance with the contract for the "ADV" product (Tr. 250, 411-412).

14. The testimony of the witnesses who appeared in this proceeding fully supports the fact that respondents' bait and switch methods of selling their products as described in respondents' training manuals were carried out. First, the testimony of Mr.

John E. Moseley, a former sales trainee, described his experiences as a trainee and prospective salesman for respondents. His experiences were that he was trained in the above-described bait and switch operation and that he was actually present with some of respondents' salesmen while the operation was put into effect. Moreover, he tied in Mr. Starr directly to the training program because he testified that Mr. Starr personally advised him that the manual was very important, that it was to be adhered to, and that he had had a part in putting the manual together (Tr. 190-191). Second, a Commission investigator testified (Tr. 286, *et seq.*) as to statements made to him by Mr. Starr during the course of the investigation that outlined the bait and switch method of operation which again tied in Mr. Starr directly to the program. Third, a number of consumer witnesses appeared and testified as to their experiences in dealing with the respondents' sales representatives (Tr. 317, *et seq.*; 332, *et seq.*; 341, *et seq.*; 416, *et seq.*). In addition, it was stipulated that a number of additional witnesses could have appeared and testified in the same manner as the four consumer witnesses who did appear and testify. This stipulation covered an additional twenty-three witnesses. Consequently, the record contains substantial proof evidencing the use by respondents of the bait and switch method of selling their products described above.

15. The record establishes that the advertising claims made by respondents in their "mail-outs" and other advertising materials are not truly offers at special or reduced prices from respondents' regular selling prices for a limited time only. With minor changes from time to time, respondents' prices for their "ADV" products have always remained substantially the same and do not represent any reduction from previously established prices. Nor is there any true time limit that a particular price may be in effect. The respondents' "PRO" products do not have any established prices but are sold at the highest price obtainable from an individual customer.

16. Respondents' salesmen make use of a number of gimmicks whereby the original prices quoted for respondents' products can be reduced. These include advising a prospective customer that his home would be used by respondents as a model home for demonstration and advertising purposes, thereby permitting respondents to grant a lower price than originally quoted (CX 48, 49). The record establishes that in general respondents do not use these homes for demonstration or advertising purposes but

that they make these statements solely for the purpose of enabling a salesman who has met with sales resistance at a higher price to quote a lower price for respondents' products and to have some apparently reasonable basis for the reduction in price. The use by respondents of this device is clearly false and misleading because a customer who is not skilled in the prices of these products, as most are not, is easily misled. The whole import of this practice is that the customer is led to believe that he is receiving something special in the form of a discount from some normal or regular price, when this is in fact false.

17. In their advertising the respondents claim that they manufacture their products and that they sell the products they manufacture directly from their factory to their customers (CX 4A, 8, 10, 25, 26, 29). Respondents do not manufacture their products and do not have a factory (Tr. 98).

18. In its mail-outs respondents advertise that their products are "100% Guaranteed Genuine Aluminum Siding" (CX 70B, 72). Respondents' actual guarantee, when presented to a customer, is not an unconditional 100% guarantee. The respondents' latest guarantee contains the following limitations:

ALL-STATE INDUSTRIES LIFETIME GUARANTEE

All-State Industries, Inc. hereby warrants to the original purchaser of the Aluminum Siding that any part or parts thereof which prove to be defective in workmanship and materials will be replaced or repaired without charge, but from no other causes, at a price not to exceed 1/60th of the then current regular price for replacement of the siding for each month the siding has been in service, not to exceed 36/60th of the then current regular price for replacement of the lifetime of the house during the continued ownership of the original purchaser.

* * * * *

Damage by fire, windstorm, accidental breakage, or by circumstances, beyond our control are not covered by this warranty. This warranty is in lieu of all other warranties, implied or expressed, and All-State Industries, Inc. will neither assume nor authorize any person to assume in our name any other liability or obligation in connection with this aluminum siding installation. (CX 71.)

Respondents' salesmen, as a part of their selling presentation, guarantee that respondents' aluminum siding is "unconditionally guaranteed against fading, chipping, peeling or cracking." This statement is incorporated into some of the contracts with customers (CX 23, 29). There is no evidence that this guarantee is not honored by respondents. Consequently, there can be no finding, as requested by counsel in support of the complaint, that this statement is in any way false or deceptive. However,

respondents' present guarantee, quoted above, is not a 100 percent guarantee or a full guarantee as claimed but is merely an agreement to replace siding under certain circumstances on a pro rata basis, and therefore respondents present guarantee claims are false and misleading.

19. The complaint charges that respondents' advertising is false and misleading in that respondents claim that their aluminum siding materials will never require repainting. The evidence in the record on this point is very meager. The only claims by respondents that the examiner can find and that are cited by counsel in support of the complaint are in respondents' mail-outs which contain statements to the effect "You get permanent beauty with no extra charge" (CX 70B and 72), "PERMANENT BEAUTY," and "enjoy everlasting home beauty" (CX 1A-B, 2, 3). There are no claims made in any of the advertising of record that respondents' siding will never require repainting. While respondents' siding is painted when installed, Mr. Starr, when he testified, admitted that the siding would fade and lose its original appearance after a considerable period of time and that waxing or washing might be necessary to retain the original finish (Tr. 413-415). However, this only established that some reasonable care by the homeowner of the respondents' siding is necessary in order to obtain the full benefits claimed by respondents in their advertising. The evidence of record neither establishes that respondents claim that their siding will never need repainting nor even that repainting is ever necessary if reasonable care is taken of the siding.

20. The final charge in the complaint is that respondents falsely advertise easy credit to finance the installation of their home improvement products. This charge is based upon the fact that at the time respondents' sales representatives enter into contracts with prospective buyers they obtain an executed conditional sales contract, promissory note, or other instrument of indebtedness if the prospective buyer desires to purchase on credit. After obtaining these executed negotiable instruments, the respondents generally discount or transfer them to finance companies after obtaining satisfactory credit approval. At the time one of these instruments is obtained from a customer, the customer is not advised of the fact that the instrument may be transferred to a third-party credit organization. The basis for the charge of deception is that the customer is led to believe by respondents' failure to advise him with regard to the transfer

that the respondents themselves are financing the installation and that the customer will not owe the amount due on the note to a third party against whom the customer will have no defenses in the event respondents fail to carry out properly the original contract.

21. The only evidence in the record to support this charge is that the respondents do sell or transfer these papers to third parties and that they do not advise their customers that this will be done. In the examiner's opinion, this is not sufficient evidence on which to find that this practice is false and misleading. There is no testimony from any witness that he was or could have been misled by this practice. There is no evidence that the respondents have failed to carry out in proper fashion the installation of the materials contracted for by the customer. There is no evidence that respondents have been able to avoid their legal responsibility to provide proper installation of the exact materials contracted for as a result of selling or transferring these papers. The record contains no evidence that respondents or their representatives ever said the negotiable papers would not be transferred to a third party or that they ever said the respondents themselves operated as finance organizations. It is possible that customers may have been misled by this practice, but the record contains no such evidence and any finding of violation, by the examiner, would of necessity be based upon pure speculation that deception in some instances may occur. Consequently, this charge in the complaint must be dismissed.

22. In the conduct of their business, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of aluminum siding and other home improvement products of the same general kind and nature as those sold by respondents.

CONCLUSIONS

1. Respondents have engaged in deceptive advertising by using their advertised products primarily to bait prospective customers. Respondents then attempt to switch and do switch these customers to the respondents' more expensive products. In this process respondents have disparaged their cheaper products in order to sell the more expensive products.

2. Respondents have engaged in deceptive advertising by claiming that their products are being offered at special or reduced prices.

3. Respondents have engaged in deceptive advertising by claiming that their advertised offers are made for a limited time only.

4. Respondents have engaged in deceptive advertising by claiming that their advertised products are manufactured by respondents and sold from respondents' factories.

5. Respondents have engaged in deceptive advertising and selling practices by advising prospective customers that their homes may be used as model homes for advertising purposes and thereby granting a reduction from prices originally quoted.

6. Respondents have engaged in deceptive advertising by claiming that their products are unconditionally guaranteed.

7. The use by respondents 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 respondents' products by reason of said erroneous and mistaken belief.

8. The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' 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.

9. The record does not contain reliable, probative, and substantial evidence that respondents have engaged in deceptive advertising or claims to the effect that their aluminum siding materials will never require repainting.

10. The record does not contain reliable, probative, and substantial evidence that respondents have engaged in deceptive practices as a result of respondents' failure to advise customers or prospective customers that any conditional sales contracts, promissory notes, or other evidences of indebtedness may or will be transferred to third-party credit organizations.

ORDER TO CEASE AND DESIST

It is ordered, That respondents All-State Industries of N.C., Inc., ABC Storm Window Co., Inc., All-State Industries of Tennessee, Inc., All-State Industries, Inc., and All-State Industries of Illinois, Inc., corporations, and their officers, and William B. Starr, individually and as an officer of each of said corporations,

and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution, or installation of residential aluminum siding, storm windows, storm doors, or any other products, or in connection with their business in such products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of other merchandise or services.
2. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.
3. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale, either before or after a contract has been signed for the purchase of such merchandise or services.
4. Representing, directly or by implication, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.
5. Representing, directly or by implication, that any price for respondents' products is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.
6. Representing, directly or by implication, that any offer to sell products is limited as to time, or is limited in any other manner: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that any represented limitation as to time or other represented restriction is actually imposed and adhered to by respondents.
7. Representing, directly or by implication, that respondents manufacture any of the home improvement products which they sell, or that respondents sell their home improvement products directly from their factory; or misrepresent-

ing, in any manner, the nature or scope of respondents' business.

8. Representing, directly or by implication, that the home of any of respondents' customers, or prospective customers, has been selected to be used or will be used as a model home, or otherwise, for advertising or sales purposes.

9. Representing, directly or by implication, that any allowance, discount, or commission is granted by respondents to purchasers in return for permitting the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

10. Representing, directly or by implication, that any of respondents' products are 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 respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents shall deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That the allegations of subparagraphs 7 of Paragraphs Five and Six of the complaint and the allegations of Paragraph Seven of the complaint be dismissed.

OPINION OF THE COMMISSION

APRIL 1, 1969

BY ELMAN, *Commissioner*:

I

The complaint in this proceeding, issued June 19, 1967, charged that respondents had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in unfair methods of competition and in unfair and deceptive acts and practices in the advertising, sale, and installation of various home improvement products, including aluminum siding and storm windows. The respondents filed an answer denying the allegations of the complaint. Before hearing, the respondents, on February

1, 1968, moved to dismiss the complaint on the ground, *inter alia*, that the Commission was disqualified from performing a judicial function in this case because of an alleged prejudgment of the facts. The Commission denied this motion, fully stating the reasons for its denial in an opinion issued on March 18, 1968.

After full evidentiary hearing, the examiner issued an initial decision on August 14, 1968, in which he upheld most of the charges of the complaint and dismissed the other charges; he entered an order as proposed by complaint counsel on those charges which were sustained. The case is before us on the cross-appeals of respondents and complaint counsel.

Respondents contend that the evidence is insufficient to support a finding that the respondents engaged in "bait and switch" sales techniques; that the examiner erred in finding liability against the individual respondent, William B. Starr; and that the Commission should reconsider and grant respondents' prior motion to dismiss the complaint. Complaint counsel, on the other hand, argue that the examiner did not go far enough in his finding that respondents misrepresented the nature of their guarantees and that the examiner also erred in not finding that respondents misrepresented certain characteristics of their residential aluminum siding products and in not finding that respondents engaged in unfair and deceptive acts relating to their financing practices.

II

The facts are adequately set out in the initial decision; to the extent they are not inconsistent with findings made in this opinion, the examiner's findings are hereby adopted as those of the Commission.

All-State Industries of North Carolina, Inc., is a corporation organized and doing business under the laws of the State of North Carolina, with its principal place of business at 1130 West Lee Street, Greensboro, North Carolina.¹ ABC Storm Window Co., Inc., is a corporation also organized and doing business under the laws of the State of North Carolina, with its principal place of business at 1128 West Lee Street, Greensboro, North Carolina. Respondent William B. Starr was at all relevant times the presi-

¹ This company was originally incorporated and did business at the designated address as ABC Jalousie Company of North Carolina, Inc.

dent and principal officer and operator of all the corporate respondents.²

Respondents are engaged in the advertising, sale, and installation of residential aluminum siding, storm windows, storm doors and various other home improvement products. The complaint alleges, and the examiner found, that respondents have engaged in what is termed a "bait and switch" operation in the advertising and sale of their products.³

Respondents' principal method of advertising is through mail-outs which include return mail cards. These mail-out advertisements promote an inexpensive product within respondents' product line which they refer to as an "ADV" product. The ADV product is ostensibly offered at a substantial reduction from a fictitious "regular" price for a fictitious "limited" time. Respondents also sell a more expensive line of similar products which they term "PRO" products. When prospective customers return the mail cards to respondents, the cards are turned over to salesmen who make appointments with the prospective customers. Respondents' sales approach is to attempt to obtain a signed contract for sale of the ADV product along with a signed note for the price of the product and a deed in blank. After obtaining the signed contract, the salesman proceeds to disparage the ADV product by pointing out a multitude of deficiencies in the product.⁴ The salesman then produces a sample of the PRO product, embarks upon a lengthy discussion of its virtues in contrast with the deficiencies of the ADV and concludes, wherever possible, by selling the PRO product to the customer in place of the ADV product.⁵ Respondents do, however, install the ADV product if a customer insists or demands its installation in accordance with the ADV contract.

Respondents argue that the evidence is insufficient to establish that they had engaged in an unlawful bait and switch

² It was stipulated during the course of the hearing that any order entered against All-State Industries of North Carolina, Inc., ABC Storm Window Co., Inc., and William B. Starr, individually and as an officer of said corporations, would also be entered against the other corporate respondents named in the complaint.

³ See, e.g., *In the Matter of Royal Construction Company*, F.T.C. Dkt. 8690 (Initial Decision, January 30, 1967, adopted by the Commission, June 1, 1967); *Pati-Port, Inc. v. F.T.C.*, 60 F.T.C. 35 (1962), *aff'd* 313 F. 2d 103 (4th Cir. 1963); *Luxury Industries, Inc.* 59 F.T.C. 442 (1961); *Clean-Rite Vacuum Stores, Inc.*, 51 F.T.C. 887 (1955).

⁴ In addition to oral representations, this disparagement of the ADV may include exhibiting a sample of the ADV in very poor condition and a "guarantee" of the ADV which grossly disparages the product and authorizes respondent "to install this cheap grade of aluminum [product] * * *" (R. 336; CX 60-CX 62B).

⁵ Respondents provide a substantial incentive to their salesman to operate in this fashion since the salesmen receive no commission on the ADV product but do receive their regular commission on the PRO product.

scheme. Relying upon our opinion in *In the Matter of Clarence Soles*, FTC Docket 8602 (December 3, 1964) [66 F.T.C. 1234, 1248], they base their claim of good faith in the advertising of their products upon the fact that the advertised product was available to the customer. In effect, respondents contend that the mere availability and occasional consummated sale of their advertised products are sufficient to establish their good faith and preclude a finding that their advertising and sales techniques were unfair or deceptive. This contention is without merit. The Commission has long made it clear that actual sales of advertised merchandise do not preclude the existence of a bait and switch scheme.⁶ Moreover, *Soles* is inapplicable to respondents' position. The availability of respondents' advertised product in that case was only one of several factors which supported a finding in respondent's favor. In *Soles*, respondent's salesmen did not disparage or downgrade their advertised product in an attempt to switch their customers to other products nor was there sufficient evidence to establish that the advertised offer was in other respects insincere. In sharp contrast to the evidence in that case, this record furnishes overwhelming support for the examiner's conclusion that respondents have used their advertised products primarily to "bait" prospective customers and "switch" them to respondents' more expensive products. (See Initial Decision, pp. 475-477.)

Since the record clearly requires a finding that respondents' sale of their advertised product was "a mere incidental by-product" of an overall bait and switch scheme, respondents' claim of error in this respect is rejected.

Respondents also contend that the evidence does not support a finding of liability against the individual respondent, William B. Starr. While conceding that Mr. Starr "is a major stockholder and leading official of the respondent corporations," respondents assert that there is "no evidence that he personally performed any of the acts charged in the complaint." (Respondents' Appeal Brief, pp. 4-5.) Consequently, respondents contend that an order against Mr. Starr, personally, is without warrant, citing *Coro, Inc. v. F.T.C.*, 338 F. 2d 149 (1st Cir. 1964), *cert. den.* 380 U.S. 954 (1965), and *Rayex Corp. v. F.T.C.*, 317 F. 2d

⁶ The Commission's *Guides Against Bait Advertising* note that "Sales of the advertised merchandise do not preclude the existence of a bait and switch scheme. It has been determined that, on occasions, this is a mere incidental by-product of the fundamental plan and is intended to provide an aura of legitimacy to the overall operation." CCH Trade Regulation Reporter, ¶7893, November 24, 1959.

290 (2d Cir. 1963), as authority for their position. The examiner expressly rejected respondents' contention that there was no substantial evidence in the record that Mr. Starr participated in the activities charged in the complaint. After reviewing the record, we are satisfied that there was abundant evidence to support the examiner's finding that Mr. Starr was personally and actively involved in the practices challenged here. In light of this record, neither case cited by respondents is applicable here. In *Coro*, there was no showing that the individual respondent was even aware of the unlawful practices or that the corporate respondent was participating in them.⁷ Here the evidence is sufficient to establish that Mr. Starr was not only aware of these practices but participated in them and actively encouraged them.⁸ Similarly, in *Rayex*, a Commission order against one of the individual respondents was modified to exclude him on the basis of Commission counsel's concession on oral argument that the individual respondent involved—unlike Mr. Starr—neither personally engaged in the company's sales and advertising practices nor was in a position to exercise any control over such matters. While the fact that Mr. Starr is the principal incorporator, the majority stockholder, and the principal operating officer of all the respondent corporations may in itself be sufficient to justify an order against him individually,⁹ we note also that the record supports the examiner's finding that Mr. Starr personally participated in the unlawful practices involved here and we adopt that finding. Respondents' claim of error in this respect is therefore also rejected.

Respondents' request that the Commission reconsider their prior motion for dismissal of the complaint is likewise denied. In renewing their motion, respondents have presented no ground for the motion which was not previously urged, considered in detail, and rejected in our opinion of March 18, 1968. In view of the detailed consideration there given to respondents' claim (pp. 2-7),* no purpose would be served by burdening this opinion

⁷ 338 F. 2d at 154. Cf. *Benrus Watch Co. v. F.T.C.*, 352 F. 2d 313 (8th Cir. 1965), cert. den. 384 U.S. 939 (1966) and *Clinton Watch Co. v. F.T.C.*, 291 F. 2d 838 (7th Cir. 1961), cert. den. 368 U.S. 952 (1962).

⁸ See, e.g., the testimony at R. 190-191 and R. 286-292 relating to Mr. Starr's knowledge of and participation in respondents' sales training program. Note also that the mail-outs and other advertisements, the preparation of which Mr. Starr personally supervised, were themselves misrepresentations (R. 108; Initial Decision, p. 477, Finding 15).

⁹ See *Guziak v. F.T.C.*, 361 F. 2d 700 (8th Cir. 1966), cert. den. 385 U.S. 1007 (1967); *Rayex Corp. v. F.T.C.*, 317 F. 2d 290 (2d Cir. 1963); cf. *F.T.C. v. Standard Education Society*, 302 U.S. 112 (1937) and the majority's construction of *Standard Education in Standard Distributors, Inc. v. F.T.C.*, 211 F. 2d 7, 15 (2d Cir. 1954).

*[73 F.T.C. 1242]

with a restatement of the issue raised and its disposition by the Commission. Respondents' appeal is dismissed in all respects.

III

In addition to the charges in the original complaint which were upheld by the examiner, there were other charges which he dismissed. The complaint alleged that respondents had misrepresented that their products "are unconditionally guaranteed or are guaranteed for life." While the examiner found that respondents had misrepresented the extent of their guarantee (Initial Decision, pp. 478, 479) and included a provision therefor in the proposed order, he did not find that respondents' guarantees were in other respects false or deceptive. Consequently, he declined to include in the order other provisions recommended by complaint counsel concerning respondents' guarantees. Complaint counsel argue that respondents have additionally misrepresented their guarantees primarily in that respondents have represented that their aluminum siding is "unconditionally guaranteed against fading" or is "guaranteed never to * * * fade," when in fact (1) the siding will fade in the course of time and customer maintenance is required in order to retain the original lustre of the siding, and (2) these guarantees, while added to a number of customer's contracts by respondents salesmen, are not included in respondents' printed or registered guarantees.

The examiner stated that there was no evidence that respondents did not honor these guarantees. (Initial Decision, p. 478.) In this respect, we believe the examiner erred. Respondents admitted that their siding will fade unless it is waxed and otherwise maintained (R. 413-414; see CX 71). Consequently, we do not see how the representation that the siding is guaranteed "never" to fade or is "unconditionally" guaranteed not to fade can be regarded as anything other than false and deceptive.¹⁰ Moreover, while respondents' "unconditional" guarantees against fading are included in a number of their contracts (*e.g.*, CX 23, CX 29, *cf.* CX 39, CX 40), they are not included in their printed guarantee which, rather, is accompanied by literature instructing purchasers how to maintain the siding to preserve its

¹⁰ Although this charge relates primarily to guarantees inserted in contracts for respondents' PRO siding, it is worth noting the amazement expressed by one witness when he discovered what maintenance was required to retain the lustre of the ADV siding; maintenance which is not dissimilar to that required for the PRO siding (R. 421; CX 71). Moreover, we note that respondents' salesmen apparently represent that the PRO siding does not require waxing to retain its lustre (R. 320-322), contrary to the instructions accompanying the PRO siding guarantee (CX 71).

lustre (CX 71). Even if respondents adhere to the terms of their contractual guarantee by restoring siding which has not been maintained by the customer and which has discolored or faded through normal weathering—a possibility which is not suggested by this record—the palpably false representations respecting the durability of the siding's finish are clearly capable of deceiving respondents' customers by leading them to believe that the siding will retain its lustre without substantial maintenance. *Cf. Montgomery Ward & Co., Inc. v. F.T.C.*, 379 F.2d 666 (7th Cir. 1967). If respondents wish to guarantee their siding against fading they should be required to state clearly and conspicuously exactly what the purchaser must do before respondents will fulfill their obligation under the guarantee.¹¹ The order is modified accordingly.¹²

One further claim remains to be considered. The complaint charged that respondents had violated section 5 of the Federal Trade Commission Act by failing to disclose to their credit purchasers that instruments of indebtedness executed in connection with the purchase of respondents' products would be transferred to third parties to whom respondents' purchasers would thereafter be indebted and against whom the purchasers' claims or defenses on the contract may not be available.¹³ Complaint counsel appeal the examiner's dismissal of this charge of the complaint.

The examiner found that, although respondents generally discount or transfer instruments of indebtedness obtained in connection with a retail sale to finance companies or other third parties, respondents' customers are not informed of this fact at the time the instrument is executed (Initial Decision, pp. 479, 480). While stating that it was possible that customers may have been misled by respondents' practice, the examiner dismissed the charge principally on the ground that there was no evidence in the record that respondents' customers were or could

¹¹ See Federal Trade Commission *Guides Against Deceptive Advertising of Guarantees*, CCH Trade Regulation Reporter, ¶ 7895, April 26, 1960.

¹² Complaint counsel have also urged that the examiner erred in not finding that respondents have deceptively represented, directly or by implication, that their siding products will never require repainting. We agree with the examiner that the record is insufficient to establish this claim. Similarly, although there appears to be some discrepancy between the "life" referred to in contract guarantees (see, e.g., CX 37, 39, 40, 45) and in respondent's printed "Lifetime" Guarantees (CX 5A, CX 71), there is nothing in the record to indicate that these guarantees are deceptive with respect to their duration.

¹³ The examiner apparently misread the charge in the complaint as alleging that "respondents falsely advertise easy credit to finance the installation of their home improvement products." (Initial Decision, p. 479). However, the examiner's reasons for dismissing the charge are applicable to the issues thereby raised and will be considered as though directed to the proper charge.

have been misled by it.¹⁴ Although complaint counsel introduced no evidence in this proceeding on the capacity of respondents' nondisclosure to deceive respondents' customers, the complainant declared that the Commission takes official notice of the fact that such nondisclosure is unfair and deceptive in that it tends to induce a belief in a substantial number of purchasers that respondents will not transfer the executed instrument and that legal obligations will exist, unchanged, only between respondents and purchasers and, further, that respondents' nondisclosure tends to induce a substantial number of purchasers to enter into contracts or execute promissory notes for the purchase of respondents' products. We hold that the examiner erred in dismissing this charge of the complaint. Our holding is based upon two grounds discussed in detail below: first, that failure to disclose to prospective purchasers that notes of indebtedness executed in connection with a retail sale may be assigned to third parties to whom the purchaser's claims or defenses on the contract may not be available is inherently unfair where, as here, the seller routinely assigns such instruments to third parties; and second, that such failure to disclose is deceptive in view of facts officially noticed by the Commission.

The Federal Trade Commission Act, as amended, imposes upon the Commission the duty to prevent not only unfair methods of competition but "unfair or deceptive acts or practices in commerce." 15 U.S.C. § 45. This latter aspect of the Commission's mandate was added to the Federal Trade Commission Act in 1938 as a part of the Wheeler-Lea amendments to the Act. One of the purposes of this amendment was to make clear that the protection of the consumer from unfair trade practices, equally with the protection of competitors and the competitive process, is a concern of public policy within the scope of responsibility of the Federal Trade Commission. The legislative history of the Wheeler-Lea amendments to section 5 of the Act discloses explicit and substantial concern with the exploitation of consumers

¹⁴ The examiner dismissed the charge on the additional ground that there was no evidence in the record that respondents have utilized their financing arrangements to escape their obligations under their contracts of sale or that purchasers have in fact been injured by respondents' routine assignment of notes executed in connection with their sales. This does not provide, however, an adequate basis for dismissing the charge in the complaint. The questioned practice must be judged in light of its capacity to deceive or its unfairness and not on the basis of any demonstrated injury to purchasers. See *Montgomery Ward & Co. v. F.T.C.*, 379 F. 2d 666 (7th Cir. 1967); *Charles of the Ritz Distributors Corp. v. F.T.C.*, 143 F. 2d 676 (2d Cir. 1944).

through deceptive, unethical or otherwise unfair trade practices.¹⁵ Moreover, the responsibility of the Commission in this respect is a dynamic one: it is charged not only with preventing well-understood, clearly defined, unlawful conduct but with utilizing its broad powers of investigation and its accumulated knowledge and experience in the field of trade regulation to investigate, identify, and define those practices which should be forbidden as unfair because contrary to the public policy declared in the Act. The Commission, in short, is expected to proceed not only against practices forbidden by statute or common law, but also against practices not previously considered unlawful, and thus to create a new body of law—a law of unfair trade practices adapted to the diverse and changing needs of a complex and evolving competitive system.¹⁶

In accordance with the responsibility of the Commission to execute its statutory responsibilities in the light of the changing characteristics of the American marketplace, the Commission has focused increased attention upon unfair or deceptive practices associated with credit transactions.¹⁷ It is a matter of common knowledge that, in the years since the end of the Second World War, the frequency of retail credit buying has spiralled to the

¹⁵ The test of legality under Section 5 had to be amended, it was stated, "to stop the exploitation or deception of the public." S. Rep. No. 1705, 74th Cong., 2d Sess. 3 (1936). See also S. Rep. No. 221, 75th Cong., 1st Sess. 3 (1937). Cf. H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937).

¹⁶ "Courts have always recognized the customs of merchants, and it is my impression that under this act the Commission and the courts will be called upon to consider and recognize the fair and unfair customs of merchants, manufacturers and traders, and probably prohibit many practices and methods which have not heretofore been clearly recognized as unlawful." 51 Cong. Rec. 11593 (1914) (remarks of Senator Saulsbury). See, e.g., *F.T.C. v. Texaco, Inc.*, 393 U.S. 223, 89 S.Ct. 429 (1968); *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357 (1965); *F.T.C. v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934); *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67 (1934). In the words of Judge Learned Hand, describing the Commission's power in the field of deceptive and unfair practices: "The Commission has a wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." *F.T.C. v. Standard Education Society*, 86 F. 2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937).

¹⁷ On July 22, 1965, the Commission published its *Guides Against Debt Collection Deception*, CCH Trade Regulation Reporter ¶ 7907. In 1964 it brought its first case challenging deceptive practices in the field of debt consolidation, *Budget Counsellors, Inc.*, FTC Dkt. C-748, May 27, 1964. Most recently, the Commission instituted a special program to investigate unfair and receptive practices in the District of Columbia to which the poor are most susceptible, which resulted in the publication of two reports: *Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers*, March 1968, and *Report on District of Columbia Consumer Protection Program*, June 1968. The former report found that low-income market retailers used installment credit in 93 percent of their sales; the latter report noted that a typical and recurring consumer complaint was that a customer discovered only after a purchase that he was indebted to a finance company and not to the merchant with whom he had dealt.

point at which it has become an accepted and common feature of American purchasing habits.¹⁸ Indeed, recognition of the increased importance of consumer credit to the operation of our economy was a basic reason for enactment of the Truth in Lending Act of 1968.¹⁹ With the increased use of credit for the purchase of consumer goods has also come the increased use of negotiable instruments of indebtedness, most notably the conditional sales contract, executed in connection with consummation of a retail sale.²⁰ This in turn has changed the character of many retail transactions from transactions involving only a buyer and a seller to transactions in which at least three parties are involved: the buyer, the seller, and the assignee of a negotiable instrument executed in connection with the sale. When a seller knows, but the buyer does not know, that the debt contracted by the buyer in making a credit purchase will be assigned to a third party,²¹ the buyer may be entering into a transaction quite different in its characteristics from the one the buyer imagines he is entering. If the instrument executed in con-

¹⁸ In 1945, the total consumer credit debt, exclusive of real estate mortgages and insurance policy loans, amounted to \$5.7 billion. By the end of 1968, it had risen to over \$113 billion. Included in this latter figure is nearly \$25 billion in consumer installment credit notes other than those executed for personal loans, automobiles, and home repairs and improvement, more than half of which are held by banks, finance companies and other financial institutions. See *Federal Reserve Bulletin*, February 1969, p. A-52 *et seq.*

¹⁹ P.L. 90-321, May 29, 1968. Section 102 of the Act declares in part: "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit . . ." It should be noted that the Truth in Lending Act does not restrict the jurisdiction of the Federal Trade Commission to enforce the Federal Trade Commission Act in areas related to credit transactions. Indeed, § 108(c) of the Act expressly provides that a violation of any requirement imposed by the Truth in Lending Act shall be deemed a violation of a requirement imposed under the Federal Trade Commission Act.

²⁰ See note 18, *supra*.

²¹ See *FTC Report on District of Columbia Consumer Protection Program*, June 1968, pp. 9-10. This problem was presented to the Commission in an exaggerated form as early as 1961 in *Lifetime, Inc.*, 59 F.T.C. 1231 (December 1, 1961). In the past six years, the Commission has instituted more than a dozen cases in which one or more charges in the complaint related to respondent's failure to disclose that a negotiable instrument executed in connection with a sale would be assigned to a finance company or other third party to whom the purchaser would thereafter be indebted. With one exception, these cases were all terminated by default judgments, consent decrees, or assurances of voluntary compliance. In one case, *Marlo Furniture Company*, FTC Dkt. 8745, which was terminated by an assurance of voluntary compliance on January 16, 1969 [75 F.T.C. 112], there had been a full hearing in which several witnesses testified as to their ignorance of the fact that the conditional sales contracts they executed were to be assigned to third parties. They further indicated their lack of knowledge as to how such a transfer would affect their rights. Several witnesses also testified to a preference for credit extended by the merchant with whom they were dealing rather than a finance company. In another case, *Empec Corporation*, FTC Dkt. 8702 (February 14, 1967) [71 F.T.C. 158], the issue was decided on stipulated facts, the Commission entering an order requiring respondent to disclose to purchasers that negotiable instruments executed in connection with a sale may be assigned to a finance company or other third party at the respondent's option and without notice to the purchasers.

nection with the purchase is negotiated to a holder in due course, the buyer may be indebted to the assignee notwithstanding any defense or claim the buyer may have against the seller on the original contract such as nondelivery or defects in the purchased merchandise (see the Uniform Commercial Code § 3-305, now adopted in most States).²² In this circumstance, we find it palpably unfair for a seller who routinely assigns instruments of indebtedness executed by his purchasers to third parties to fail to disclose to his purchasers that such transfer is contemplated and may result in a substantial alteration of the buyer's rights and liabilities.

If the average consumer were aware of the legal implications of signing a conditional sales contract or other negotiable instrument, such disclosure might be unnecessary. However, the average consumer does not have such knowledge; he is not only, in many cases, unaware of the fact that conditional sales contracts might be negotiated or assigned to a third party, he is also unaware of how such transfer may affect his rights.²³ In the absence of such disclosure, he has no reason to believe that his liability on the note may persist even in the face of unconscionable conduct by the seller. He therefore stands in a wholly unequal relation to the seller, who may defer, evade or seek to mitigate his responsibilities under the contract while the buyer remains fully indebted to a third party for the amount of his purchase. It seems to us, therefore, that a seller's failure to disclose to a purchaser that an instrument which the buyer executes in connection with the sale may be transferred to a third party to whom the buyer will thereafter be indebted and against whom the buyer's claims or defenses may not be available is, in the most clear and literal sense of the term, an unfair trade practice. In the words of the Supreme Court in another context, "It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair.'" *F.T.C. v Keppel*, 291 U.S. 304, 313 (1934).

Moreover, we believe that the Commission has had sufficient experience in this area²⁴ to take official notice of the fact—which appears almost self-evident—that in the absence of an affirmative

²² Moreover, even though some courts have become increasingly reluctant to find that an assignee took as a holder in due course where his connection to the transaction indicated some awareness of the buyer's defenses, this fact provides little comfort to the consumer of modest means who is put to the burden and expense of litigation to vindicate his rights.

²³ See footnote 17 and footnote 21, *supra*.

²⁴ See footnote 17 and footnote 21, *supra*.

disclosure to the contrary, a substantial number of purchasers, having no reason to believe otherwise, will assume that they will be indebted to the seller for the goods they have purchased and that all rights and liabilities between the parties to the sale, and those parties only, will persist.²⁵ Where, as here, the seller in fact routinely assigns negotiable instruments executed in connection with his sales to finance companies or other third parties without disclosing to the purchaser that this may be done, the purchaser is thus deceived. Since assignment of a purchaser's note to a holder in due course may materially alter the nature of the purchaser's rights and liabilities,²⁶ such deception is contrary to the public interest and is prohibited by section 5 of the Trade Commission Act. The obvious remedy for such deception is to require the seller to disclose affirmatively to the purchaser that a conditional sales contract or other instrument of indebtedness executed in connection with the sale may, at the seller's option and without notice to the purchaser, be assigned to a finance company or other third party to whom the purchaser will thereafter be indebted and against whom the purchaser's claims or defenses on the contract may not be available. This is only one of many kinds of cases in which the Commission has found a requirement of affirmative disclosure necessary in order to prevent deception.²⁷ The order will so issue.

²⁵ Consistent with the requirements of the Administrative Procedure Act § 7(e), 5 U.S.C. § 556(e), respondents were duly notified of the facts officially noticed by the Commission by declaration in the complaint and were thus afforded ample opportunity to show the contrary. Respondents apparently declined to do so.

²⁶ We need not consider what remedy, if any, would be appropriate if the holder in due course doctrine were not applicable to instruments arising out of consumer transactions, including the home improvement transactions here involved. To date only two states, Vermont and Massachusetts, have abolished the holder in due course doctrine for consumer paper. The Massachusetts law provides: "If any contract for sale of consumer goods on credit entered into in the Commonwealth between a retail seller and a retail buyer requires or involves the execution of a promissory note, such note shall have printed on the face thereof the words 'consumer note,' and such a note with the words 'consumer note' printed thereon shall not be a negotiable instrument within the meaning of the Uniform Commercial Code—Commercial Paper * * *" Mass. Gen. Laws ch. 255, § 12c (1966 Supp.). See Vt. Stat. Am. tit. 9, § 2455 (1967 Supp.).

Such statutes would seem to provide more complete protection than cease and desist orders entered against individual respondents on a case-by-case basis. It may be that, if such legislation is widely enacted, prohibitory orders like the one entered in the instant case may no longer be necessary. In this connection, we note that Section 3.72(b) of the Commission's Rules of Practice provides an expeditious method for reopening an outstanding order, on respondents' motion or by the Commission acting *sua sponte*, and modifying it in the light of "changed conditions of fact or law."

²⁷ See, e.g., *Waltham Precision Instrument Co. v. F.T.C.* 327 F. 2d 427 (7th Cir. 1964) cert. den. 377 U.S. 992 (1964); *Bantam Books, Inc. v. F.T.C.*, 275 F. 2d 680 (2d Cir. 1960); *American Medicinal Products, Inc. v. F.T.C.*, 136 F. 2d 426 (9th Cir. 1943). See also *Manco Watch Strap Co.*, 60 F.T.C. 495, 510 (March 13, 1962).

FINAL ORDER

This matter has been submitted to the Commission on the cross-appeals of complaint counsel and respondents from the initial decision of the hearing examiner filed on August 14, 1968. The Commission has rendered its decision denying respondents' appeals in all respects, granting complaint counsel's in part, and adopting the findings of the hearing examiner to the extent they are consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

It is ordered, That respondents All-State Industries of North Carolina, Inc., ABC Storm Window Co., Inc., All-State Industries of Tennessee, Inc., All-State Industries, Inc., and All-State Industries of Illinois, Inc., corporations, and their officers, and William B. Starr, individually and as an officer of each of said corporations, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution, or installation of residential aluminum siding, storm windows, storm doors, or any other products, or in connection with their business in such products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of other merchandise or services.
2. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.
3. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale, either before or after a contract has been signed for the purchase of such merchandise or services.
4. Representing, directly or by implication, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.
5. Representing, directly or by implication, that any price

for respondents' products is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

6. Representing, directly or by implication, that any offer to sell products is limited as to time, or is limited in any other manner: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that any represented limitation as to time or other represented restriction is actually imposed and adhered to by respondents.

7. Representing, directly or by implication, that respondents manufacture any of the home improvement products which they sell, or that respondents sell their home improvement products directly from their factory; or misrepresenting, in any manner, the nature or scope of respondents business.

8. Representing, directly or by implication, that the home of any of respondents' customers, or prospective customers, has been selected to be used or will be used as a model home, or otherwise, for advertising or sales purposes.

9. Representing, directly or by implication, that any allowance, discount, or commission is granted by respondents to purchasers in return for permitting the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

10. Representing, directly or by implication, that respondent's products are unconditionally guaranteed when in fact such guarantee is not an unconditional guarantee; or misrepresenting, in any manner, the nature, terms, or conditions of any guarantee.

11. Representing, directly or by implication, that any of respondents' products are 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.

12. Representing, directly or by implication, that respondents' products are guaranteed not to fade without clearly and conspicuously disclosing the limitations applicable to

such guarantee; or misrepresenting, in any manner, the durability, performance, or quality of respondents' products.

13. Failing to disclose orally prior to the time of sale, and in writing on any conditional sales contract, promissory note or other instrument of indebtedness executed by a purchaser, and with such conspicuousness and clarity as is likely to be observed and read by such purchaser, that:

Any such instrument, at respondents' option and without notice to the purchaser, may be discounted, negotiated or assigned to a finance company or other third party to whom the purchaser will thereafter be indebted and against whom the purchaser's claims or defenses may not be available.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions and to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That the allegations of sub-paragraphs 7 of Paragraphs Five and Six of the complaint be dismissed.

It is further ordered, That the respondents herein shall, within sixty (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 of their compliance with this order.
