

Complaint

78 F.T.C.

It is further ordered, That the hearing examiner's initial decision and order to cease and desist, as above modified and as modified by the accompanying opinion, be, and they hereby are, adopted as the decision and order of the Commission.

IN THE MATTER OF

CURTIS PUBLISHING COMPANY, ET AL.

ORDER OF DISMISSAL, OPINION, ETC., IN REGARD TO THE ALLEGED
VIOLATION OF THE FEDERAL TRADE COMMISSION ACT*Docket 8800. Complaint, Oct. 13, 1969—Decision, June 30, 1971*

Order of dismissal which modified the initial decision by striking its conclusions and summary statement and dismissed the complaint which charged a Philadelphia, Pa., national magazine with failure to provide cash refunds to subscribers for the uncompleted portions of their subscriptions when the magazine ceased publication.

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 Curtis Publishing Company, The Saturday Evening Post Company and Perfect Film and Chemical Corporation, 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 Curtis Publishing Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business located at Independence Square, Philadelphia, Pennsylvania.

Respondent The Saturday Evening Post Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1615 Northern Street, Manhasset, New York.

Respondent Perfect Film and Chemical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1615 Northern Street, Manhasset, New York.

PAR. 2. Respondent Curtis Publishing Company, prior to on or about October 14, 1968, was engaged in the business of publishing, selling and distributing weekly and monthly magazines to the public including, among others, a magazine known as "The Saturday Evening Post."

On or about October 14, 1968, some of the magazines published by said respondent, including "The Saturday Evening Post," were transferred to the respondent Perfect Film and Chemical Corporation.

On or about November 12, 1968, the respondent Perfect Film and Chemical Corporation transferred to respondent The Saturday Evening Post Company certain magazines, including "The Saturday Evening Post," formerly published by respondent Curtis Publishing Company.

The capital stock of the said respondent The Saturday Evening Post Company is owned by the respondent Curtis Publishing Company and the respondent Perfect Film and Chemical Corporation in equal amounts, the said respondents being the only stockholders of The Saturday Evening Post Company.

The said respondent The Saturday Evening Post Company continued to publish the magazine known as "The Saturday Evening Post" until February 8, 1969, when it ceased publication.

PAR. 3. In the course and conduct of their business as aforesaid, respondent Curtis Publishing Company, during the time it published the magazine "The Saturday Evening Post," as aforesaid, caused its said magazines when sold to be shipped from its place of business in the Commonwealth of Pennsylvania to purchasers thereof located in various other States of the United States and in the District of Columbia and maintained, and at all times until on or about October 14, 1968, maintained a substantial course of trade in said publication in commerce as "commerce" is defined in the Federal Trade Commission Act.

In the course of their business, as aforesaid, respondent The Saturday Evening Post Company and the respondent Perfect Film and Chemical Corporation caused, until on or about February 8, 1969, the said magazine known as "The Saturday Evening Post," when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various States of the United States and in the District of Columbia and at all times from on or about October 14, 1968, until on or about February 8, 1969, maintained a substantial course of trade in said publication in commerce as "commerce" is defined in the Federal Trade Commission Act.

Complaint

78 F.T.C.

PAR. 4. In or about the month of July 1968, respondent, Curtis Publishing Company, in order to reduce its circulation, notified some of its subscribers to "The Saturday Evening Post" that the said magazine would no longer be delivered to them. At the same time, said respondent gave to its subscribers the choice of a subscription to a different magazine for the unexpired portion of the subscription. At no time did the said respondent notify any of its subscribers that they were entitled to, and could, receive a cash refund for the unexpired portion of their subscriptions.

PAR. 5. On or about February 8, 1969, the respondents notified the subscribers to "The Saturday Evening Post" that said magazine would no longer be published and that they could substitute a magazine selected from a list presented to the subscriber by the respondents. In no instance, did the respondents notify the subscribers that they were entitled to, and could, receive a cash refund for the unexpired portion of their subscriptions.

PAR. 6. By offering the subscribers the sole choice of a substitution of a selected magazine in lieu of the magazine originally contracted for:

- (1) Respondents failed to offer their subscribers a cash refund for the unexpired portion of said subscriber's subscription for a specific magazine, *i.e.*, The Saturday Evening Post;

- (2) Respondents failed to carry out their obligation to their subscribers, all of whom were entitled to a cash refund; and

- (3) Respondents obscured the legal rights of said subscribers by withholding the option of a cash refund for the unexpired portion of the subscription for which respondents could not deliver the specific magazine subscribed for.

PAR. 7. Respondents' failure to offer their subscribers a choice of a cash refund upon cancellation of their subscription, respondents' failure to carry out their obligation to their subscribers, all of whom were entitled to a cash refund, and respondents' obscuring of the legal rights of said subscribers by withholding the option of a cash refund for the unexpired portion of the subscription for which respondents could not deliver the specific magazine subscribed for, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that they had no choice but to substitute another magazine for the unexpired portion of the subscription.

PAR. 8. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition in

1472

Initial Decision

commerce with other corporations, firms and individuals engaged in the magazine publishing business.

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

Mr. Anthony J. Kennedy and *Mr. David C. Fix* supporting the complaint.

Mr. Ernest R. von Starck and *Mr. Peter C. Ward* for respondents, *Morgan, Lewis & Bockius*, Philadelphia, Pa.

Initial Decision by Edgar A. Buttle, Hearing Examiner

OCTOBER 23, 1970

CONTENTS

	Page
PRELIMINARY STATEMENT.....	1476
A. The Complaint.....	1476
B. Answers and Issues.....	1476
C. Proceedings.....	1477
FINDINGS OF FACT.....	1477
A. Nature of Business.....	1477
B. Curtis Losses and Financial Deterioration.....	1478
C. Perfect's Loan Participation.....	1480
D. Post's Reduction Program and Arrangement with Time.....	1481
E. Curtis' Sale of Circulation and Subscription Companies to Perfect.....	1482
F. Perfect's Sale of Receivables to Curtis.....	1483
G. Formation of SEPCO.....	1484
H. Pension Fund Overfunding.....	1484
I. Transfer of Curtis Assets to Perfect In Satisfaction of Indebtedness.....	1484
J. Perfect's Purchase of SEPCO Stock.....	1486
K. Curtis Withdrawals From Pension Fund.....	1486
L. Sale of SEPCO Notes.....	1486
M. Liquidity of Curtis' Assets—End of 1968.....	1486
N. Post Termination.....	1487
O. Arrangements for Magazine Substitutions.....	1487
P. PDS Contracts.....	1487
Q. Financial Forecast—1969.....	1487
R. Refund Offer on Post Termination.....	1488
CONCLUSIONS.....	1488
A. Conclusions of Fact.....	1488
B. Commentary on Factual Conclusions and Proceedings.....	1490
1. Analyzation of Evidence and Contentions as Related to Alleged and Unalleged Charges.....	1490
2. Post-Hearing Conferences to Discuss Evidence as Affecting Due Process.....	1493
3. Restatement of Evidentiary Evaluation.....	1494

	Page
C. Conclusions of Law.....	1496
D. Commentary on Legal Conclusions.....	1497
1. Hearing Examiner Authority to Initially Resolve Jurisdictional Questions.....	1497
2. Immateriality of Good Faith—Non-Applicability.....	1499
3. Inapplicability of Warranty Argument.....	1499
4. Public Interest as Affecting Jurisdiction.....	1499
5. Limitations on Federal Trade Commission Remedial Powers.....	1502
6. Alternative Commission Relief Within the Scope of Its Authority and the Public Interest.....	1503
7. Prohibitory Nature of Commission Authority.....	1503
8. Cease and Desist Orders of Commission Have Prospective Effect Only.....	1504
9. The Commission Lacks Jurisdiction to Render Punitive or Compensatory Relief.....	1505
10. Indicia of Commission Policy.....	1506
SUMMARY STATEMENT.....	1507
ORDER.....	1507

PRELIMINARY STATEMENT

A. The Complaint

A complaint against The Curtis Publishing Company (Curtis), The Saturday Evening Post Company (SEPCO), and Perfect Film and Chemical Corporation (Perfect) was issued by the Federal Trade Commission on October 13, 1969, alleging that those respondents violated Section 5 of the Federal Trade Commission Act in connection with the circulation cut-back and termination of publication of The Saturday Evening Post (Post) which occurred during the last half of 1968 and the first half of 1969. The complaint asserts that the failure of respondents to advise Post recipients of an alleged right to a refund at the time respondent Curtis was arranging for substitute magazines to fill out the unexpired portions of Post subscriptions, was an unfair and deceptive act and practice.

B. Answers and Issues

Respondents Curtis and SEPCO filed answers to the complaint asserting the factual defenses (including financial inability to refund) contesting Commission jurisdiction of this matter for lack of the necessary public interest, and attacking the proposed order for overreaching the limits on Federal Trade Commission remedial power imposed by the Federal Trade Commission Act. Perfect also defended on the ground that its participation was that of a creditor only with never more than two minority directors on the board.

C. Proceedings

Hearings were held before Edgar A. Buttle, Hearing Examiner, on June 10-12, 1970, and June 24, 1970. Complaint counsel and counsel for respondents Curtis and SEPCO have filed proposed findings of fact and conclusions of law.

The hearing examiner has carefully considered the proposed findings of fact, and conclusions supplemented by briefs, and reply briefs, submitted by complaint counsel and counsel for respondents which were supplemented by discussion and argument at post-hearing conferences on September 23, 1970, and September 25, 1970. The proposed findings and conclusions if not herein adopted either in the form proposed or in substance are rejected as not supported by the record or as involving immaterial matters. Some proposed findings have also been rejected as argumentative rather than reflective of evidentiary facts. Proposed conclusions of law such as those relating to Paid-During-Service (PDS) subscribers have been rejected since the hearing examiner was of the view that the evidence and Federal Trade Commission jurisdiction was insufficient to resolve all of the issues propounded by respondents in this connection. Furthermore, such issues are immaterial since the hearing examiner has concluded the complaint should be entirely dismissed on more encompassing grounds. In view of the nature of respondents' primary defense (in financial inability to offer to make refunds), it has seemed preferable for the most part to arrange the fact findings chronologically rather than categorically.

FINDINGS OF FACT

A. Nature of Business

1. Respondent, the Curtis Publishing Company (Curtis), is a Pennsylvania corporation with its principal place of business at Independence Square, Philadelphia, Pennsylvania (Curtis, Perfect, SEPCO answers, par. 1).

2. Curtis Publishing Company, directly and through subsidiaries, owned and operated a large publishing enterprise engaged in the business of producing and distributing the following magazines: The Saturday Evening Post, the Ladies' Home Journal, Holiday, American Home and Jack and Jill and engaged in book publishing and various forms of educational publishing. Its magazines have had mass circulation and acceptance throughout the United States

for many years. The circulation of its magazines numbered into the many millions. Curtis owned its own paper mill, sources of wood pulp, printing plant and distributing facilities. It owned and operated several subsidiaries engaged in the business of circulation solicitation and magazine distribution for other periodicals, as well as its own. This entire enterprise was operated profitably until 1961. (RPX-13, pp. 4-10.)

3. Respondent, The Saturday Evening Post Company (SEPCO) is a Delaware corporation with its principal place of business at 641 Lexington Avenue, New York, N.Y. (Curtis, Perfect, SEPCO answers, par. 1.) It is a controlled subsidiary of respondent Curtis, and on August 5, 1970, SEPCO's name was changed to Holiday Publishing Company.

4. Curtis, prior to October 14, 1968, was engaged in publishing bi-weekly and monthly magazines including, among others, a magazine known as "The Saturday Evening Post" (Post). (Curtis, Perfect, SEPCO answers par. 2.)

5. On December 17, 1963, Curtis entered into a loan agreement with a group of banks, which agreement was amended from time to time thereafter. (Basic Bank Agreement.) (Stipulation 1; CX 1.) Security for the loans under the Basic Bank Agreement was all of Curtis' assets. (Stipulation 1; CX 1; Tr. 91.) Under the agreement Curtis was required to maintain a minimum working capital and liquidity ratios in its operations. (CX 1, par. 8.7.)

B. Curtis Losses and Financial Deterioration

6. In the period 1961-1967, Curtis suffered net operating losses of \$48,641,585. (RPX 13, 14, 15, 3, 4, 5, 6; Tr. 450-457.) Only in 1966 was there an operating profit, which amounted to \$347,000. (RPX 5.)

7. Specifically the Curtis losses were as follows:

Year	Loss	Reference
1961.....	\$4,193,585	Gould, Tr. 451; RPX-13.
1962.....	18,917,000	Gould, Tr. 451; RPX-14.
1963.....	3,393,000	Gould, Tr. 452-493; RPX-15.
1964.....	13,948,000	Gould, Tr. 493; RPX-3.
1965.....	3,352,000	RPX-4.
1967.....	4,839,000	Gould Tr. 462; RPX-6.

8. Curtis had an operating loss of approximately \$5,000,000 in 1967. In March 1968, Curtis owed approximately \$12,500,000 under

the Basic Bank Agreement and it was in default in its payments. (Tr. 246-249, 462.) Although the banks had expressed no intention of immediately foreclosing on the loan, it was apparent that Curtis had to find a solution to its financial problems. (Tr. 463.) The sum of approximately \$8,000,000 was due and payable on March 31, 1968. (RPX-6, p. 13.)

9. In March 1968, officers of The First National Bank of Boston called Milton Gould, one of the directors of Curtis, to inform him that the banks were deeply concerned about the "disastrous" results of operations for 1967 and did not see how they could continue to carry Curtis' obligations under the Basic Bank Agreement. (Gould, Tr. 458.) On or about March 30, 1968, a meeting was held at the offices of The First National Bank of Boston between bank officials and Messrs. Clifford, Gould, and Brown. At the time of the meeting, Curtis owed the banks \$15,000,000 and was in default to the banks on payments due on March 31, 1968. (Gould, Tr. 462.) In addition, Mr. Moore, senior vice president of the bank, informed the Curtis representatives that: (a) they had no extension, and (b) the bank had no intention of giving any extensions of the due date. (Gould, Tr. 463.) The loan being in default, the bank was entitled to proceed with its foreclosure remedies at any time it chose, unless Curtis was in a position to cure these defaults and raise new money for operating needs, estimated as high as \$10,000,000. (Gould, Tr. 463.) On the Monday following the meeting with the bank representatives, Milton Gould, in an attempt to find a solution to Curtis' financial problems, met with Armand Erpf, of Loeb, Rhoades & Company, and Messrs. Woodfin, Hallingby, and Reese, of White, Weld & Company in the hope of finding some business or financial solution to Curtis' problems. Although the foregoing financial advisers were fully familiar with Curtis' affairs, were highly skilled, and had access to institutional and investor financial resources, none was able to come up with a program for the solution of Curtis' problems. As one adviser observed, Curtis was "a dead horse." (Gould, Tr. 464-466.)

10. From 1962 until April 1968 Curtis had a steadily deteriorating financial position except as heretofore stated in 1966. (RPX 3, 4, 5, 13, 14; Gould, Tr. 450-457.) Curtis was not lacking in assets but in the liquidity of operating capital and assets. In early 1967 Mr. J. M. Clifford, president of the Curtis Publishing Company advised the board of directors that Curtis was expected to show a profit in 1967. (Gould, Tr. 457.) In the latter part of 1967 representatives of the First National Bank of Boston informed two Curtis directors, Mr. Milton S. Gould and Mr. Moreau D. Brown that the bank, as

Curtis' principal credit, was deeply concerned about Curtis' financial condition and that unless something was done about the management or the sale of the company, they didn't see how they could continue to participate in Curtis' bank loans. (Gould, Tr. 458.) The board of directors attempted to negotiate an agreement with Downe Communications, Inc., to ease the financial pressure on Curtis. These negotiations failed in late February 1968. (Gould, Tr. 460.) A meeting attended by representatives of the First National Bank of Boston, Mr. Gould, Mr. Brown, and Mr. Clifford was held in Boston on the last Saturday in March 1968. At this meeting the Curtis Publishing Company's annual report for 1967 showed that the Company would lose approximately \$5,000,000 in 1967. The representatives of the First National Bank of Boston stated that Curtis was in default to the banks under the Basic Bank Agreement. At that time Curtis owed the banks approximately \$12,500,000. The bank stated that while they had no present intention of foreclosing on the loan it was essential that Curtis find a solution to its immediate financial problems. (Gould, Tr. 460-463.) Pursuant thereto, the directors of Curtis attempted to find a solution to its financial problems without success. (Gould, Tr. 464-465.) The outstanding bank loans were in default. (Ackerman, Tr. 245-246.)

C. Perfect's Loan Participation

11. Martin S. Ackerman was president and chairman of the board of directors of Perfect Film and Chemical Corporation from 1962 to 1969. Prior to that time he had been a lawyer specializing in corporate securities, banking, mergers, and acquisitions. Throughout the time that Mr. Ackerman was president and chairman of the board of directors of Perfect, the company made acquisitions and sold many companies. (Ackerman, Tr. 83-84.) It was the policy of Perfect that Ackerman, in his capacity, sometimes individually, at times as a lawyer, and at times as president of Perfect would utilize his efforts on various projects which could be ultimately related to Perfect. (Ackerman, Tr. 92.)

12. On April 22, 1968, The board of directors of Curtis accepted a proposal under which Perfect would agree to lend Curtis \$5,000,000 *pari passu* with the existing bank loans, Mr. Ackerman and his designee would be elected to the board of directors of Curtis, and Mr. Ackerman would be elected Curtis' president. (Stipulation 3; CX 3.) At no time did Perfect Film ever have more than two representatives on Curtis' board of directors. Perfect Film was willing to ad-

vance funds under the security of the Basic Bank Agreement in order to gain an opportunity to make a thorough study of Curtis in the hope that as a result of that study a profitable combination could be worked out. (Ackerman, Tr. 87-90.)

13. After taking office, Mr. Ackerman tried unsuccessfully to sell any or all of the Curtis magazines. (Tr. 98-99.)

D. Post's Reduction Program and Arrangement With Time

14. In May 1968, Curtis was losing money on each copy of Post that it sold. (Tr. 203.) The advertising page rate on the Post had been declining for several years. (Tr. 204.) In an effort to save the magazine by reducing the many expenses connected with putting out a general circulation magazine and by creating a magazine product more attractive to advertisers, Curtis decided to reduce the Post circulation by half and to direct its editorial content to urban readers. (Tr. 203-204.)

15. By a letter agreement dated May 17, 1968, between Time, Incorporated, and the Curtis Publishing Company, Time agreed to fulfill the unexpired portions of approximately 2,500,000 Post subscriptions with Life magazine. In exchange for the right to substitute Life magazine for the Post, Time, Incorporated, agreed to loan Curtis, directly or indirectly, \$2,500,000 on July 1, 1968, and an additional \$2,500,000 on September 30, 1968, on the terms and conditions described in the Basic Bank Agreement. Time's agreement to loan was conditioned upon Perfect Film and Chemical Corporation having acquired a \$5,000,000 participation in the secured bank loans of Curtis. Time also agreed to purchase printing services from Curtis between January 1, 1969, and June 30, 1970, in the amount, at the option of Time not to exceed \$3,000,000. Time agreed to transfer within 150 days the single copy distribution rights to Life, Time, Time Canada, Sports Illustrated, and Fortune to Curtis Circulation Company and to permit Keystone Readers' Service, Inc., to solicit sales of Life subscriptions on a Paid-During-Service basis at the rate of 250,000 sales contracts per year, commencing January 1, 1969. The agreement also provided that if, within five years the circulation of the Post is further reduced or the Post discontinued, Curtis will use its best efforts to induce such of the then current Post subscribers as Time shall reasonably specify to accept Life in substitution for their unfilled subscriptions to the Post. (Stipulation 6; CX 6.) This agreement was approved by the board of directors of Curtis at a special meeting of the board on May 17, 1968. (Stipulation 7; CX 7.) The

agreement was amended by a Letter Agreement dated June 30, 1968, to provide for payment of Curtis' indebtedness to Time, at Time's election, by credit against purchases of services by Time from Curtis. (Stipulation 13; CX 11.)

16. In the spring of 1968, Life was in a circulation race with Look and was losing. Time, Inc., would agree to the offer of refunds only to the extent required by the Audit Bureau of Circulations, an independent organization which certifies magazine circulations for advertising rate purposes. (Tr. 107, 211-212.)

17. Curtis and Time, Inc., in conjunction with and with the approval of the Audit Bureau of Circulations, prepared and sent a series of letters to approximately half of the Post subscribers proposing the substitution of Life or several other magazines for unexpired Post subscriptions. In each letter there was a card to be returned to Curtis at the Chicago address of Time, Inc., on which the subscriber could indicate his wishes. (Tr. 110-11, 211-213; CX 40-57.)

18. Each Post subscriber who received a letter as part of the circulation reduction proposing a substitution of Life or another magazine for his Post subscription was told that if he wanted to continue receiving the Post he could do so. (Tr. 111, 336; CX 40-46, 48-50, 52, 54-55.) Those who advised Curtis of that desire were scheduled by Curtis to be returned to the Post subscription list. (Tr. 324.) Because of confused communications between Time, Inc., in Chicago to whom reply cards were sent and Curtis in Philadelphia and because the mechanics of magazine publishing prevented reinstating subscribers for at least 6 weeks and usually more, some subscribers who requested reinstatement were not returned to the Post subscription list before the decision to terminate publication of the Post was made in January 1969. (Tr. 112-113, 325.)

E. Curtis' Sale of Circulation and Subscription Companies to Perfect

19. On May 29, 1968, the board of directors of the Curtis Publishing Company authorized the sale of its wholly-owned circulation and subscription companies (Curtis Circulation Company, Keystone Readers' Service, Inc., and the Moore-Cottrell Subscription Agencies, Inc.) to Perfect Film and Chemical Corporation. (Stipulation 9; CX 8.)

20. On June 10, 1968, through the unanimous consent of the board of directors, the officers of Perfect Film and Chemical Corporation

were authorized to enter into an agreement of purchase of the assets of Curtis Circulation Company and Keystone Readers' Service, Inc., and the stock of the Moore-Cottrell Subscription Agencies. (Stipulation 10; CX 9.)

21. On June 29, 1968, the Curtis Publishing Company and its wholly-owned subsidiaries entered into an agreement with Perfect Film and Chemical Corporation whereby Curtis sold virtually all of the assets of Curtis Circulation Company and Keystone Readers' Service, Inc., and all of the stock of Moore-Cottrell Subscription Agencies, Inc., to Perfect Film and Chemical Corporation for \$12,500,000 payable in Perfect's 5% Convertible Subordinated Notes due 1988, convertible into Perfect's common stock at \$53 per share commencing two years from the date of the issuance of the Notes. The final price was subject to upward or downward adjustment following the closing based on the determination of Standard Research Consultants, Incorporated, of the fair market value of the assets transferred to Perfect by Curtis. (Stipulation 12; CX 10.)

This agreement was executed by Martin S. Ackerman on behalf of all contracting parties. (Ackerman, Tr. 136.)

Under part of the terms of this agreement, *inter alia*,

(1) Curtis warranted that all of the accounts receivable of Curtis Circulation Company, Keystone Readers' Service, Inc., and Moore-Cottrell Subscription Agencies, Inc., were valid and collectable and were not subject to any right of set-off or counterclaims. (CX 10, p. 10.)

(2) Curtis agreed to guarantee that the pre-tax income of circulation and subscription companies to be operated by Perfect would earn a \$2,000,000 per year for ten years. If they failed to earn this amount, Curtis was to pay the difference in cash to Perfect. (CX 10, pp. 13-19.)

(3) Curtis was obligated under the agreement to pay Perfect for any uncollected receivables. (CX 10, p. 10.)

As a result of this agreement, Perfect Film and Chemical Corporation owned and controlled the business of Curtis' former circulation and subscription companies. After June 29, 1968, Perfect Film and Chemical Corporation owned and controlled companies that both solicited subscriptions for and distributed the Curtis magazines including The Saturday Evening Post. (Ackerman, Tr. 142-146.)

F. Perfect's Sale of Receivables to Curtis

22. On August 5, 1968, Perfect Film and Chemical Corporation sold to the Curtis Publishing Company the accounts receivable that

it had purchased from Curtis on June 29, 1968. Curtis paid Perfect \$12,500,000 for these receivables. Listed below is a schedule of the assets sold to Curtis by Perfect. (Stipulation 20; CX 17, 18.) This transaction was authorized by the board of directors of the Curtis Publishing Company and Perfect Film and Chemical Corporation. (Stipulation 15, 17; CX 13,¹ 15.)

Perfect Film and Chemical Corporation Schedule of Assets Sold

Keystone Readers' Service, "paid-during-service" accounts receivable.....	\$4, 271, 548
Keystone Readers' Service advances to franchise agents.....	3, 231, 276
Curtis Circulation Co., single copy wholesale accounts receivable..	1, 103, 381
Keystone payments in advance to Curtis for magazines.....	1, 080, 064
Moore-Cottrell note receivable from Curtis, plus accrued interest..	812, 396
Keystone open account receivable from Curtis.....	637, 909
Keystone interest receivable from Curtis.....	575, 169
Curtis Circulation Co., notes receivable from franchise holders.....	439, 550
Curtis Circulation Co., open account receivable from Curtis Publishing.....	181, 118
Keystone miscellaneous accounts receivable.....	167, 638
	12, 500, 049

G. Formation of SEPCO

23. During August and September 1968, the idea of The Saturday Evening Post Company evolved. It was hoped that the Curtis magazines, particularly Post, might be saved by placing their publication in a new company set up with new money unencumbered by the financial problems of Curtis. (Tr. 166.) The Saturday Evening Post Company was incorporated in the State of Delaware on October 21, 1968. (Stipulation 31.)

H. Pension Fund-Overfunding

24. In September 1968, an analysis of the Curtis pension fund disclosed that it was overfunded in the approximate amount of \$9,000,000. (CX 22; Tr. 161.)

I. Transfer of Curtis Assets to Perfect in Satisfaction of Indebtedness

25. On or about October 14, 1968, Curtis and its subsidiaries entered into an agreement with Perfect whereby certain assets of Curtis were transferred to Perfect in complete satisfaction of the in-

¹ Metro Readers' Service was a division of Keystone Readers' Service.

debtedness of Curtis and its subsidiaries to Perfect under the Basic Bank Agreement. The terms of the agreement and the assets transferred are set forth in CX 28 and CX 27, respectively, (Stipulation 30); Martin S. Ackerman signed this agreement for all parties thereto. (C-28.)

26. In the October 14, 1968, agreement Perfect did not assume any of the obligations of Curtis or its subsidiaries, including among other obligations, any liabilities for the fulfillment of subscriptions to the magazines published. (CX 28, pp. 7, 12.)

27. By virtue of the terms of this agreement full and complete title to the following properties was vested in Perfect Film & Chemical Corporation among other provisions of the agreement.

(a) All of Curtis' United States Patent Office and United States Copyright Office registrations and all copyrights, trademarks, and trade names relating to the publications "The Saturday Evening Post," "Holiday," "Status," and "Jack and Jill." All Curtis' rights, title, and interest in and to the publication of those magazines;

(b) All editorial and art inventory and plates related to said publications, including published and unpublished manuscripts, drawings, arts, and the like;

(c) All material pertaining to circulation, promotion, and correspondence in connection therewith, useful in connection with the production, sale, and distribution of said publications;

(d) All furniture, leasehold improvements, and fixtures presently owned by Curtis and used by employees performing services in connection with the aforesaid publications;

(e) The sole right to use material published or prepared for publication, all advertising and publicity material including plates, drawings, arts, and the like in prior issues of the aforesaid publications, subject to publication rights presently outstanding in third parties;

(f) All back issues and inventories related to prior issues of the aforesaid publications, and all files pertaining to said publications;

(g) All receivables from advertising in the aforesaid publications, and from advertising in "Ladies' Home Journal" and "American Home" prior to the November 1968 issues of these magazines. (Thirty-Sixth Proposed Finding CX 28, 27.)

28. As a result of the October 14, 1968, agreement, *supra*, all of the magazines published by the said respondent, Curtis Publishing Company, including "The Saturday Evening Post" were transferred to the respondent Perfect Film and Chemical Corporation. (Curtis Ans. #2; Perfect Ans. #2, [iii] SEPSCO Ans. #2 [iii]; CX 28, 27.)

J. Perfect's Purchase of SEPCO Stock

29. On November 12, 1968, Perfect purchased from SEPCO 100,000 shares of SEPCO common stock and as consideration transferred to SEPCO all of the assets relating to the publication of The Post, Holiday, and Status magazines which Perfect had previously acquired from Curtis in satisfaction of Curtis' indebtedness. (Stipulation 37.)

K. Curtis Withdrawals From Pension Fund

30. In November 1968, Curtis withdrew \$5,080,000 from the over-funded pension fund and on November 12, 1968, it purchased 100,000 shares of SEPCO common stock with this money. (CX 23; Tr. 167.)

L. Sale of SEPCO Notes

31. On November 12, 1968, SEPCO sold \$10,000,000 principal amount of its 4% Convertible Subordinated Notes to certain institutional investors. (Stipulation 38; CX 36, Ex. A.) One of the understandings on which the \$10,000,000 was raised was that if it became apparent that the Post would continue to lose substantial amounts of money, a recommendation would be made to terminate the Post. (Tr. 189.)

M. Liquidity of Curtis' Assets—End of 1968

32. A reasonable restatement of the assets and liabilities from financial evidence at liquidating value on December 31, 1968 (In Millions), is as follows:

Assets:

Cash and receivables.....	\$7. 4
Plants and inventories.....	11. 8
Total.....	19. 2

Less estimated Federal settlement.....	4. 5
Available for creditors.....	14. 7

Liabilities:

Current.....	11. 4
Senior.....	2. 0
Debentures and interest.....	11. 3
Other.....	2. 0
Total.....	26. 7

Post refund.....	40. 0
Holiday refund.....	11. 0
Total liabilities.....	77. 7

Deficit.....	(63. 0)
--------------	---------

(See also Conclusions of Fact 1-9.)

1472

Initial Decision

N. Post Termination

33. At a special joint meeting of the boards of directors of Curtis and SEPCO on January 10, 1969, it was resolved "that publication of The Saturday Evening Post magazine be terminated, effective with the February 8, 1969 issue." (CX 39, pp. 3-4.)

O. Arrangements For Magazine Substitutions

34. In accordance with the prior agreement with Time, Inc., and with the agreement of the publishers of a number of magazines, a program of magazine substitution was commenced to be conducted in the same manner as the circulation reduction which had taken place during the previous six months. (CX 6; Tr. 217.)

35. Letters were sent to Post subscribers giving them an opportunity to select a substitute magazine. Those who did not respond were written to again for their substitute selection. Subscribers who did not respond to the Curtis letters were eventually sent a substitute magazine for their unfilled Post subscriptions. (CX 58-50.)

P. PDS Contracts

36. Approximately 60% of Post subscriptions were customers of Paid-During-Service (PDS) subscription companies. (Stipulation 51.) These companies sell a package of four or five subscriptions, running for several years, to a subscriber who pays a sum monthly to the company. The subscription company makes the collections and remits a portion to each publisher. In the case of Post, the remittance rates were only 15-18% of the subscription price. (Tr. 296-301, 308-309.)

37. A substantial number of PDS contracts between the PDS customer and the subscription company provided that if any publication ordered by the customer ceased publication, the customer would agree to accept a substitute magazine which would be offered by the subscription company to fill the remainder of the subscription. (Stipulation 51; Tr. 298-299.)

38. PDS subscription companies insisted on approving the Post substitution program and letters to their customers were sent in their behalf. (Tr. 277; CX 40-80.) After insisting that it had the right and obligation to do so (RCS 20), Cowles Publishing Company arranged for and conducted its own substitution program with regard to PDS customers of its own subscription companies. (Tr. 313; CX 79-80.)

Q. Financial Forecast—1969

39. Studies conducted by Touche, Ross, Bailey & Smart, forecasted that Post would lose between \$3,000,000—\$6,000,000 in 1969. (Tr. 190; RCS 9.)

R. Refund Offer on Post Termination

40. Pursuant to the program of mailings approved by the Audit Bureau of Circulations, a letter was mailed in December 1969 to those subscribers who had not responded to previous letters, advising them that a refund could be arranged. (CX 57.) By the time responses were received to this letter, however, the Post had been terminated and Curtis did not discriminate between those responding to that letter and others who had as yet received no communications because it had originally been intended to continue them as subscribers. No funds therefore were subsequently offered.

CONCLUSIONS

A. Conclusions of Fact

1. Throughout 1968 and 1969 to the present, Curtis has been on the verge of bankruptcy with never sufficient cash to stay even with its creditors (Tr. 164, 400, 406-407, 459, 462). The offer of payment of refunds to Post subscribers would have precipitated bankruptcy at any time from 1968 to the present.

2. The book value of Curtis' assets at the end of 1968 was \$43.6 million (RCS 10). In the light of subsequent events and sales, however, the real value of those assets was approximately \$19.2 million and consisted of:

a. Cash, notes, and accounts receivable.....	\$7. 4
b. Plants and inventories paper plant (Tr. 414).....	\$3. 2
Packard Press (Tr. 414-416).....	1. 0
Sharon Hill printing plant (Tr. 414-416).....	7. 6
	11. 8
Total.....	\$19. 2

3. The investment in SEPCO (one-half interest) had minimal liquidating value at the end of 1968 in view of \$10 million in notes owed to institutional investors (Stipulation 38; CX 36, EX. A), termination of the Post, losing operations of Holiday (Tr. 419, 425), and the disastrous investment in Lin stock (RCS 12, p. 25).

4. Curtis' equity in the receivables of the circulation and subscription companies, held by Perfect in satisfaction of Curtis' bank debt of approximately \$12 million (CX 38), had no resale value.

5. The Sharon Hill printing plant was subject to a lien of the United States for claimed tax deficiencies of approximately \$8 million (Tr. 416). It is estimated that that matter might be settled for \$4.5 million (Tr. 428).

6. Curtis' assets available under the most favorable circumstances for payments to general creditors were \$14.7 million.

7. At the end of 1968, Curtis had \$11.4 million of current liabilities, \$2 million senior debt, \$11.3 million Subordinated Income Debentures plus interest, and \$2 million of other liabilities excluding the Federal tax liability, or total liabilities of \$26.7 million (RCS 10).

8. Non-balance sheet assets such as the surplus in the Curtis pension fund were offset by liabilities also not on the balance sheet such as termination pay (Tr. 226), a long-term lease obligation in excess of \$3 million (Tr. 420, 424), and numerous potential and actual judgments in law suits (Tr. 420, 423).

9. Refunds to Post subscribers would total approximately in excess of \$20 million to \$40 million (Tr. 428).

10. Had refunds been made at any time during 1968-69, bankruptcy would have resulted and the amounts obtained in the sale of Curtis' assets, during the Curtis program of orderly liquidation could not have been obtained. The paper mill would have been all but worthless in a forced liquidation situation (Tr. 408-409) and sale of the printing facilities would not have been given sufficient opportunity to find a buyer at the best price (Tr. 219, 411).

11. Bankruptcy occasioned by the offer of refunds to Post subscribers would have meant the demise of all Curtis magazines and a total refund exposure of approximately \$80-\$90 million before the sale of Ladies' Home Journal and American Home to Downe Publications in August 1968 (Tr. 100, 221). Payment of refunds now would involve an additional \$11 million refund exposure to Holiday subscribers (Tr. 425) since that magazine has proved to be unsaleable (Tr. 426-427).

12. Curtis did not and does not now have sufficient cash or assets to make refunds to Post subscribers (Tr. 221-226, 428-430). Assuming orderly liquidation of Curtis' assets under the most favorable of circumstances, general creditors might get at best only 10-20 cents on the dollar (Tr. 428-429). Under forced liquidation in bankruptcy, general creditors probably would have gotten nothing (Tr. 221-226, 251).

13. Although the communications to subscribers failed to offer cash refunds or option therefor addressed by Curtis Publishing Company to the subscribers of The Saturday Evening Post, they were not deceptive within the purview of the charges as alleged by the complaint because of the Curtis financial inability to make refunds.

B. Commentary on Factual Conclusions and Proceedings

1. *Analyzation of Evidence and Contentions as Related to Alleged and Unalleged Charges*

Specifically the charges in the complaint are set forth in Paragraph Six thereof as follows:

PAR. 6. By offering the subscribers the sole choice of a substitution of a selected magazine in lieu of the magazine originally contracted for:

(1) Respondents failed to offer their subscribers a cash refund for the unexpired portion of said subscriber's subscription for a specific magazine, i.e., The Saturday Evening Post;

(2) Respondents failed to carry out their obligation to their subscribers, all of whom were entitled to a cash refund; and

(3) Respondents obscured the legal rights of said subscribers by withholding the option of a cash refund for the unexpired portion of the subscription for which respondents could not deliver the specific magazine subscribed for.

With regard to these charges, the evidence adduced indicates that respondent Curtis was unable to commit itself to the making of cash refunds to subscribers for the unexpired portion of subscriptions to The Saturday Evening Post since in 1968 and 1969 there was a reasonable likelihood cash refunds for this purpose could not be made available. It would have been impossible for the respondent, Curtis, to indicate what the subscribers' entitlement was since the financial solvency of Curtis was obscured by its manifold obligations, offset by assets, the liquid value of which was considerably conjectural. The findings and conclusions herein set forth in detail the financial problems of Curtis which reflect that a precise estimation of what could be paid to subscribers with formal accounting preciseness was impossible. The likelihood of insolvency and absence of liquidity to pay general creditors, including subscribers, seems quite apparent.

It is unreasonable to assume that Curtis was required to render a full legal opinion to its subscribers as to what their legal rights were with regard to refunds. Such an opinion would necessarily have to be premised on contingencies, some of which were essentially unknown. Other opinion would have had to be predicated on the specific nature of the contracts involved and the contractual relationships (e.g., PDS subscriptions). Curtis was obligated, however, if it wished to avoid deception to inform its subscribers so that they could exercise their own judgment in determining whether or not they desired to take another magazine or await the possibility of a refund.

The position of Curtis appears to be that they were acting in the best interest of subscribers in not representing the facts suggestive

of insolvency since this would have precipitated bankruptcy and would have prevented subscribers from receiving substitute magazines. This excuse is without merit since subscribers were entitled to determine their own best interests.

In addition to the conclusion of Curtis and Perfect that subscriptions could not be refunded, because of a contemplated insufficiency of funds, they argue that an announcement of this situation to subscribers would have been immaterial and therefore not in the public interest if insolvency in the bankruptcy sense had been precipitated.

This argument also overlooks the fact as heretofore suggested that it was material and in the public interest for subscribers to be made reasonably knowledgeable so that they could exercise their own judgment in making a choice regardless of the financial effect upon Curtis. Furthermore, subscribers could have been made knowledgeable by a statement to the effect that cash refunds could not be made pending financial and business reorganization thereby allowing a choice to subscribers of becoming a general creditor of Curtis or a subscriber to a substitute magazine. Such a statement probably would not have precipitated bankruptcy.

Certainly Post subscribers were not obligated to take the substitutions rather than a credit unless the subscription agreement provided otherwise (*e.g.*, some PDS contracts).

Perfect claims correctly it was out of the Curtis organization as a participant in the administration of Curtis when its representative Ackerman was eliminated from the board of directors precedent to the Curtis offer of a substitute magazine to its subscribers in place of The Saturday Evening Post. In this connection, Perfect argues it has not participated in any deception or failure to offer a cash refund to Post subscribers since Curtis was a free agent and Perfect merely a creditor without administrative participation on the board of directors.

This argument, however, overlooks the fact that Perfect was participating in the Curtis financial and business operations when new or renewed advanced subscription funds were being utilized in part to refinance Curtis. This amount was significant since approximately \$20 million to \$40 million was involved in refund cost. Subscriptions to the Post were taken not long before the substitute magazine offer and before Perfect's exit, administratively, without making subscribers aware that a substitution might be necessary and why. The predictability of this necessity, as well as the financial problem that made its likelihood evident, was not conveyed to new or renewal subscribers before the letters offering a substitute magazine were sent

out by Curtis. It is true, of course, that some subscribers in certain categorical areas were temporarily continued on the Post during the reduction program and some subscribers were tentatively offered refunds prior to the Post termination; but this has no significance in the presence of an over-all deception or unfair business practice (regardless of good faith) encompassing many subscribers.

The foregoing deception or unfair business practice was not in failing to make refunds, after the cash subscriptions became a part of Curtis' assets subject to prior obligations indicative of Curtis' insolvency, but in failing to make subscribers aware of the contingencies involved before and after subscription funds were accepted. These contingencies must have been and were apparent to both Perfect and Curtis long before substitutions became necessary on the demise of the Post. However, this deception and unfair practice in seeking advance subscription funds, which could be partially utilized in the refinancing of Curtis, does not come within the purview of the allegations set forth in the complaint. It would appear, therefore, from the evidence to the extent adduced, that it was the alleged withholding of material facts from the subscribers before and after accepting subscriptions, rather than the failure to make refunds in the presence of potential insolvency, that has constituted deception or an unfair business practice here. Such a conclusion cannot be prejudged however in the presence of pleadings which fail to make such practice a justiciable issue thereby enabling a defense, if any.

Perfect contends that, regardless of its non-participation in the administration of Curtis after it ceased to have representation on the board of directors, it in any event had only a board minority at all times, and therefore had no true responsibility for what Curtis did at any time. This argument is totally fallacious since, in the absence of evidence indicating their opposition to any deceptive or unfair business practices, Perfect must be presumed to have assumed participation in any deception or unfair practice that Curtis engaged in while it was represented on the board or in an administrative capacity. Furthermore, Perfect's position, as well as that of other creditors in administering the affairs of Curtis, was enhanced by Perfect's financial control.

At no time, even prior to the sending of the letters providing for a substitute magazine, did Perfect or Curtis in the course of the Curtis financial reorganization make provision for a trust arrangement or otherwise so that subscriber advance funds could be protected for restitution purposes free from creditor encumbrance in the

event the reorganization or refinancing was unsuccessful. The evidence does not suggest that the success of any financial reorganization could have been looked upon with much optimism even before letters were sent out to subscribers advising them they could have a substitute magazine but omitting they could become a creditor, pending financial and business reorganization, unless their subscription contract required them to take a substitute magazine without choice. This failure to relate material facts upon which a choice could have been premised, although clearly deceptive as heretofore stated, was not encompassed by the charges in the complaint.

It was not the failure to immediately make available cash refunds in the presence of Curtis' insolvency that constituted a deception or unfair business practice, but the failure to make subscribers knowledgeable as to the conditions under which their advance cash subscriptions were being received or withheld, as heretofore indicated, and the failure to disclose at least temporary inability to make the cash refunds. It is possible this may have precipitated bankruptcy. If it did, it suggests these advanced funds were an essential part of Curtis' refinancing program at the partial expense of subscribers. This does not imply any illegality on the part of Curtis or Perfect, but it does suggest the urgency of subscriber protection.

Perfect has indicated concern that, if the Commission does have authority to render money judgments and the complaint charges are sustained, the order should release them from refunding since the settlement agreement from Curtis releases them from liability. Regardless of what the authority of the Federal Trade Commission is, with regard to requiring refunds which the hearing examiner considers tantamount to rendering a money judgment under the guise of opinioning entitlement, the Commission obviously cannot resolve the liability issues between Curtis and Perfect. If both participated in any alleged deception or unfair practice, they are both appropriately subject to a cease and desist order. Perfect's argument, however, does emphasize the impracticability of a money judgment or equivalent under the circumstances in the absence of legislatively well-defined Commission jurisdiction which undoubtedly encumbers the Commission's effectiveness in consumer protection.

2. Post-Hearing Conferences to Discuss Evidence as Affecting Due Process

Vigorous exception was taken by complaint counsel to the post-hearing conferences at which the foregoing concepts were argued finding by finding in specific relationship to the proof adduced and

the extent to which such concepts were within the meaning of the complaint and the jurisdiction of the Commission.

Such objection appears to have been directed at the lack of due process in such conferences because counsel had filed his proposed findings and briefs with the Commission and did not consider further discussion desirable. This post-hearing procedure was with the concurrence of respondents at the suggestion of the hearing examiner, who has found such conferences useful in informally evaluating the evidence and issues more precisely than frequently found in proposed findings and briefs or developed in formal oral argument. Furthermore, this conference method is not uncommon in court procedure. In the circumstances of this particular case where complicated financial interrelationship between respondents is involved, such a conference seemed quite appropriate and destined to afford more than the usual due process.

Furthermore, a consideration of the charges of the complaint in relation to whether or not a money judgment was being sought, and the jurisdiction of the Commission to render such a money judgment, also appears to the hearing examiner to justify a precise consideration of these issues at a post-hearing conference in the interest of accuracy.

In any event, all counsel helpfully participated in clarifying their construction of specific parts of the evidence and issues with reasons therefor not entirely covered by their proposed findings.

Post-hearing-conference procedures with required intensive specificity are also considered invaluable by the hearing examiner because the Commission cannot be expected to examine the evidentiary facts with the same preciseness that can be accorded them at the trial level. The hearing examiner therefore considers complaint counsel's objection to the post-hearing procedure as frivolous.

3. *Restatement of Evidentiary Evaluation*

Summarily restated, the hearing examiner opines as follows:

a. The evidence establishes the failure of Curtis to refund any part of the subscription prices paid by many of its subscribers upon discontinuance of the Post.

b. The evidence is uncontradicted that at the time of the Post's discontinuance there existed a reasonable probability that the assets of Curtis, if liquidated, were insufficient to make such refunds after priority creditors were paid. The refund cost as evidenced was estimated in excess of \$20 million to approximately \$40 million.

c. In the presence of the foregoing facts, Curtis could not advise

subscribers of their entitlement to a refund since the liquidity of the entitlement appeared to be foreclosed because of priority creditors. To have so advised subscribers would have been deceptive.

d. Curtis could have avoided obscuring entitlement by advising subscribers that refunds could not be made pending financial and business reorganization efforts thereby enabling subscribers to choose a substitute magazine or an unliquidated credit. The materiality of such a representation and the public interest in it seem somewhat obscure if insolvency preclusive of any refund was established in the formal accounting sense. Although the proof adequately supports the likelihood and probability of insolvency in the bankruptcy sense if refunds were made, it is inadequate in the formal accounting sense.

e. Withholding of financial information enabling subscribers to know the status of their advance cash subscriptions and utilizing such funds to the detriment of subscribers who could only obtain restitution as general creditors subject to priority creditors was a deceptive and unfair practice to the benefit of Curtis and contravened the public interest. The foregoing deceptive and unfair practice, however, was clearly not charged in the complaint since the complaint alleges the unfair practice to be (1) a failure to offer or make a cash refund and (2) obscuring the legal rights of subscribers by withholding the option of a cash refund. Under the theory of these charges, the inability of the respondent to make an immediate cash refund is clearly a complete defense.

f. Contrary to complaint counsel's contention, such a defense is not predicated on good faith; it is premised on avoiding deception as to refundability at the time the substitute magazine offer was made in view of the probable inability of Curtis to make refunds because of its apparent financial situation (although not conclusively established in a formal accounting sense).

g. After the disassociation of Perfect's representatives with Curtis from the board of directors preceding the sending of substitute magazine offers (but allegedly obscuring a right to cash refunds), Curtis was a free agent to act without Perfect's participation. The failure to permit the exercise of any alternative prerogatives as alleged was therefore the responsibility of Curtis alone. Perfect's defense in this regard is therefore sustained. This, however, does not absolve Perfect from its participation in unalleged deceptive practices hereinbefore set forth, which cannot be considered in the ultimate resolution of this case under the existing complaint. Thus, as heretofore stated, Perfect and Curtis failed to protect advanced sub-

scription funds from priority creditors when new or renewal subscription funds were received in the presence of what should have appeared then to be a financial crisis and the impending contingency with regard to whether or not the publication of the Post could be continued.

h. However, in fairness to Curtis and Perfect, it should be added that they did offer to make refunds and Post deliveries to the extent finances and publication did permit. This, of course, was minimal and does not offset in the equity sense the failure of respondents to protect the cash advances of subscribers utilized in the operation of the business hopefully to obtain financial stability which they lacked at the time they received cash subscription advances. In any event, since this is only a good-faith defense, it may not prevail.

i. Aside from the prohibitive limitations of the complaint herein, an order might properly issue requiring respondents to maintain adequate reserves or other protective devices for the benefit of subscribers in soliciting and accepting cash advances and subscriptions to the extent that restitution might have to be made or, in the alternative, alert subscribers concerning their prerogatives and entitlement (in the factual sense rather than in the legal sense) with regard to future transactions relating not only to the sale of the Post which has been discontinued, but to other magazines presently published. As heretofore discussed, this type of relief is not contemplated by the Commission's complaint or the proposed order.

j. Until such time as the Commission obtains jurisdiction to render money judgments, lack of such jurisdiction in this matter presently before the hearing examiner, as has heretofore been stated, requires dismissal.

C. Conclusions of Law

1. Failure to offer former Post subscribers an alternative of a cash refund, in connection with the magazine substitution program connected with the circulation reduction and termination of the Post, was not an unfair and deceptive act since respondents' financial predicament made cash refunding prohibitive.

2. Whether or not a Post subscriber was or is entitled to a refund for the remaining portion of his subscription depends upon the circumstances under which the subscription was written, the contract terms, the response of the subscriber to the opportunity to accept a substitute magazine, and the law of the state where the subscription contract was made.

3. Obviously there was no right to a cash refund created nor any

obligation on Curtis to advise its subscribers of such right during the Post circulation reduction in those instances where subscribers were given the opportunity to keep their Post subscriptions or where subscribers were required to choose a substitute magazine by agreement (*e.g.*, some PDS agreements).

4. As to those subscribers of Post who received the December 1968 letter (CX 57) as part of the circulation reduction advising that refunds could be arranged, respondents engaged in no unfair or deceptive act if such refunds in the amounts necessary were available.

5. The Federal Trade Commission has no jurisdiction over this matter which under the allegations of the complaint as related to the evidentiary facts here is brought for what amounts to a money judgment only for the benefit of distinct and identifiable persons rather than the general public.

6. The Federal Trade Commission has no authority to issue an order which amounts to a money judgment for past violations of the Federal Trade Commission Act.

7. Respondents' conduct during the circulation reduction and termination of the Post did not violate Section 5 of the Federal Trade Commission Act within the purview of the charges alleged in the complaint and an order against respondents would not be appropriate.

D. Commentary on Legal Conclusions

1. *Hearing Examiner Authority to Initially Resolve Jurisdictional Questions*

Those cases in which hearing examiners have differed with the Commission on "jurisdictional" issues presented by a complaint and proposed order are of considerable relevance in the present proceeding. In two interesting cases the Commission defined the extent to which a hearing examiner may question the Commission's decision to issue a complaint. In *Florida Citrus Mutual*, 50 F.T.C. 959 (1954), the Commission reversed a decision of the hearing examiner which granted respondents' motion to dismiss the complaint prior to trial. Approximately two years later, the same hearing examiner, doubtful of his authority to dismiss a complaint, certified the question to the full Commission for consideration. The Commission remanded the case to the examiner with instructions that he had full authority to dismiss since complaint counsel had already presented its case. *Premier Pillow Corp.*, 52 F.T.C. 1417 (1956).

In *Florida Citrus*, the Commission characterized its decision to issue a complaint as an administrative judgment which, prior to

Initial Decision

78 F.T.C.

trial, was not subject to judicial review. To allow an examiner to dismiss a complaint before any evidence was taken would be to "subvert . . . [the] discretionary powers" of the Commission. "An examiner has no power to sit in judgment on the discretionary decisions of the Commission . . ." 50 F.T.C. at 961.

Premier Pillow clarified what was implicit in the *Florida Citrus* opinion and held that once

government counsel has completed its case-in-chief . . . the question of whether an order to cease and desist would be in the 'public interest' becomes justiciable in nature and rests within those judicial powers we have delegated to hearing examiners. 52 F.T.C. at 1418.

Thus, a hearing examiner may not differ with the Commission on those purely discretionary matters within the agency's power which are not judicially reviewable. He may rule on all those matters which are justiciable and subject to judicial review. The authority of the Commission to enter a particular order and the "public interest" question of jurisdiction are justiciable, reviewable matters on which the hearing examiner should make an independent judgment.

Commissioner Howrey's dissenting opinion in *Florida Citrus* carefully examined the distinction between the Commission's administrative and adjudicatory functions and discussed the implications of this distinction for the authority of the hearing examiner. Commissioner Howrey stated that while the decision to issue a complaint is a matter of administrative discretion, the Commission's decision to issue a cease and desist order is adjudicatory and reviewable in the courts.

In considering the issue of "public interest" after complaint, the hearing examiner is looking toward the second stage. It is his duty to make a decision that will stand up before the Commission and in court. The Commission's decision to issue a complaint merely means that it is at that time, in its administrative capacity, of the opinion that the public interest requires a proceeding. It cannot mean that the Commission is of the opinion, in its adjudicatory capacity, that it is to the interest of the public to issue an order, for that would be to prejudge the case and do violence to fundamental principles of administrative and constitutional law. 50 F.T.C. at 971-972. . . . the jurisdiction of the hearing examiner is the same as that of the Commission insofar as adjudicatory matters are concerned. 50 F.T.C. at 972.

The majority in *Florida Citrus* did not disagree with this statement. In their opinion, however, the question of "public interest" only becomes "adjudicatory" after the facts have been developed at the hearing. Of course, that limitation is not relevant in this case, since the hearings have been held.

It is probably also necessary to add to Commissioner Howrey's

broad statement of the hearing examiner's jurisdiction, the qualification that the final decision with respect to law and policy, and very often the facts, always rests with the Commission itself. A hearing examiner functions only as a judicial officer with the same authority as an individual agency member (under Administrative Procedure Act prescription) to act unilaterally at the trial level in rendering initial decisions or recommendations upon hearing the evidence. Final determination must be made by the Commission collectively but this does not preclude unilateral reviewable adjudicative determinations not within the scope of administrative matters.

2. Immateriality of Good Faith—Non-Applicability

It is true that good faith is immaterial if an inducement to purchase is likely to deceive. *Feil v. F.T.C.*, 285 F. 2d 879 (9th Cir. 1960). Thus, if a statement is made in good faith as an inducement to purchase but the buyer is likely to misconstrue it or, unknown to the seller, the statement is not true, then the seller's good faith in making the statement is immaterial. That does not apply where, as here, the statement when made was true and represented the policy and practice of the company at that time.

3. Inapplicability of Warranty Argument

There is a suggestion that complaint counsel treat the guarantee and the letter as a warranty which was breached when some subscribers were unable to obtain refunds. But this is not a contract action or a breach of warranty action. Whether or not the "guarantee" creates a legal right in the instant circumstances would depend upon the laws of each of the 50 states and the particular facts and circumstances relating to each subscription contract.

The Commission complaint does not allege the making of false warranties, and the hearing examiner cannot convert this into a warranty case in contravention of the complaint. See *Grand Caillou Packing Co.*, [1963-1965 Transfer Binder] Trade Reg. Rep. ¶16,927 at 21,960 (FTC 1964) [65 F.T.C. 799 at 811] to the effect that:

Neither complaint counsel nor the hearing examiner have the authority to amend a Commission complaint in such a manner that new charges or new matter not in keeping with the original theory of the original complaint are appended thereto.

4. Public Interest as Affecting Jurisdiction

Section 5(b) of the Federal Trade Commission Act authorizes the Federal Trade Commission to issue a complaint if it appears to the

Commission that a proceeding in respect of any unfair method of competition or unfair or deceptive act or practice "would be to the interest of the public." Interpreting this language, the Supreme Court has held that "to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public." *Federal Trade Commission, v. Klesner*, 280 U.S. 19, 27 (1929). This prerequisite of public interest is a "limitation" upon F.T.C. jurisdiction. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931).

The Commission's proposed order reveals that this proceeding is not brought because it would be to the interest of the public. Rather, the proposed order concerns itself exclusively with providing compensatory monetary relief to those who subscribed to The Saturday Evening Post at the time of the termination of its publication.

The first substantive provision of the order would direct respondents to "cease and desist from failing to provide cash refunds to subscribers for the uncompleted portions of any subscription." In order for this provision to make sense, it must be read as applying not to future subscribers of other magazines of respondents but to former subscribers to the now terminated Post. Clearly, this proceeding is brought to provide refunds to those people who had uncompleted subscriptions at the time of the Post termination.

Similarly, the second provision of the proposed order would have respondents "cease and desist from failing to notify subscribers that they were, and are, entitled to a cash refund for the uncompleted portion of any subscription when such subscription is canceled by the respondents." Obviously, the use of the word "were" refers to former Post subscribers.

The final substantive provision of the order would have respondents notify former recipients of the Post that they were and are entitled to receive a cash refund for their outstanding subscription terms at the time of the Post termination. Counsel in support of the complaint make the Commission's intent perfectly clear when they state at page 20 in their brief in support of their proposed findings that "it is imperative that these respondents be ordered to make a cash refund for the unexpired portion of the subscription premium for which no magazines or a forced substitute magazine was sent to the subscribers." Thus, it is apparent that this proceeding is being used to direct refunds to former Post subscribers. It is equally clear that the Commission lacks jurisdiction to concern itself with the specific grievances of individual, identifiable Post subscribers only. The thrust of the complaint and proposed order interpreted conjunctively is not to enjoin an unfair practice in the public interest at

large but to impose without reservation refund monetary obligations which as to the present or future are currently conjectural and therefore unsustainable under any concept of law or jurisdiction.

It is not the "public interest" which the Commission seeks to protect by this proceeding but, rather, the Post subscribers whose subscriptions had not expired at the time when publication of the magazine was terminated. The proposed order overreaches the statutory limits on Federal Trade Commission jurisdiction in its effort, not only to protect the public from future deceptions, but, rather, to redress alleged past breaches of contractual rights of ascertainable individuals. "Only unfair practices which affect the public, as distinguished from individuals, are within the jurisdiction of the Commission." *N.J. Asbestos Co. v. FTC*, 264 Fed. 509 (2d Cir. 1920). "If this [lack of public interest] appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint." *Federal Trade Commission v. Klesner*, 280 U.S. 19, 30 (1929). See also *Motion Picture Advertising Service Co. v. Federal Trade Commission*, 194 F. 2d 633, 637 (5th Cir. 1952), *rev'd on other grounds*, 344 U.S. 392 (1953).

"Certainly Congress never intended that the machinery of the Federal Trade Commission, severe as its operation can be made, should be set in motion for the settlement of private controversies, when the courts can act. The official character of the Commission makes it all the more necessary that it act only when the public interest is involved." *Flynn & Emrich Co. v. Federal Trade Commission*, 52 F. 2d 836 (4th Cir. 1931). The Supreme Court has found that Section 5 was "prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons." *Amalgamated Workers v. Edison*, 309 U.S. 261 (1940).

No case has been discovered in which a fixed, identified group of people has been held to be the "public" for purposes of FTC jurisdiction. Courts have recognized circumstances lacking the necessary "public interest" for Federal Trade Commission jurisdiction when there are involved either (1) matters of too trivial a nature to concern the public, see *Moretrench Corp. v. F.T.C.*, 127 F. 2d 792, 795 (2d Cir. 1942); (2) matters concerning a private dispute between two people or entities, see *F.T.C. v. Klesner*, 280 U.S. 19 (1929); or (3) matters where the complained of activity has ceased with no likelihood of recurrence, see *Stokley-Van Camp, Inc. v. F.T.C.*, 246 F. 2d 458 (7th Cir. 1957). While this proceeding involves a large number of people, that fact should not abrogate the principle firmly established in *Klesner* that the Federal Trade Commission lacks ju-

jurisdiction over private disputes. In its landmark *Klesner* decision, the Supreme Court stated that "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs." Directly applicable to this proceeding, the Supreme Court stated further in *Klesner*, that "the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest."

If there are any rights involved in this matter, they are strictly private rights belonging to specific individuals. No member of the public will join that group in the future since the Post is no longer published and subscriptions to that magazine are no longer being taken. Thus, the Federal Trade Commission lacks jurisdiction to apply Section 5 of the Federal Trade Commission Act to remedy allegedly improper actions in the past.

5. *Limitation on Federal Trade Commission Remedial Powers*

The proposed order in this case violates three fundamental limitations on Federal Trade Commission remedial powers. While cease and desist orders are supposed to be prohibitory, the Commission's proposed order would require the initiation of affirmative undertakings. While cease and desist orders apply only prospectively to future conduct, the Commission's proposed order would apply retroactively to conduct completed. And while a cease and desist order is not compensatory for past damage but only prohibitory of future deceptive conduct, the Commission's proposed order particularly as limited by the complaint charges relating only to the failure and obligation to make Post refunds as an alternative would have respondents pay a money judgment to former Post subscribers and pre-judges the right to a money judgment of subsequent subscribers to other Curtis magazines. In each respect, the proposed order exceeds the authority of the Commission under the Federal Trade Commission Act.

The foregoing distinguishes in part this case from the *Windsor* case Docket No. 8773 [77 F.T.C. 204] also decided by this hearing examiner. In the *Windsor* case, entitlement to a refund payment was not a justiciable issue to be resolved under the pleadings as here (*i.e.*, Curtis), where it is the sole issue in determining the alleged presence of an unfair practice for failure to offer or make refunds. Refund entitlement in *Windsor* was merely one of the conditions precedent ordered by the Commission to insure the future cessation of other alleged unfair practices. The issuance of the complaint itself in

Windsor would not therefore exceed the Commission's jurisdictional powers as in *Curtis*. A sustention of the *Curtis* complaint would have to result in a Commission order for a money judgment in violation of its jurisdictional authority since the allegations thereof contemplate only this remedy in the presence of the evidentiary facts.

6. *Alternative Commission Relief Within the Scope of Its Authority and the Public Interest*

Succinctly stated, the deception or unfair practice, if any, emanates from the failure to protect subscribers (1) by having cash refunds available for restitution pending completed magazine deliveries and (2) the acceptance of such subscribers' cash advances for unrestricted financial utilization to the advantage of respondents and priority creditors. Clearly, the Commission would have had jurisdiction to adjudicate these practices short of rendering a money judgment or premising its charge on failure to offer payment which is the equivalent of seeking a money judgment.

In pointing out alternative relief that would be within the scope of Commission jurisdiction, the hearing examiner is not seeking to prejudge other unalleged charges that appear to support complaint counsel's contention as to uncontradicted evidence in this case. Its purpose is to opine that a money judgment or equivalent is not the only solution for protecting subscriber consumers as suggested by complaint counsel. However it must be observed here that respondents may well have a prevailing defense if such facts were brought into focus as a justiciable issue by appropriate allegations.

7. *Prohibitory Nature of Commission Authority*

Section 5 of the Federal Trade Commission Act provides that if the Commission determines that a method of competition or an act or practice is one prohibited by the Act, it shall issue an order requiring the offender "to cease and desist from using such method of competition or such act or practice." Thus, the authority of the Commission is purely prohibitory in nature. The statute gives the Commission no authority to require respondents to affirmatively initiate a new course of action.

In *Coro, Inc. v. F. T. C.*, 338 F. 2d 149 (1st Cir. 1964), *cert. denied* 380 U.S. 954 (1965), the court clearly summarized the Commission's authority in stating that it was clothed "with broad discretion to determine whether a cease and desist order is needed to make certain that a method of competition or a trade practice it has found unlaw-

ful will be stopped and not resumed It has power only to put a stop to present unlawful practices and to prevent their recurrence in the future."

Frequently cited in support of the proposition that the Federal Trade Commission can require affirmative acts of respondents is *Luria Bros. & Co. v. F.T.C.*, 389 F. 2d 847 (3rd Cir.) *cert. denied*, 393 U.S. 829 (1968), in which the FTC order called for the steel mills there involved to cease and desist from purchasing more than 50 percent of their annual scrap requirements from Luria. The court saw the order as a prohibition but stated that it would not be invalid even if considered an affirmative directive.

The *Luria* case and those cited by it are inopposite in this situation. In those cases, there existed a continuing course of commercial conduct involving the objectionable practice, the elimination of which required that certain affirmative actions be taken. Thus, in one case cited by *Luria*, respondent was ordered to cease and desist from selling trays which resembled wood without revealing the fact that they were actually surfaced with paper. *Haskelite Mfg. Corp. v. F.T.C.*, 127 F.2d 765 (7th Cir. 1942). In another, respondent was ordered to cease and desist selling abridgements of books without disclosing the fact that the books were abridgements. *Bantam Books Inc. v. F.T.C.*, 275 F. 2d 680 (2d Cir.), *cert. denied*, 364 U.S. 819 (1960). The last case cited by *Luria* required disclosure of the foreign origin of the goods involved. *L. Heller & Son v. F.T.C.* 191 F. 2d 954 (7th Cir. 1951).

Thus, in each case the mere selling of the article itself was deceptive or misleading without some explanation by the seller of its real nature. In the present case, however, the attempt is not to obtain a cessation by means of placing limitations on an existing practice but, rather, to require that respondents initiate a completely new act, unconnected with any on-going activity or commercial practice. *Luria* and its forerunners cannot be taken as authority for requiring respondents in this case to make refunds to those whom the Commission alleges to have been deceived in the past.

8. Cease and Desist Orders of Commission Have Prospective Effect Only

The courts have uniformly held that the remedy available to the Commission—a cease and desist order—is not for the purpose of undoing or correcting any past wrongs, but, rather, for the purpose of insisting that they do not continue in the future. Thus, in *Regina Corp. v. Federal Trade Commission*, 322 F. 2d 765 (3d Cir. 1963), the court stated:

The purpose of the Federal Trade Commission Act is to protect the public, not to punish a wrongdoer . . . and it is in the public interest to stop any deception at its incipency.

See also, *Gimbel Bros. v. F.T.C.*, 116 F. 2d 578 (2d Cir. 1941).

Clearly, then, the Federal Trade Commission order pertains to the future only. By its own terms, to "cease and desist" means that in the future one will not do that which one has been doing; it is "wholly prospective in operation." *Standard Container Mfgs. Assn. v. F.T.C.*, 119 F. 2d 262 (5th Cir. 1941).

The nature and proper bounds of an FTC proceeding were set out by Justice Black in *F.T.C. v. Cement Institute*, 333 U.S. 683 (1948) where he stated for the Court:

And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this. *where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress.* 333 U.S. at 706. (Emphasis added.)

This *in futuro* effect of Commission orders has been reaffirmed time and again by the courts. "Orders of the Commission have relation to future, not to the past." *P. Lorillard Co. v. F.T.C.*, 186 F. 2d 52 (4th Cir. 1950); See also *American Chain & Cable Co. v. F.T.C.*, 142 F. 2d 909, 911 (4th Cir. 1944); *Doyle v. F.T.C.*, 356 F. 2d 381, 383 (5th Cir. 1966); *United Corp. v. F.T.C.*, 110 F. 2d 473 (4th Cir. 1940); *Erickson v. F.T.C.*, 272 F. 2d 318 (7th Cir. 1959), *cert. denied*, 362 U.S. 940 (1960); *Benrus Watch Co. v. F.T.C.*, 352 F. 2d 313, 322 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

9. *The Commission Lacks Jurisdiction to Render Punitive or Compensatory Relief*

By its complaint and proposed order, the Commission is attempting to exceed its statutory authority by seeking to compel respondents to pay compensation in money to those upon whom the alleged deception was practiced. In this respect, the proposed order is directly contrary to the Supreme Court's finding that Section 5 was "prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons." *Amalgamated Workers v. Edison*, 309 U.S. 261 (1940). In *F.T.C. v. Ruberoid Co.* 343 U.S. 470, 473 (1952), the Court stated further:

Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future.

Most pertinent to the present proceeding is the statement of the Second Circuit in *Royal Baking Powder Co. v. F.T.C.*, 281 Fed. 744 (2d Cir. 1922) that "it is not intended that compensation is to be made for any injuries which may have been suffered. The intent of the [Federal Trade Commission] Act is the prevention of injury to the general public." See also *Nat'l Harness Mfrs. Ass'n. v. F.T.C.*, 268 Fed. 705, 712 (6th Cir. 1920).

Despite these clearly defined limits upon FTC authority, the proposed order seeks to compel respondents to pay refunds to former Post subscribers, obviously constituting monetary, compensatory relief to the subscribers allegedly aggrieved. The fact that the form of the order has been framed in the form of a cease and desist order by ordering respondents to cease not doing a particular act does not obscure the Commission's assumption of power to act as a court of law and award a money judgment to a certain class of plaintiffs.

Furthermore, courts have constantly and consistently reiterated that the purpose of the Act is to "protect the public, not to punish a wrongdoer." *Regina Corp. v. F.T.C.*, 322 F. 2d 765 (3rd Cir. 1963); *Guziak v. F.T.C.*, 361 F. 2d 700 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967). "The Federal Trade Commission Act was intended to afford a preventative remedy, not a compensatory one . . ." *Ford Motor Co. v. F.T.C.*, 120 F. 2d 175, 182 (6th Cir.) *cert. denied*, 314 U.S. 668 (1941). See also *Doyle v. FTC*, 356 F. 2d 381 (5th Cir. 1966).

In *United Corp. v. FTC*, 110 F. 2d 473 (1940), the Fourth Circuit held that the Commission must have jurisdiction over the respondent at the time the order is entered rather than at the time the unfair trade practices occurred because "the order to be entered does not relate to past practices or determine rights as of the time of the filing of the complaint, as in an action at law, but commands or forbids action in the future."

10. *Indicia of Commission Policy*

Although not legal precedent in a strict sense, recent statements by Commission members suggest that the Commission itself questions that it has the power to do what the proposed order would require. In a statement on February 4, 1970, before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce House of Representatives, Chairman Weinberger,² expressed the Commission's views on pending consumer legislation.

² See Chairman Weinberger's statement and covering letter to Senator Moss in *Hearings on S.2246, S.3092 and S.3201 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st and 2nd Sess., pt. 1, at 8 (1970).

In noting some of the areas not covered by the proposed legislation, Chairman Weinberger stated:

[T]he Commission should be empowered to award damages where consumers have been injured by the acts or practices found by the Commission to be in violation of the law.

SUMMARY STATEMENT

Regardless of the jurisdictional problems involved the unfair practice and deception here was not as alleged in the failure to offer or make cash refunds since they were unavailable and to do so would have been deceptive. If any deceptive or unfair practice existed, it was the failure to provide for the availability of refunds on accepting subscribers' cash advances in the event restitution became necessary and the failure to explain nonpayment where refund restitution was justified at the time of making substitute magazine offers. The contention that the latter failure would have precipitated bankruptcy and contravened the best interests of subscribers who then could not have received a substitute magazine is an unpersuasive motive and clearly a good faith defense which in any event could not prevail. The public interest requires the disclosure of material facts, and purportedly, determining the subscribers' best interests as an excuse for withholding information is not the publishers' (*i.e.*, Curtis) prerogative. As heretofore stated, subscribers to publications (or all consumers for that matter) must be made reasonably knowledgeable so that they may resolve their own alternatives devoid of factual obscurity.

Accordingly, since the alleged deception and unfair practice has not been established, because of respondents financial inability to offer refunds alternatively with the offer of substitute magazines on discontinuance of the Post, and also because the Commission lacks jurisdiction to render a monetary judgment that a sustention of the allegations of the complaint would require as herein set forth:

ORDER

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

OPINION OF THE COMMISSION

JUNE 30, 1971

By Dixon, *Commissioner*:

The complaint in this matter, issued October 17, 1969, charges as unlawful under Section 5 of the Federal Trade Commission Act de-

ception stemming from respondents' failure to offer refunds to subscribers to The Saturday Evening Post upon cancellation of their subscription to that magazine. The hearing examiner rendered his initial decision in which he ordered that the complaint be dismissed. Counsel supporting the complaint have appealed from the examiner's decision.

The complaint charges that in July 1968 respondent Curtis Publishing Company notified some of the subscribers to The Saturday Evening Post that the magazine would no longer be delivered to them. Thereafter, in February 1969, respondents Curtis Publishing Company, The Saturday Evening Post Company and Perfect Film and Chemical Corporation notified the remaining subscribers to the Post that the magazine would no longer be published. With each of the above notifications, subscribers were informed that they would be given a subscription to a different magazine for the unexpired portion of their subscriptions. At no time, according to the complaint, did respondents notify any subscribers that they were entitled to, and could, receive a cash refund for the unexpired portion of their subscriptions. The complaint specifically charges, in this connection:

PAR. 6. By offering the subscribers the sole choice of a substitution of a selected magazine in lieu of the magazine originally contracted for:

(1) Respondents failed to offer their subscribers a cash refund for the unexpired portion of said subscriber's subscription for a specific magazine, *i.e.*, The Saturday Evening Post;

(2) Respondents failed to carry out their obligation to their subscribers, all of whom were entitled to a cash refund; and

(3) Respondents obscured the legal rights of said subscribers by withholding the option of a cash refund for the unexpired portion of the subscription for which respondents could not deliver the specific magazine subscribed for.

PAR. 7. Respondents' failure to offer their subscribers a choice of a cash refund upon cancellation of their subscription, respondents' failure to carry out their obligation to their subscribers, all of whom were entitled to a cash refund, and respondents' obscuring of the legal rights of said subscribers by withholding the option of a cash refund for the unexpired portion of the subscription for which respondents could not deliver the specific magazine subscribed for, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that they had no choice but to substitute another magazine for the unexpired portion of the subscription.

The proposed order accompanying the complaint would require respondents, *inter alia*, to "forthwith notify all of their former subscribers who did not receive their full contractual subscription to The Saturday Evening Post, that they were, and are, entitled to re-

ceive a cash refund for the portion of any subscription that had not expired at the date the Post ceased publication."

I

The following facts are not in serious dispute. Respondent, the Curtis Publishing Company (Curtis) had been engaged for many years in the production and distribution of several magazines, including The Saturday Evening Post. Curtis had also owned and operated its own paper mill, sources of wood pulp and printing plants, as well as subsidiary corporations engaged in the business of selling and distributing magazines, both Curtis' magazines and those of other publishers.

In 1961, Curtis began losing money. In December 1963 it entered into a loan agreement with a group of banks, referred to as the Basic Bank Agreement, with security for the loans being all of Curtis' assets. Despite this loan arrangement, Curtis' financial position continued to deteriorate. By early 1968 the bank loan amounted to \$12,726,500 and Curtis was in default on \$8,000,000 of that loan. While the banks had no intention of granting an extension, there was no immediate threat of foreclosure on the loans. The company, however, was on the verge of bankruptcy and was desperately seeking a solution to its financial problems. Outside financial experts reviewed Curtis' problems and expressed the belief that the corporation was dying.

Respondent, Perfect Film and Chemical Corporation (Perfect), knowing of Curtis' troubled financial condition, became interested in establishing a relationship with Curtis which would lead to an eventual combination between the two concerns. It therefore offered to lend Curtis five million dollars in return for which the president of Perfect, Martin S. Ackerman, and his designee would be elected to Curtis' board of trustees, and Mr. Ackerman would be elected president of Curtis. This proposal was accepted by Curtis on April 22, 1968.

On June 29, 1968, Perfect acquired Curtis circulation and subscription companies. On or about August 5, 1968, Perfect paid off Curtis' loans under the Basic Bank Agreement and assumed the position of the banks as creditor under that agreement. On October 14, 1968, Perfect foreclosed on these loans, obtaining, among other things, all rights, title and interest in and to the publication of Curtis' magazines, including the Post.

In a further attempt to salvage the Curtis magazines, Curtis and Perfect decided to place the publication of these magazines in a new

company unencumbered by Curtis' obligations and liabilities. This new company, The Saturday Evening Post Company (Sepco), was incorporated on October 21, 1968. Management personnel for this company were provided by Perfect. On November 12, 1968, Perfect transferred to Sepco all of the assets of Curtis' magazines (which it had acquired through foreclosure) and at about the same time Curtis, having discovered that its pension fund was over-funded by approximately nine million dollars, contributed to Sepco five million dollars which it had withdrawn from the fund. An additional ten million dollars was obtained for Sepco from a group of individual investors.

Shortly after Ackerman had taken over as president of Curtis, in May 1968, a decision was made by Curtis' board of directors to cut the circulation of The Saturday Evening Post from seven and one-half million to about three million. The purpose of this reduction was to cut Curtis' losses and, if possible, to save the Post. Curtis then entered into an arrangement with Time, Inc., whereby the latter agreed to provide Life magazine on an issue-for-issue basis in substitution for the unfulfilled portion of a minimum of two and one-half million Post subscriptions. Letters were sent to about one-half of the Post subscribers notifying them that Curtis would "be unable to continue sending the Saturday Evening Post after the July 27 issue," and that it had "arranged to replace the remainder of your POST subscription with LIFE Magazine for an equivalent number of issues." The letter further stated that "... if your attachment to the POST is absolutely unbreakable, we could continue your subscription but only if you notify us within the next ten days." Those subscribers who gave timely notification of their desire to keep the Post were scheduled by Curtis to be returned to the Post subscription list. Follow-up letters were sent in several mailings from September 10 to December 18, 1968, to those Post subscribers who had not responded to the above communication. Each of these follow-up letters offered to substitute other magazines for the remainder of the Post subscription and the letter (December 18, 1968) also stated that Curtis could "arrange to send you a cash refund for the unused portion of your POST subscription." There is no evidence, however, that refunds were made to persons who may have requested them after December 18.

On January 10, 1969, a decision was made at a special joint meeting of the boards of directors of Curtis and Sepco that publication of the Post would be terminated with the February 8, 1969, issue. Respondents did not, however, discontinue the sale of long-term sub-

scriptions to the Post during the period between January 10 and February 8. Instead, a series of letters, including follow-up letters, were sent to subscribers after publication had been discontinued giving them an opportunity to select another magazine as a replacement for the Post. Subscribers who did not respond were eventually sent a substitute magazine for the balance of their Post subscription.

II

The hearing examiner found that Curtis did not have sufficient cash or assets at any time during 1968-69 to make refunds to Post subscribers. He estimated that the cost of making refunds would have been \$20 to \$40 million and that any attempt by Curtis to make refunds or to offer to make them during this period would have precipitated bankruptcy. Under the circumstances, according to the examiner, Curtis' failure to offer Post subscribers a cash refund for the unexpired portion of their subscriptions was not an unfair or deceptive practice as alleged in the complaint. To the contrary, in view of his finding of Curtis' inability to make refunds, the examiner held that it would have been deceptive for Curtis to make such an offer.¹ The examiner further held that Perfect's participation in the conduct of Curtis' affairs while it was represented on Curtis' board of directors was such as to make Perfect equally responsible for Curtis' practices. Moreover, he found that Perfect's position was enhanced by its financial control of Curtis.

As an additional basis for his order recommending dismissal of the complaint, the examiner held that the proceeding was not in the public interest since it "is being used to direct refunds to former Post subscribers." He further held that the proposed order "violates three fundamental limitations on Federal Trade Commission remedial powers." These limitations, according to the examiner, are as follows:

While cease and desist orders are supposed to be prohibitory, the Commission's proposed order would require the initiation of affirmative undertakings. While cease and desist orders apply only prospectively to future conduct, the Commission's proposed order would apply retroactively to conduct completed. And

¹ The examiner held that Curtis should have informed subscribers that cash refunds could not be made pending financial and business reorganization, thereby allowing a choice to subscribers of becoming a general creditor of Curtis or a subscriber to a substitute magazine. He further held that respondents, Curtis and Perfect, "failed to protect advanced subscription funds from priority creditors when new or renewal subscription funds were received in the presence of what should have appeared then to be a financial crisis. . . ." According to the examiner, however, respondents' failure to so inform subscribers was not challenged by the complaint and is therefore outside the scope of this proceeding.

while a cease and desist order is not compensatory for past damage but only prohibitory of future deceptive conduct, the Commission's proposed order particularly as limited by the complaint charges relating only to the failure and obligation to make Post refunds as an alternative would have respondents pay a money judgment to former Post subscribers and prejudices the right to a money judgment of subsequent subscribers to other Curtis magazines. In each respect, the proposed order exceeds the authority of the Commission under the Federal Trade Commission Act. (Initial Decision, p. 1502.)

The short answer to these conclusions of law by the examiner is that the Commission has the authority under Section 5 to require the initiation of affirmative undertakings; that an order requiring restitution of money or property obtained by a respondent prior to issuance thereof may operate prospectively; and that an order of restitution is not punitive or compensatory. Each of these points will be discussed *infra*.

The hearing examiner has also made other observations on the "law" of this case, but we find it unnecessary to dwell on them at any length except to say that we are in general disagreement with the views he has expressed. We will comment only on the conclusions referred to in the preceding paragraphs.

III

The principal legal issue raised by the appeal concerns the breadth of the Commission's remedial powers under Section 5 of the Federal Trade Commission Act. More specifically, the question presented is whether the Commission has the authority under Section 5 to require a respondent to refund to customers money which the respondent had obtained from them at some time prior to the issuance of the Commission's complaint.

The Commission is empowered by Section 5(b) of the Federal Trade Commission Act to issue orders requiring violators of the Act "to cease and desist" from using unfair methods of competition or unfair or deceptive acts or practices. It has been generally recognized that the remedial powers thus conferred are far broader and more flexible than a literal reading of the statutory language would indicate.² It has been held that the Commission has wide discretion

² "We have heretofore analogized the power of administrative agencies to fashion appropriate relief to the power of courts to fashion Sherman Act decrees. . . . Authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees . . . subject of course to judicial review. Dissolution of unlawful combinations . . . is an historic remedy in the antitrust field, even though not expressly authorized. . . . Likewise, the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority. . . ." *Pan American World Airways v. United States*, 371 U.S. 296, 312, n. 17 (1963).

in its choice of a remedy "deemed adequate to cope with the unlawful practices" disclosed, and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611-13 (1946). Moreover, the Commission is not limited to prohibiting an illegal practice in the precise form existing in the past but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). And it may even prohibit the use of a "lawful device" for the purpose of preventing the continuation of an illegal practice. *Federal Trade Commission v. National Lead*, 352 U.S. 419 (1957). It is abundantly clear from the case law that the Commission has the power to direct whatever is necessary to prevent the continuation of a practice found to be unlawful and to effectively redress injury to competition attributable to the violation.

Contrary to the holding of the hearing examiner in the present matter, the Commission has the authority to require affirmative undertakings or actions in its orders. See *Luria Bros. Co. v. Federal Trade Commission*, 389 F. 2d 847 (3rd Cir. 1968), *cert. denied*, 393 U.S. 829, *Bantam Books, Inc. v. Federal Trade Commission*, 275 F.2d 680 (5th Cir. 1960), *cert. denied*, 364 U.S. 819, *Keele Hair & Scalp Specialists, Inc. v. Federal Trade Commission*, 275 F. 2d 18 (5th Cir. 1960), *Haskelite Mfg. Corp. v. Federal Trade Commission*, 127 F. 2d 765 (7th Cir. 1942). The Commission has also issued orders under Section 5 requiring divestiture, *Golden Grain Macaron Company*, Docket No. 8737 (Jan. 18, 1971) [p. 63 herein] and *L. G. Balfour Company*, Docket No. 8435 (July 29, 1968) [74 F.T.C. 345], *aff'd.*, 442 F.2d 1 (7th Cir. 1971); licensing under a patent and the furnishing of technical information and know-how, *American Cyanamid Co.*, Docket No. 7211 (Sept. 29, 1967) [72 F.T.C. 623], *aff'd sub nom.*, *Charles Pfizer & Co., Inc. v. Federal Trade Commission*, 401 F. 2d 574 (6th Cir. 1968); furnishing copies of Commission orders to employees, *e.g.*, *Mather Hearing Aid Distributors, Inc.*, Docket No. 8791 (April 29, 1971) [p. 709 herein]; and providing for a cooling-off period, *e.g.*, *Household Sewing Machine Co., Inc.*, Docket No. 8761 (Aug. 6, 1969) [76 F.T.C. 207]. Remedies of this nature are often necessary to prevent recurrence of an illegal practice or to cure the ill effects of such a practice.

With respect to the examiner's conclusion that any type of restitutionary relief would run afoul of the requirement that cease and desist orders must be wholly prospective in operation, it seems ques-

tionable whether the purported distinction between "prospective" and "retrospective" relief is a useful analytical construct for determining whether a particular type of provision is permissible. Every Commission order is "retrospective," in the sense that it looks to and is based upon the causes and results of the acts found to violate the statute, and at the same time it is "prospective" in the sense that its design, purpose, and effect is to dissipate any lingering effects of the past violations and to prevent their recurrence in the future. In reality, the "prospective/retrospective" formulation seems based upon concern that the Commission in structuring its orders might go beyond the bounds of what is reasonably necessary to eradicate the violations found to exist, and impose requirements that are in essence punitive because they are superfluous. Indeed, two of the opinions quoted by the examiner in his initial decision make it clear that this is the rationale underlying judicial emphasis on the prospectivity of Commission orders. See *Regina Corp. v. Federal Trade Commission*, 322 F. 2d 765 (3rd Cir. 1963); *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 706 (1948); initial decision, pp. 1504-05. Viewing the problem in this light, the question of whether a given remedy like restitution is punitive is one which will turn largely on the facts and circumstances of a particular case.

In this regard, it may be useful to examine a recent case in which the Commission ordered a respondent to refund money as a means of preventing the recurrence of practices found to be unlawful. In *Windsor Distributing Company*, Docket No. 8773 (March 6, 1970) [77 F.T.C. 204], *aff'd*, 437 F. 2d 443 (3rd Cir. 1971), respondents were ordered, *inter alia*, to "refund immediately all monies to (1) customers who have requested contract cancellation in writing within three days from the execution thereof, (2) customers who have refused to sign statements indicating satisfaction with respondents' placement of the machines, and (3) customers showing that respondents' contract, solicitations or performance were attended by or involved violations of any of the provisions of this order." The Commission took the position in its brief to the court that, in addition to its inhibitory effect, such an order would be in the public interest since it would protect the public against the specific injury caused by the unlawful practices. According to the brief, "The injury here is the loss of money by purchasers of vending machines as a result of petitioners' deceptive practices, and the Commission's order reasonably guards against this injury by providing for the return of the purchaser's money."

The order in *Windsor* relates to future practices of respondents in

that case. As stated above, however, an order granting restitutionary relief for past offenses may also operate prospectively. This would be the case, for example, if the circumstances of the violation were such that restitution of money to consumers would be necessary to dissipate the anticompetitive effects of unlawful conduct. Such a situation could arise when a seller has obtained substantial amounts of money by virtue of a deceptive promotion and his competitors have suffered corresponding losses. The Commission and the courts have long recognized, in this connection, that honest sellers may be competitively injured by deceptive acts and practices of their less scrupulous rivals. In the *Winsted Hosiery Co.* case³ the Supreme Court held that the mislabeling of respondent's product constituted an unfair method of competition as against manufacturers who branded their product truthfully, "For when misbranded goods attract customers by means of the fraud which they perpetuate, trade is diverted from the producer of truthfully marked goods." And in *Algoma Lumber*⁴ the Court held that "Dealers and manufacturers are prejudiced when orders which would have come to them if the [product had not been deceptively labeled], are diverted to others whose methods are less scrupulous."

But competitors are not only injured by the loss of business which results directly from the deceptive promotion. They may also be seriously disadvantaged when the seller who employs such tactics realizes substantial monetary gain as a result thereof and is thereby placed in a more favorable competitive position. The possibility of such injury occurring as a result of unfair or deceptive practices was discussed by Commissioner Jones in a recent speech:

In the field of credit, questionable debt collection practices (such as excessive use of garnishment) not only prey on consumers, but also affect the very structure of competition, by giving merchants employing them an unfair competitive advantage over the honest and ethical businessman who does not use them. In such a situation, Gresham's Law could well operate, as businessmen employing such deceptive and unfair practices and reaping the profits therefrom can use those excess profits to drive out honest efficient businessmen who do not use them, and thus, severely injure the competitive structure of the affected market.⁵

It may well be that in some situations injury to competition resulting from the deceptive practice cannot be adequately remedied by an order which merely enjoins the practice. In such a case re-

³ *Winsted Hosiery Co. v. Federal Trade Commission*, 258 U.S. 483 (1922).

⁴ *Federal Trade Commission v. Algoma Lumber*, 291 U.S. 67 (1934).

⁵ Address of Commissioner Jones, New Challenge for the Consumer Movement, March 6, 1971.

funding of the money obtained by illegal means may be the only effective method of restoring the competitive *status quo* which was disrupted by the deceptive practice. Restitutionary relief under such circumstances would be analogous to the type of relief ordered in cases such as *Balfour* and *Cyanamid*, *supra*. While directed at past acts, such an order would be prospective in its effect since it would be designed to restore competition.

An order granting restitutionary relief could also operate prospectively if it were issued on the basis of a finding by the Commission that a seller's retention of its customers' money or property was an unfair trade practice in and of itself. Such a situation could conceivably occur, for example, where consumers pay in advance for goods or services which are never received, where the goods are defective or not as represented and are returned by the consumer after payment is made, where a consumer orders and pays for one product and is sent another which he refuses to accept, or in other situations where the consumer, as a result of deception or fraud on the part of the seller, pays for a product or service but receives nothing of value in return or receives something that is either worthless or of only token value. In such instances the retention of the money or property of consumers may be deemed to be a continuing violation of Section 5, separate and apart from any misrepresentation or deceptive sales scheme which may be utilized by the seller. And to terminate such a practice an order would of necessity require restitution of the money or property unjustly held by the seller.

This is not a novel approach since the Commission has previously taken the position that the refusal to return money or property to consumers is an unfair trade practice. In *Interstate Home Equipment Co., Inc.*, 40 F.T.C. 260 (1945), respondents were charged with using numerous misleading and deceptive claims in connection with the sale of their products. In addition, the complaint charged as separate offenses that respondents had refused to return payments or deposits made by purchasers on merchandise in cases where respondent did not desire to complete the sale and that they failed to return merchandise which had been taken up by respondents for repair. The order specifically required respondents to cease and desist from "Refusing to return deposits or payments made by purchasers on merchandise in cases where respondents declined or refused to complete the sale" and from "Failing or refusing to deliver merchandise which had been returned by purchasers for repair." In *Success Portrait Company*, 35 F.T.C. 227 (1942), and *Footwear Associates*, 40 F.T.C. 654 (1945), respondents were charged with retaining money and property of consumers as part of a scheme to

coerce consumers to buy the respondents' product. The Commission's orders in these cases not only prohibited the coercive practice but also required respondents to refund down-payments on merchandise which they could not deliver and to return property belonging to others.

It is important to note that in situations of the type referred to above, *i.e.*, where restitution may be necessary to terminate an illegal practice or to cure its effects, an order directing that money or property be returned to consumers would be neither punitive nor an award for compensatory damages. In *Bowles v. Skaggs*, 151 F. 2d 817 (6th Cir. 1945), the court ruled that it was permissible for the Administrator of the Office of Price Administration to seek restitution under a statute⁶ that authorized a district court to issue "a permanent or temporary injunction, restraining order, or other order," notwithstanding the possibility that the defendant would also be liable in damages. The court held in this connection that:

An order of restitution is not a judgment for damages or for penalties. It compels compliance and is restoration of the status quo which falls within the recognized power of a court of equity. . . . The Administrator acts in the public interest—the purchaser in his own. The remedies are not irreconcilable. There are undoubtedly many instances where the relationship of buyer and seller is such that the buyer is deterred from vindicating his own and therefore also the public right. To deny to the Administrator power to act in cases where, as here, restitution rather than a prohibitory injunction is the only practical remedy, would be to subvert the purposes of this Act. 151 F. 2d at 82.

In a later decision involving the same statute, the Supreme Court emphasized that restitution could be justified as a tool to enforce compliance and that it was distinguishable from a compensatory damage remedy:

Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e). . . . When the Administrator seeks restitution under § 205(a), he does not request the court to award statutory damages to the purchaser . . . or to pay to such a person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205(e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946).

Finally, it should be emphasized that an order directing restitutionary relief in such situations would not be for the purpose of redressing private injuries even though it may have the incidental ef-

⁶ The Emergency Price Control Act of 1942.

fect of benefiting private individuals. The Supreme Court held in *Klesner*⁷ that Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. It did not imply, however, that any relief to private parties was an impermissible result of a Commission order. To the contrary, the court held, "[T]o justify the Commission in filing a complaint under §5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident." Thus, if adequate public interest grounds for granting restitution are present in a particular case, the benefit to private persons who may be restored to the *status quo ante* would be merely an incidental aspect of the Commission's order.

IV

The final issue before us is whether on the basis of the complaint and record in this matter an order is warranted. We do not believe that it is.

Commissioner Dixon would dismiss the complaint for the following reasons:

The complaint alleges that all subscribers to the Post whose subscriptions were cancelled by respondents were entitled to a cash refund. It further charges that the offering to such subscribers of a substitute magazine in lieu of the Post, the failure to offer them a cash refund for the unexpired portion of their subscriptions, and the obscuring of their legal rights by withholding the option of a cash refund had the capacity and tendency to mislead them into the erroneous and mistaken belief that they had no choice but to substitute another magazine for the unexpired portion of the subscription. Thus the complaint is grounded on the assertion of subscribers' "rights," or "entitlement" to a refund.⁸ Respondents denied in their answer that subscribers had any right to a refund as a matter of law, and this issue was tried before the hearing examiner.

The hearing examiner ruled that "Whether or not a Post subscriber was or is entitled to a refund for the remaining portion of his subscription depends upon the circumstances under which the subscription was written, the contract terms, the response of the subscrib-

⁷ *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929).

⁸ The complaint does not distinguish between subscribers who purchased directly from Curtis and those who purchased through intermediaries; nor does it distinguish between those who were victims of the cutback in circulation and those whose subscriptions were cancelled when the Post was terminated; or between those who purchased prior to respondents' decision to terminate the Post and those who purchased after respondents had made this decision.

er to the opportunity to accept a substitute magazine, and the law of the state where the subscription contract was made." (initial decision, p. 1496) Counsel supporting the complaint take exception to this ruling, contending that such a conclusion would be appropriate only if the subject matter were a case at law on the contract. According to counsel, the conclusion is not pertinent to a proceeding before the Commission brought under the Federal Trade Commission Act since, under that Act, it is unlawful to offer a substitute magazine for a specific magazine ordered. In so arguing, complaint counsel place principal reliance on *Algoma Lumber Co.*, *supra*, wherein the Court held that "The consumer is prejudiced if, upon giving an order for one thing, he is supplied with something else." Thus, counsel contend, it is an unfair and deceptive act to the prejudice and injury of the public for a respondent to send a substitute magazine or no magazine at all to individuals who have subscribed to a specific magazine.

The *Algoma Lumber* decision is inapposite here, however. The issue as framed by the pleadings and trial of this matter is not whether Section 5 of the Federal Trade Commission Act would be violated by sending to a subscriber a magazine different from the one ordered. As pleaded and tried, the issue is whether respondents misled subscribers as to their private rights or entitlement to a refund. Whether or not the practice was deceptive under Section 5 has no bearing on the right of the individual subscriber to a refund from respondents under state law, nor does a showing that the practice was deceptive create such a right.

Complaint counsel also argue that subscribers were entitled to a refund because Curtis had offered a money back guarantee to any subscriber who wished to cancel his subscription. This offer, which appeared on the masthead page of the magazine until it was removed on June 28, 1968, stated: "We agree upon request direct from subscribers to the Philadelphia office to refund the full amount paid for any copies of Curtis' Publications not previously mailed." This argument should also be rejected. Under the theory of the complaint, the existence of the guarantee is merely one other factor to be considered in determining whether subscribers were legally entitled to a refund under state law. Whether they were or not has not been demonstrated on this record. Consequently, this essential allegation of the complaint has not been sustained.

It is also my opinion, upon reconsideration of the complaint, that even had a showing been made that subscribers were deceived in the

manner alleged, such a showing would not, in the circumstances of this case, provide an adequate basis for the type of relief sought by the complaint. As stated above, the theory of the complaint is that respondents, by offering a substitute magazine and by failing to offer refunds, deceived subscribers as to their legal rights. Under this theory there is no justification for an order which would do more than cure the deception. In other words, the elimination of the practice alleged to be unlawful does not call for an order of restitution.

Moreover, the facts developed in this record do not indicate that such relief is warranted. Certainly, an order of restitution would not be required under either of the theories discussed above. There is no indication that other magazine publishers would be competitively disadvantaged by virtue of the fact that respondents had obtained advance payments from subscribers to The Saturday Evening Post. Nor do I believe that the record discloses a violation of Section 5 on the part of respondents of such magnitude as to necessitate an order requiring refund of advance payments even if the complaint had charged that the retention of such payments was an unfair trade practice. The cutback in Post subscriptions and finally the termination of the Post were brought about solely by Curtis' financial condition. Every effort was made by respondents to furnish a magazine of comparable value to Post subscribers, many of whom had previously signed contracts agreeing to accept a substitute magazine in the event the Post should cease publication. These facts, together with the showing by respondents that the money actually received by Curtis from most subscriptions covered only a small fraction of its total cost of publishing and distributing the Post, negate any suggestion of unjust enrichment.

Commissioners Dennison and Jones would dismiss the complaint for the following reasons:

We fully agree with Parts I-III of the foregoing opinion, including the view that this agency has authority in an appropriate case to order restitution as a means of stopping an unfair practice or preventing recurrence of one. We also concur that the complaint should be dismissed. However, we do not subscribe to all the reasons for doing so as set forth by Commissioner Dixon.

As we read Part IV of his opinion, it holds, among other things, that complaint counsel has failed to demonstrate that subscribers to The Saturday Evening Post were legally entitled to refunds under state law upon Curtis' failure to complete the subscription contract with copies of the Post. Apparently, Commissioner Dixon feels that

since complaint counsel did not put in the record copies of all the subscription contracts, and proof as to the law of the state where such contracts were made, there could be no finding of violation in a case of this kind.

We do not agree that complaint counsel were under such a burden. As to subscribers who contracted directly with Curtis or its subsidiary selling agency (some 3 million subscribers), surely there can be no serious question but that, under general principles of contract law, these subscribers had a right to a refund of money of the unexpired portion of the contract.⁹ If there were provisions in any of Curtis' contracts, which allowed the publisher to substitute another magazine, or if perchance there were state laws giving a publisher such an option in the event of insolvency, respondent should be charged with the burden of bringing forth such facts. In the absence of such a showing, we see no reason that should prevent the Commission from taking notice of elementary principles of contract law and, accordingly, recognizing that Curtis' subscribers had a "right" to a refund when Curtis decided, first in July 1968, to stop sending the Post to approximately half of its subscribers, and later, in 1969, to stop publishing the Post altogether.

Nor do we think that the "offer" and receipt of Life Magazine in lieu of the Post amounted to a mutual reformation of the subscription contracts nullifying this right to a refund. The "substitution" of these magazines was virtually forced on subscribers who in the vast majority of cases undoubtedly had no clear notion of just what rights they did have in the matter. Equitable principles are clear enough today that an unknowledgeable "waiver" of rights, induced by misleading statements of the contract terms by the other party to the contract, is no waiver at all. See Restatement of Contracts § 353.

In other words, we would hold that, although it may be a matter of state law, rather than FTC law, as to whether a particular subscription contract gives certain "rights" in the event of nonperformance by the publisher, this agency is not barred from taking appropriate action against practices in interstate commerce that obfuscate

⁹ There is a question whether Curtis would owe refunds to readers who subscribed to the Post through intermediary sales agencies (so-called PDS firms). About 60 percent of its subscribers had contracts with such firms and there is judicial precedent indicating that subscribers must look to these intermediaries rather than the publisher for satisfaction of contractual rights. Also, evidence was submitted that some of these contracts provided that upon cessation of publication the agency "will offer a substitute magazine" for the remaining term. Assuming that patrons of these agencies had no "right" of refund from Curtis, this in itself would be no reason to dismiss the complaint as respondents urge. Any order could be limited to provide refunds to the remaining subscribers who purchased directly from Curtis.

and mislead subscribers as to those rights. As stated in *Federal Trade Commission v. Standard Education Society*, 86 F. 2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937): "The Commission has a wide latitude in such matters [remedies]; 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."

The case of *Portwood v. Federal Trade Commission*, 418 F. 2d 419 (10th Cir. 1969), relied upon by respondents, does not stand for the proposition that the Commission must have before it all the laws of the states before it can act in this area. There the Commission issued a cease and desist order based on a finding that respondent had misrepresented the legal obligation between him and those to whom he was sending unsolicited merchandise. The court, in upholding the Commission's finding of violation of Section 5, noted that the "Commission's findings of deception as to legal duties were based on generally applied legal principles" (p. 422). It is true that the court deleted from the Commission's order the requirement that respondent disclose to recipients of unordered merchandise that they had no duty to preserve intact such merchandise, because, as the court saw it, "the duty of care for unsolicited merchandise intentionally imposed upon the recipient appears unsettled . . ." under state law. However, the court did so with the belief that the Commission in that part of the order purposefully "aimed at an accurate statement of legal rights and duties which do rest on State law" (p. 423). There is no indication that the court thought that the findings and remedial order of the Commission in all cases must necessarily be supported by, and tailored to fit, the laws of the states in which the order is to be enforced.

In sum, we think that it is clear enough under general principles of contract law that the subscribers who dealt directly with Curtis were entitled, theoretically at least, to a refund upon respondents' decision to terminate distribution of the Post to them and that it would be within the authority of the Commission to find on the basis of this record that respondents' acts had the tendency to mislead subscribers into believing they had no other right or option but to take a substitute publication. Whether, in view of the evidence as to Curtis' inability to make refunds, those acts constituted deception as to a *material* fact such that an order is warranted, is another question which we will discuss below.

Also, we must disagree with Commissioner Dixon's statement that "even had a showing been made that subscribers were deceived in the manner alleged," there would in no case be justification for an order "which would do more than cure the deception." If the complaint clearly alleged no more than deception, we might agree. But we read the complaint as also charging that unfair retention of advance subscription payments was a part of the unfair practice. Thus, the complaint alleges "at no time did the said respondent notify any of its subscribers that they were entitled to, *and could*, receive a cash refund for the unexpired portion of their subscriptions" (Paragraphs 4 and 5, emphasis added). Complaint counsel made a sizable effort to trace the complicated intercorporate financial arrangements between Curtis, SEPCO, and Perfect Film in an endeavor to demonstrate that there were, in fact, always sufficient funds to repay subscribers. Had such fact been shown, in addition to deception, we think the proposed order of restitution would not only be appropriate, but would be the only order, in a case of this kind, that would effectively remedy the situation to protect the public interest. *Cf. International Union of E., R. & M.W. AFL-CIO v. NLRB*, 426 F. 2d 1243 (D.C. Cir. 1970), holding that it was error for the Board *not* to order a form of restitution in an unfair labor practice case where it appeared that the usual cease-and-desist type of order would be ineffective to restore the *status quo*.

Nevertheless, we are persuaded by the evidence adduced by respondents that Curtis was never able to make substantial refunds. Without elaborating on the details, it seems clear that Curtis was so close to bankruptcy during 1968 and onwards that as a practical matter any significant refund to customers was out of the question. Also, any unconditional "offer" of a refund to subscribers under such circumstances would have been misleading, as undoubtedly creditors would have immediately taken Curtis to bankruptcy court with the result, as the hearing examiner found, that subscribing members of the public (being general creditors) would have lost everything to the secured creditors. Although we think respondents should have made more clear to subscribers their contract rights at the time and should have frankly explained that Curtis' financial condition made it unlikely that refunds could ever be made, the failure to do this did not actually prejudice subscribers in any material way. In other words, had respondents clarified, rather than obfuscated, subscribers' "rights" under their contracts, they would not have been any better off. To warrant Commission action under Section 5, a charge of nondisclosure must be shown to involve material

facts, not immaterial facts. In short, we find there has not been a showing of deception on the part of Curtis and SEPCO of such magnitude as would warrant an order against them.

Nor do we see any theory upon which Perfect Film's assets could be reached by a restitution order, although complaint counsel point out that this company at least was able to make such payments and that it exercised control over the Post during the time that decisions to cut back circulation were made. The trouble with this line of argument is that Perfect Film was a secured creditor who was trying to rescue the Post. It had stepped into the shoes of a number of banks who were holding overdue loans owed by Curtis and who at any time could have foreclosed on all of Curtis' assets. At no time did Perfect Film assume any liabilities for Curtis' failure to complete subscription terms, and, although it hoped to make a profit in its venture to aid Curtis, the evidence does not show that it siphoned off any assets which otherwise would have been available to subscribers. Under these circumstances, it is difficult to see how an order requiring refunds to subscribers could be issued against this respondent.

For the above reasons, we agree that further proceedings in this matter are not warranted and that the complaint should be dismissed.

The appeal of counsel supporting the complaint is denied. The initial decision will be adopted to the extent that it is consistent with the views expressed in this opinion and, as so modified, will be adopted as the decision of the Commission.

Commissioner MacIntyre concurs in the result.

Chairman Kirkpatrick did not participate.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having determined, for the reasons stated in the accompanying opinion, that the appeal should be denied and that the initial decision should be modified:

It is ordered, That the hearing examiner's initial decision be modified by striking therefrom the findings and conclusions beginning on page 15 [p. 1488 herein] with the word "Conclusions" and ending on page 39 [p. 1507 herein] thereof.

1472

Complaint

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

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

Commissioner MacIntyre concurs in the result. Chairman Kirkpatrick did not participate.
