

Complaint

84 F.T.C.

IN THE MATTER OF

WILBANKS CARPET SPECIALISTS, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS*Docket 8933. Complaint, June 28, 1973—Decision, Sept. 24, 1974*

Order requiring an Essex, Md., seller, distributor and installer of carpeting and floor coverings, among other things to cease misrepresenting itself as a manufacturer; using bait and switch tactics; disparaging merchandise; failing to maintain adequate records; misrepresenting offers as free when their cost is incorporated into the selling price; misrepresenting prices; and failing to inform consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the Truth in Lending Act.

Appearances

For the Commission: *Maureen L. McGill, Everette E. Thomas, Richard F. Kelly and Alice C. Kelleher.*

For the respondents: *Benjamin R. Civiletti and John Henry Lewin, Jr.,* Baltimore, Md., withdrew from participation on June 6, 1974.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Wilbanks Carpet Specialists, Inc., a corporation, trading as Mr. Carpet Centers and Design Carpets Consultants, and J.C.B. Distributors, Inc., a corporation, trading as Mr. Carpet Centers, and George Wilbanks and Lester L. Miller, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending 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 Wilbanks Carpet Specialists, Inc., trading as Mr. Carpet Centers and Design Carpets Consultants, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 18 South Maryland Street, Essex, Md.

Respondent J.C.B. Distributors, Inc., trading as Mr. Carpet Centers, is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Maryland, with its principal office and place of business located at 10508 Baltimore Boulevard, Beltsville, Md.

Respondents George Wilbanks and Lester L. Miller are individuals and are officers of said corporate respondents. The said individual respondents formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. The address of respondent George Wilbanks is the same as that of corporate respondent Wilbanks Carpet Specialists, Inc., and the address of respondent Lester L. Miller is the same as that of corporate respondent J.C.B. Distributors, Inc.

All of the aforementioned respondents cooperated and acted together in the carrying out of the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for sometime last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business located in the State of Maryland, to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

CARPETING DIRECT FROM OUR FAMILY MILL

* * * * *

WE SELL FOR LESS — WE MAKE IT OURSELVES

* * * * *

Complaint

84 F.T.C.

MR. CARPET SAYS: "YOU CAN NOW AFFORD" TO CARPET YOUR ENTIRE HOME—INCLUDING 5 AREAS—Living Room, Dining Room, Hall, Stairs and Landings \$139-100% NYLON PILE From Our Family's Factory To You! 270 Square Feet-WALL TO WALL-FREE PADDING AND LABOR!

* * * * *

Dupont 501 Nylon Carpet Up to 320 Sq. Ft. installed Wall to Wall at no additional cost. Free padding \$189-FREE! PORTABLE TELEVISION With the purchase of our deluxe carpeting

* * * * *

WASHINGTON'S GREATEST CARPET SALE!!

Mr. Carpet can save you money! We have our own mill and our own warehouse in order to lower our overhead. Thousands of yards in our warehouse. You lose money if you don't check with us before you buy carpeting!

* * * * *

INSTALLATION INCLUDED WALL-TO-WALL PADDING FREE

* * * * *

10 Year Guarantee

* * * * *

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

1. Respondents are an integrated manufacturing and retailing business organization, and by virtue of such integration respondents are able to sell carpeting at lower prices than other competing retail carpet dealers.

2. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

3. By and through the use of the word "SALE," and other words of similar import and meaning not set out specifically herein, that said carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

4. By and through the use of the words "INSTALLATION INCLUDED WALL-TO-WALL PADDING FREE" and other words of similar import and meaning, not set out specifically herein, that all of the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

5. Certain of respondents' products are unconditionally guaranteed for various periods of time, such as fifteen (15) years.

6. Purchasers of the said deluxe carpeting receive a "free" portable television.

PAR. 6. In truth and in fact:

1. Respondents are not an integrated manufacturing and retailing business organization. Respondents do not manufacture carpeting, but purchase it from sources which are generally available to their competitors.

2. Respondents' offers are not bona fide offers to sell said carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen who make little or no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced carpeting.

3. Respondents' products are not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price. In fact, seldom, if ever, are the advertised items sold, because the offer is designed to act as the inducement for the practices set forth in Paragraph Six, 2., hereof.

4. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting.

5. Respondents' carpeting and floor coverings are not unconditionally guaranteed for the period of time orally represented by the respondents' salesmen. To the contrary, such written guarantees as they have provided to their customers were subject to conditions and limitations not disclosed in respondents' representatives' oral representations, and

in a substantial number of instances customers did not receive a written guarantee.

6. Purchasers of respondents' deluxe carpeting do not receive a free portable television. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

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

PAR. 7. In the future course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six, above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

PAR. 8. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraph Four above, respondents offer carpet with padding and installation included at a price based upon specified areas of coverage. In making such offer, respondents have failed to disclose the material fact that the prices stated for such specified areas of coverage are not applied at the same rate for additional quantities of carpet needed, but are priced substantially higher.

The aforesaid failure of the respondents to disclose said material facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the prices charged for quantities of carpet needed in excess of the specified areas of coverage will not be substantially higher than the rate indicated by the initial offer.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

PAR. 9. In the further course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price.

PAR. 10. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents' use of square foot measurements exaggerates the size of quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Therefore, the acts and practices as set forth in Paragraph Nine hereof were and are unfair, false, misleading and deceptive.

PAR. 11. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and service of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 14. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer

credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 15. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused, and are causing, customers to execute binding retail installment contracts, hereinafter referred to as the "contract."

PAR. 16. By and through the use of the contract respondents:

(1) Failed in some instances to disclose the due dates or periods of payments scheduled to repay the indebtedness, as required by Section 226.8(b) (3) of Regulation Z.

(2) Failed in some instances to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b) (2) of Regulation Z.

PAR. 17. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY MILES J. BROWN,
ADMINISTRATIVE LAW JUDGE
APRIL 24, 1974

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this matter on June 28, 1973, charging respondents with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as well as with violations of the Truth in Lending Act (15 U.S.C. 1604, *et seq.*). By answer duly filed respondents denied summarily the substantive allegations of the complaint and denied violating the Federal Trade Commission Act or the Truth in Lending Act.

Adjudicative hearings were held in Wash., D.C. and Baltimore, Md., during Nov. 1973. The record in this proceeding was closed for the reception of evidence on Jan. 8, 1974. On Feb. 15, 1974, proposed findings and briefs were filed by counsel supporting the complaint and counsel for respondents, and a reply brief was filed by complaint counsel on Mar. 1, 1974. By letter dated Feb. 27, 1974, respondents' counsel advised the administrative law judge that respondents chose not to file a reply

brief. By order dated Mar. 15, 1974, the Commission extended until May 8, 1974, the time in which the initial decision should be filed.

Any motions appearing on the record not heretofore or herein specifically ruled upon either directly or by the necessary effect of the conclusions in this decision are hereby denied.

The proposed findings, conclusions and briefs submitted by counsel have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.¹

Some of the abbreviations used in this decision are as follows:

CX - Commission's Exhibit

RX - Respondents' Exhibit

CSCPF - Proposed Findings and conclusions filed by Counsel Supporting the complaint

RPF - Proposed Findings and conclusions filed by Respondents' Counsel

TR - Transcript of the testimony

CSC Reply - Reply Brief of Counsel Supporting the complaint. Specialists - Wilbanks Carpet Specialists, Inc.

J.C.B. Dist. - J.C.B. Distributors, Inc.

At the outset it should be pointed out that respondents now admit that they have engaged in certain practices challenged by the Commission (RPF, Concl. 3, 4, 5, & 6). Respondents' main contentions at this posture of the case are that the two corporate respondents are entirely separate business entities, that they operated in two distinct trading areas, Specialists in Baltimore, and J.C.B. Dist. in Washington, D.C., and that Specialists, which is still engaged in business, should not be held liable or subjected to an order because of certain practices engaged in by J.C.B. Dist. which ceased operations in late 1972. They further contend that the terms of the proposed order, especially the so-called "consumer warning" disclosure, should not be issued against Specialists.

Having reviewed the record in this proceeding, and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusions, and briefs submitted by the parties, I make the following findings as to the facts.

FINDINGS OF FACT

1. Respondent Wilbanks Carpet Specialists, Inc., ("Specialists") which trades as Mr. Carpet Centers, is a Maryland corporation with its

¹Counsel supporting the complaint have meticulously annotated their proposed findings to the record in this proceeding. Where noted, instead of repeating long string citations to exhibits, I have adopted counsel's citations along with the finding, being satisfied that the finding is fully supported by the record.

principal office and place of business located at 11 South Marlyn Street, Essex, Md. (Ans., Tr. 21-25).

2. Respondent J.C.B. Distributors, Inc., ("J.C.B. Dist.") is also a Maryland corporation, and also traded as Mr. Carpet Centers from March of 1970 until about Thanksgiving of 1972, during most of which period it had its principal place of business at 10508 Baltimore Boulevard, Beltsville, Md. (Ans., CX B(1); Tr. 27, 28, 154).

3. Respondent George Wilbanks is an individual and an officer of both corporate respondents, Specialists and J.C.B. Dist., and he alone formulates, directs and controls the acts and practices of Specialists (Tr. 23, 25, 129, 130).

4. Respondent Lester L. Miller is an individual and was an officer of both corporations. He was in charge of the day-to-day operations at J.C.B. Dist. He now resides in Laurel Springs, N.C., where he is engaged in the retail carpet business (Tr. 23, 28-29, 139).

5. Wilbanks and Miller entered the carpet business as partners in 1967 (Tr. 23). They were the sole owners of Specialists with Wilbanks owning 55 percent interest and Miller 45 percent interest (Tr. 23, 140). In March of 1970, Wilbanks and Miller went into business with J. C. Briggs in the Washington area and when Briggs terminated his association with J.C.B. Dist., Wilbanks and Miller became sole owners thereof in the same proportion as their interest in Specialists, *i.e.*, 55 percent-45 percent (Tr. 27-29, 140, 142).

6. Both corporations, as well as the individual respondents, were engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor covering to the general public at retail (Tr. 25, 29) and they used the trade name Mr. Carpet Centers, advertising and selling under that name (see CX D 1-39, 41; RX 1-10).

7. Specialists purchased and warehoused almost all of the carpeting ultimately sold at retail by J.C.B. Dist. (Tr. 32-33, 51, 143, 148, 747). After J.C.B. Dist. took orders for this carpeting, it was transported from Specialists' Baltimore warehouse by the installers who were employees of Specialists to various purchasers located in Maryland, Northern Virginia and the District of Columbia (Tr. 31-34, 48, 143). Specialists charged J.C.B. Dist. for the installing services and for the carpeting used in these installations (Tr. 33, 78, 156; see CX C 1-25). In the later operation of J.C.B. Dist., Wilbanks attached an installation crew to J.C.B. Dist.'s payroll (Tr. 34, 149).

8. Although Miller was in charge of the day-to-day operation of J.C.B. Dist., Wilbanks often visited the J.C.B. Dist. store location and at certain times went over its books (Tr. 144, 230-231). The overall policy decisions

for J.C.B. Dist. were made jointly by Miller and Wilbanks (Tr. 29; CX B-1), and the basic format for all J.C.B. Dist. advertising was decided on jointly by Wilbanks and Miller (Tr. 27-29, 142).

9. Specialists places advertisements under the name Mr. Carpet Centers in the TV Guide sections of the Sunday editions of the Baltimore Sun and Baltimore News American and on television on Baltimore channels 2, 13, and 45. Transmissions of these Baltimore television stations may be received in the District of Columbia and Northern Virginia and the Sunday editions of both newspapers are circulated in states other than Maryland (Tr. 26, 555, 568, 608, 609-617).

10. J.C.B. Dist. advertised on a regular basis in newspapers, including the Washington Post, the Washington Star, and the Washington Daily News, all of which have substantial interstate circulation, the latter two papers now constituting the Washington Star News (Tr. 31, 38, 142, 603), and it ran a commercial on Washington television channel 20 for a short period of time in 1971 (see CX B-7; Tr. 63).

11. In the course and conduct of their businesses of advertising, offering for sale, sale and installation of carpeting, respondents have engaged in a substantial course of trade in commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. 44) (Findings 7, 8, 9, 10, *supra*).

12. In the course and conduct of their businesses, respondents in their advertisements and by representations of their salesmen have made, among other statements, the following statements to prospective purchasers with respect to their products and services:

- (a) CARPETING "DIRECT FROM OUR FAMILY MILL" (CX D 27, 28, 31);
- (b) WE SELL FOR LESS - WE MAKE IT OURSELVES (CX D 4, 9, 10, 11, 21, 22, 23);
- (c) MR. CARPET SAYS: "YOU CAN NOW AFFORD" TO CARPET YOUR ENTIRE HOME - INCLUDING 5 AREAS - Living Room, Dining Room, Hall, Stairs and Landings \$139 100% NYLON PILE, From our Family's Factory To You! 270 Square Feet WALL TO WALL FREE PADDING AND LABOR! (CX D 8, 12);
- (d) Dupont 501 Nylon Carpet Up to 320 Sq. Ft. installed Wall to Wall at no additional cost. Free padding \$189 FREE! PORTABLE TELEVISION With the purchase of our deluxe carpeting (CX D 27, 28, 35);
- (e) WASHINGTON'S GREATEST CARPET SALE!! Mr. Carpet can save you money! We have our own mill and our own warehouse in order to lower our overhead. Thousands of yards in our warehouse. You lose money if you don't check with us before you buy carpeting! (CX D 5, 13, 14, 15);
- (f) INSTALLATION INCLUDED WALL-TO-WALL PADDING FREE (CX D 27, 28, 35);
- (g) 10 Year Guarantee (CX F 14, 19, 23(a), 197).

13. Through such statements as "Carpeting Direct from our Family Mill" or "We sell for less - We make it ourselves," coupled with a picture

of a factory and a figure carrying rolls of carpet, respondents represent to prospective consumers that they are a factory outlet of an integrated manufacturing and retailing business organization, and accordingly, were able to sell carpeting at lower prices than other competing retail carpet dealers (CX D 27, 28, 31; see also Tr. 401, 410-413, 432, 438, 461, 462, 488, 506-507).

14. Respondents did not manufacture carpeting but purchased it from sources which were generally available to their competitors. Only a small quantity of carpeting was purchased by respondents from Wilbanks' in-law relatives (Tr. 92-95, 149, 196-198, 212-214).

15. The representations set forth in Finding 13, *supra*, were untrue and had the tendency to mislead prospective consumers (RPF, Concl. 3).

16. Through such statements as "You can now afford to carpet your entire home - including 5 areas - Living Room, Dining Room, Hall, Stairs and Landings, \$139, 100% Nylon Pile, From Our Family's Factory to You! 270 Square Feet, Wall to Wall, Free Padding and Labor!" respondents represent that they are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements (see CX D 8, 12).

17. The so-called "5 areas for \$139" advertisements² did not constitute a bona fide offer to sell the advertised carpeting. Such advertising was used primarily to obtain "customer leads" in order to sell to them more expensive carpeting (see RPF, Concl. 4).

18. Because of the poor appearance and condition of the samples of the advertised carpeting shown to the prospective customers, they immediately rejected any idea of purchasing it (See CX J 1-6; Tr. 337-338, 402, 418, 441, 451, 463, 477, 466, 484, 507, 517-518, 533, 557, 570, 589, 596, 619, 635, 650, 675).

19. Very few actual sales were made of the advertised carpeting at the price and on the terms set forth in the advertisements (Tr. 241, 289; see CX F 1-550B).

20. The salesman's commission on the sale of the advertised carpeting was very small (Tr. 75, 146-147).

21. Although respondents did have some carpeting in stock which they could sell at the advertised price, *i.e.*, \$139, at little or no profit, such carpeting was not specifically designated in advance as the advertised carpeting and salesmen merely used respondents' generic names such as "Candystripe" or "Adios" to designate a sale of such carpeting (see Tr. 46, 69-72, 137; see also CX K).

²The areas and prices contained in this type of advertisement vary. Findings 17 through 28 refer also to all of the "areas for stated price" representations.

22. In addition to the very appearance of the samples of the advertised carpeting, respondents' salesmen disparaged this carpeting, saying, for example, that it was not good carpeting or that it would not last long (see Physical Exhibit CX J 1-6; Tr. 298, 457, 477, 484, 508, 518, 538, 557, 569, 619, 674).

23. In most instances, the salesman attempted to sell a different and more expensive carpet product than the advertised carpeting (*ibid.*).

24. Salesmen's commissions on the higher priced carpeting were substantially more than on the advertised carpeting, such commissions being based on the difference between the "par" price established by respondents and the amount of the sale. The sale price was established by the salesmen at the time that the sale was consummated at the customer's home, there being no established upper limit (Tr. 38-44, 159-160, 241-243, 288).

25. Although the offer of a "free" television set or vacuum cleaner was made in most advertisements (see CX D-43), an offer which appeared to be related to the advertised carpeting and which prompted many prospective consumers to call respondents initially, the "free" offer was limited to a "deluxe carpeting" determined at the discretion of the salesman, was not offered with the advertised carpeting, and, when given to the purchaser, the cost thereof was subtracted from the amount upon which the salesman's commission was computed (RPF, Concl. 6; Tr. 100, 150, 151, 156, 158-159, 246-249, 299-301; see Tr. 401, 456, 476, 479, 618, 634, 674; CX B-2; see also customer contracts, CSCPF p. 48).

26. Through the use of such advertising respondents were able to obtain leads to persons who were interested in purchasing carpeting, and, when calling upon said persons in their homes, attempted to and did sell more expensive carpeting than the advertised carpeting (Findings 16, 17, 18, 19, 20, 21, 22, 23, 24, 25; RPF, Concl. 4; Tr. 378-379, 434, 441-442, 458, 464-465, 477-478, 493-494).

27. Through the use of the word "SALE" and other words of similar import, respondents represented that the carpeting and floor covering offered in such advertisements could be purchased at reduced or special prices, affording consumers savings from respondents' regular selling price for such products (see CX D 30, 32, 33).

28. Examination of the advertisements themselves show, and Wilbanks testified, that the "sale" prices were the regular prices for which the advertised carpeting was offered for sale and such prices were not reduced or special prices and that the consumer would not receive a

saving from respondents' regular price for such products (RPF, Concl. 5; see Finding 21, *supra*; Tr. 96-100).

29. Through the use of such words as "Installation included, wall-to-wall padding free," respondents represented that all of the carpeting mentioned in said advertisements was to be installed with separate padding included at the advertised price (see CX D 27, 28, 35).

30. Certain of the advertised carpeting had a rubberized backing bonded to the carpeting and this carpeting was not installed with separate padding (Tr. 78, see Tr. 121-122, 134, see also Tr. 672).

31. Through the use of such words as "guaranteed for 10 years" or any other specifically mentioned period, either in their advertising or written on consumer contracts, respondents represented that the advertised carpeting or the carpeting actually sold was unconditionally guaranteed for the time period specified (CSCPF, p. 44).

32. Respondents' guarantee was not an unconditional guarantee, but was a limited "prorated wear" guarantee (CX B-12a; Tr. 104, 301, 302, 458, 477, 518, 539).

33. In the course and conduct of their business respondents, through various representations in their advertisements, as well as oral representations of their salesmen, induced consumers into signing customer contracts without giving the consumer sufficient time to consider carefully the purchase, and the terms or the consequences thereof (Tr. 378, 403, 418, 435, 493, 541, 571, 583, 589, 620).

34. In circumstances where respondents sold the advertised carpeting in quantities greater than the area of coverage contained in the advertisements, *i.e.* 270 square feet or 320 square feet, the additional carpeting was priced substantially higher than the rate for the advertised coverage, although no information to this effect is contained in the advertisement (Tr. 102-103, 153).

35. Although the unit of measurement usually and customarily employed in the retail sale of carpeting is square yards, respondents used square foot measurements to describe the coverage of their advertised carpeting, which tended to exaggerate the quantity of carpeting being offered (See Tr. 182-184, 252-253, 275-276, 401, 413, 420, 426, 437, 455, 475, 565, 575, 594-595).

36. In the course and conduct of their business, respondents have been, and now are, in substantial competition with corporations, firms and individuals in the sale and distribution of rugs, carpeting, and floor coverings, and service of the same general kind and nature as those sold by respondents (Tr. 123-124).

37. In the ordinary course and conduct of their business respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act (Ans. pp. 4, 5; CSCPF, 56).

38. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business, and in connection with their "credit sales" as defined in Regulation Z, have caused customers to execute binding retail installment contracts (Ans., p. 5; CSCPF, p. 56).

39. By and through the use of the retail installment contracts, respondents failed in some instances to disclose the due dates or periods of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z (see customer contracts, CSCPF, p. 57).

40. By and through the use of the retail installment contracts, respondents failed in some instances to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provision of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z (see customer contracts, CSCPF, p. 57).

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Specialists, Wilbanks, J.C.B. Dist. and Miller.

Said respondents have at all times relevant hereto engaged in interstate commerce within the intent and meaning of Sections 4 and 5 of the Federal Trade Commission Act. There is no doubt on this record that both Specialists and J.C.B. Dist. advertised in commerce. The newspapers in which such advertisements were placed have interstate circulation. The television stations over which such advertisements were transmitted, are interstate in range. In addition, during the period from early 1970 until Nov. 1972, J.C.B. Dist. and Specialists were engaged in a course of trade in commerce. Specialist purchased carpeting from suppliers located outside the State of Maryland and warehoused such carpeting in anticipation of sales to J.C.B. Dist. for shipment directly to customers located in the District of Columbia and Northern Virginia. *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951); *Holland Furnace Co. v. Federal Trade Commission*, 269 F.2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 932; *Guziak v. Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966). All acts and practices which were part of these transactions were methods of competition or acts and practices in commerce within the coverage of the Federal Trade Commission Act.

See *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944); *Holland Furnace Co. v. Federal Trade Commission*, *supra*.

2. Respondents Wilbanks and Specialists are responsible for their own actions as well as for the actions of J.C.B. Dist. Respondents contend that because Specialists and J.C.B. Dist. are separate corporations, operated separately in their own distinct geographic trading areas with different personnel, different stores, different banking arrangements etc. (see RPF 14), that the acts and practices of J.C.B. Dist. and its salesmen are not to be considered as the acts and practices of or the responsibility of Specialists (Tr. 129-130). Parsing the record, they contend that there is no direct evidence that Specialists engaged in the admittedly illegal conduct in which J.C.B. Dist. was engaged and that, accordingly, certain provisions of the proposed order should not be entered against Specialists. Wilbanks contends that he was not responsible for the day-to-day operation of J.C.B. Dist. or its salesmen's conduct, and that, accordingly, he is not responsible, individually, for the actions of J.C.B. Dist. or its salesmen.

Respondents' arguments must be rejected for at least three reasons.³ First, as stated in Conclusion 1, *supra*, Specialists was directly involved in the chain of events that resulted in the "switched carpet" being delivered to the consumer. It directly benefited from whatever practices J.C.B. Dist. and its salesmen used to make the sale of said products, including the advertising and the salesmen's representations. Specialists is responsible, under the Federal Trade Commission Act, for any illegal conduct engaged in by J.C.B. Dist. *Star Office Supply Co.*, 77 F.T.C. 383, 445 (1970), *affirmed per curiam*, 2d Cir. No. 35066 (1972) (not reported); *Parke, Austin & Lipscomb, Inc. v. Federal Trade Commission*, 142 F.2d 437 (2d Cir. 1944), *cert. denied*, 323 U.S. 753. policy decisions relative to the advertising format used by J.C.B. Dist. as well as its finances. He is also liable for the acts and practices in which J.C.B. Dist. was found to be engaged. *Sunshine Art Studios, Inc. v. Federal Trade Commission*, 481 F.2d 1171 (1st Cir. 1973).

Second, the J.C.B. Dist. advertising and sales policies, including the method of compensating its salesmen, and the handling of carpeting, placed in the hands of said salesmen the instrumentality by which certain unfair and deceptive acts and practices were conducted. Specialists and Wilbanks were essential to the J.C.B. Dist. operation and are

³The consumer testimony of the Baltimore witnesses, firmly established that Specialists' advertising, especially on television, included most, if not all, of the representations covered in this proceeding, and that Specialists' salesmen engaged in tactics designed to switch customers to a higher priced product. (See also CX D 29, 31, 32, 39; RX 1-12).

responsible for its acts and practices. Cf. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F.2d 273, 281 (3d Cir. 1952); *Regina Corp. v. Federal Trade Commission*, 322 F.2d 765 (3d Cir. 1963).

Third, the business operation of Specialists and J.C.B. Dist. are substantially the same. The advertising is similar, the Mr. Carpet Centers trade name was used by both (Tr. 69), and the method of selling appears to be similar (compare testimony of Washington area consumer witnesses with Baltimore area consumer witnesses). In the circumstances it is a fair inference that both corporations were guided by the same policies. Wilbanks and Miller, co-owners of both corporations, either were well aware or should have been aware of all the acts and practices challenged in this proceeding, and they are responsible for all of the acts and practices of both of the corporations. *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112 (1937).

3. The said acts and practices of respondents challenged in the complaint and in which they were found to be engaged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

It is well established that it is an unfair trade practice to make statements in advertising which have the tendency and capacity to deceive the prospective customer. *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523 (5th Cir. 1963). The Commission may challenge and prevent true statements if, when considered in the context of all representations made, the advertisement has that tendency and capacity to mislead. *J. B. Williams Co. v. Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967). Furthermore, where the advertisements themselves sufficiently demonstrate their capacity to deceive, the Commission can find the requisite deception or capacity to deceive on a visual examination of the exhibits without evidence the public was actually deceived. *Double Eagle Lubricants, Inc. v. Federal Trade Commission*, 360 F.2d 268, 270 (10th Cir. 1965); *Mohr v. Federal Trade Commission*, 272 F.2d 401, 405 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960).

It is also an unfair trade practice to fail to reveal any relevant and material fact concerning the matters set forth in an advertisement where such information might be important to the prospective customer in his choice as to whether to purchase the product or service advertised. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S.

Initial Decision

84 F.T.C.

374 (1965); *Spiegel, Inc. v. Federal Trade Commission*, 7th Cir. No. 73-1233 (March 18, 1974).

It is no defense to a charge of engaging in unfair trade practices to assert that the customer was advised of the truth or of all material facts before making his choice to purchase. The initial contact, if deceptive, may be prohibited under the Federal Trade Commission Act. *Exposition Press, Inc. v. Federal Trade Commission*, 295 F.2d 869, 873 (2d Cir. 1961) *cert. denied*, 370 U.S. 917 (1962); *Carter Products, Inc. v. Federal Trade Commission*, 186 F.2d 821, 824 (7th Cir. 1951).

With respect to the specific practices challenged in the complaint in this proceeding, it is an unfair trade practice to falsely represent that one is a manufacturer. See *Goodman v. Federal Trade Commission*, 244 F.2d 584 (9th Cir. 1957); *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 216 (1933).

It is an unfair trade practice to advertise a product in order to obtain contact with a prospective customer for the purpose of selling another product. *Tashof v. Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Pati-Port Inc. v. Federal Trade Commission*, 313 F.2d 103 (3d Cir. 1963). Respondents contend that, although their "5 areas for \$139" advertisements were improper "bait" advertising, in advertisements where they also offered other products, no improper conduct was involved. I disagree. If any portion of an advertisement is "bait," it is no cure to also advertise another more expensive product at the same time. In any event the record shows that in many of the transactions, the carpeting actually sold to the consumer was not carpeting that was particularly advertised along with the so-called advertised special.

It is an unfair trade practice to misrepresent that a price is a "sale" price, if in fact it is the usual and customary price at which the product is sold. *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883.

It is an unfair trade practice to offer an unconditional guarantee in an advertisement or on a customer contract when in fact there are undisclosed conditions on the terms of the actual guarantee. *Coro, Inc. v. Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Benrus Watch Co. v. Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

It is an unfair trade practice to offer anything as "free," if the cost thereof is included in the cost of the merchandise. *Federal Trade Commission v. Mary Carter Paint Co.*, 382 U.S. 46 (1965); *Sunshine Art Studios, Inc. v. Federal Trade Commission*, *supra*.

It is an unfair trade practice to manipulate a prospective consumer by high pressure tactics. *Household Sewing Machine Co., Inc.*, 76 F.T.C. 207, 242-243 (1969); see also Trade Regulation Rule "Cooling-Off Period for Door-to-Door Sales" 16 C.F.R. Part 429 (Effective date: June 7, 1974).

Where the cost of additional carpeting is at a higher rate than the rate of the offered merchandise, it is unfair and deceptive not to state that fact in the advertisement. *Federal Trade Commission v. Colgate-Palmolive Co.*, *supra*.

Stating the area to be covered by the carpeting offered for sale in terms of "square feet," exaggerates the area to be covered, and such exaggeration has the tendency and capacity to deceive and is an unfair trade practice. See *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F.2d 676, 679-680 (2d Cir. 1944).

It is an unfair trade practice not to install separate padding as advertised, even where the product sold has a bonded latex backing, unless the customer expressly states that he does not want the extra padding. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934); *National Trade Publications Service, Inc. v. Federal Trade Commission*, 300 F.2d 790, 792 (8th Cir. 1962).

4. Pursuant to Section 103(q) of the Truth in Lending Act (15 U.S.C.A. 1602(q)) respondents' failures to comply with the provisions of Regulation Z constitutes violations of that Act and, pursuant to Section 108(c) thereof, respondents violated the Federal Trade Commission Act. See *Zale Corp. v. Federal Trade Commission*, 473 F.2d 1317 (5th Cir. 1973).

THE REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

It is also well settled that the Commission may require affirmative statements in advertising where failure to make such statements leaves

false and misleading impressions. *Federal Trade Commission v. Colgate-Palmolive Co.*, *supra*.

Counsel supporting the complaint have proposed an order which, except for slight modifications, is substantially similar to the notice order which was attached to the complaint (see CSCPF pp. 62-73).

Respondents do not object to most of the provisions of the order. Consistent with their proposed findings and conclusions they claim, however, that issuance of Pars. 8(a), (b), (c), 10, 12, 14, 15, 17, 27, 28, 29, and 30 would not have any support in the record. The question at this posture of the case is whether these paragraphs of the order are reasonably related to practices in which respondents were found to be engaged, not whether the evidence demonstrates that they engaged in the specific practices.

Paragraphs 8(a), (b) and (c) cover representations concerning reduced or special prices. Each relates to a specific type of savings claim in terms of comparative pricing. These prohibitions and definitions are reasonably related to the practice of representing a product is on "sale" when in fact, it is being offered at its "regular" price.

Paragraphs 10, 29, and 30 cover specific statements and representations contained in respondents advertising that were found to have a tendency and capacity to deceive.

Paragraphs 12, 14, 15 and 17, relate to the use of the word "free" or any similar term. Although these particular prohibitions cover certain types of "free" goods offers different than respondents' representations concerning free goods, such as television sets or vacuum cleaners, or free installation or padding, these prohibitions do set forth certain guidelines for any future representation that something is "free." In my opinion these paragraphs are reasonably related to respondents' past practices.

Paragraphs 27 and 28 of the proposed order which relate to respondents' obligations in handling situations in which customers may cancel purchase contracts are part of the general provisions of the order stated in Paragraphs 19 through 26 and are proper. Paragraph 23, which respondents claim is meaningless, seems clear to me. It prohibits respondents from inserting any waiver of a customer's rights in the terms of a purchase contract.

Respondents claim that Paragraph 4 of the proposed order is too restrictive, in that it unnecessarily prohibits "honest advice by salesmen to consumers of the suitability of certain carpeting." This paragraph relates to an integral part of the "bait & switch" scheme. The record shows that an experienced salesman can use even "honest advice" to

510

Initial Decision

effect the switch (see Tr. 235-237, 241-242, 261-262, 434). The prohibition is proper in the context of this case.

Respondents also assert that certain record keeping requirements of the order, *viz.*, Pars. 6(b) and (c), would impose a hardship and undue burden because respondents are small businesses without any sophisticated method of bookkeeping available to them. In my opinion compliance with Par. 6(b) relating to records showing the volume of sales made of advertised products or services at the advertised price would not require much in the way of bookkeeping, merely the separate filing of copies of customer contracts relating to such transactions. With respect to establishing "net profit" on such sales, the other relevant information would be the purchase invoices showing the cost. Other costs, such as installation, padding and other general overhead expenses are apparently not difficult to determine (see Tr. 41-43, 75-79).

In any event the exact manner of compliance and the difficulties of bookkeeping would depend on the advertising itself. General observations at this point in the proceedings mean little. Suffice to say that the record in this case shows the difficulty in correlating advertised specials with any particular product in stock and this demonstrates the need for some documentation as required by Paragraph 6 in order to ensure against a repetition of the practices in which respondents were engaged (see Tr. 82-83, 145).

Although respondents apparently concede that the obligations imposed by Paragraphs 19, 20, 21, 22, 24 and 25, and perhaps even 23, seem appropriate, they contend that these requirements should be limited to sales made in customers' homes and should not relate to "in store" sales, or where a customer demands immediate installation or emergency services. Respondents' contentions appear to be consistent with the tenor of the Commission's Trade Regulation Rule on the "Cooling Off Period for Door-to-Door Sales" which is limited to in house sales (16 C.F.R. §429.1, *et seq.*).

The language of the paragraphs of the order appear to be directed primarily to situations where a contract is entered into for purchase of carpeting, or other merchandise, for later delivery, installation, and payment. The fact that this contract is executed "in store" or for cash, in my opinion, does not alter the fact that consumers are entitled to the same protection. The fact that the carpeting has been actually installed does not alter the need for the various provisions of the order to protect the customers' rights in case of cancellation. To hold otherwise would give respondents subjective control over their obligations to the consumer.

The record in this case, which demonstrates that respondents, in some instances, have been reluctant to act on customer complaints, or return deposits promptly, is ample support for including all transactions under the various terms of the order (Tr. 472, 501-505, 534, 590-594, 621-622, 646-647, 651, 677).

The "consumer warning" provision set forth in the notice order that accompanied the complaint has been amended by complaint counsel "to conform with the Commission's recent directive" concerning the language of such a warning in similar matters, although the administrative law judge has not been exposed to any such directive. The modified proposed warning, which would appear in all future advertisements disseminated by respondents, reads as follows:

The Federal Trade Commission has found that we engage in bait & switch advertising practices; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

Respondents claim that any such notice in advertising "will have the probable effect of destroying its business at no public benefit." Alternatively, respondents propose four other possible disclosures which do not contain the term "bait and switch" (see RPF, Concl. 7, 8, 9).⁴

Complaint counsel, in support of their proposed order, argue that by its very nature the practice of "bait & switch" can be done so smoothly that few customers realize or for that matter are "likely to complain that they had been baited and switched" (CSC Reply, p. 8-10). In the circumstances, according to complaint counsel, "the consumer warning provision is the only method by which a consumer would be alerted to possible unfair practices which may be perpetrated on him in his own home" (CSC Reply, p. 10). Complaint counsel add that such a required disclosure "puts the consumer in a position where he can deal effectively with the salesman in his home. If he realizes he is being switched to a higher priced product which he had no intention of purchasing, he may choose to dismiss the salesman and shop another company * * * Additionally, the provision serves as an incentive to the company as well as the salesman to abide by the terms of the order." (CSC Reply, p. 10).

I have no doubt that the Commission has the power to require affirmative disclosure of any material fact, which if known to the prospective consumer, might affect his choice of whether to do business with an advertiser. This was the Commission's rationale that was sus-

⁴ A. "Our advertising is subject to an order of the Federal Trade Commission;" B. "We must comply with an Order of the Federal Trade Commission respecting fair advertising;" C. "The Federal Trade Commission has required that this advertisement be truthful and fair;" or D. "We are required by the Federal Trade Commission to sell the products which we advertise." (RPF, Concl. 8).

tained by the Supreme Court in *Federal Trade Commission v. Colgate-Palmolive Co.*, *supra*. Certainly, the results of this proceeding, if an order becomes final, would be such a material fact.

And although I agree with complaint counsel's reasons for including a consumer warning in the order in this case, I have serious problems reconciling the "consumer warning" disclosure proposed with those supporting reasons. First the proposed warning presupposes that respondents will continue to engage in "bait & switch" practices and that any advertisement on which the disclosure appears is the "bait." It is not clear to me whether an advertisement which does not state any price for a generic product line, such as carpeting, is "bait." According to the Commission's Guides Against Bait Advertising, 16 C.F.C. Part 238, a price representation is not an essential element of the "bait." In any event, the proposed consumer warning also assumes that respondents are violating the terms of the order. Second, the warning may arm the prospective customer with knowledge about respondents, but certainly does not put the average consumer in a position where he can effectively deal with the salesman in his home.

In my opinion, the Commission ought not to use a warning which assumes in advance that respondents will continue unabated their past practices. This would be quite punitive. Further, the warning should give the prospective customer information on which he might initiate a complaint to the Federal Trade Commission concerning any noncompliance. I can think of no better deterrent to a respondent or protection for the consumer.

In this respect it should be pointed out that what the Commission *found* concerning respondents' practices during the administrative proceeding is not particularly material to postorder matters. According to the entire statutory scheme, the *order* is the thing. It is upon the specific terms of the order that respondents' future conduct must be measured, and upon which civil penalty proceedings are based. The subject matter of the order is of course a material fact.

I also think that use of the words "bait & switch" in the warning is punitive. It is interesting to note that such language does not appear in the complaint, and except for the proposed warning, does not appear elsewhere in the order. This term, although having a certain general legal connotation, covers a wide range of practices and because the consumers' understanding thereof may not be precise, it may tend to convey a wrong impression to them.

Accordingly, the following affirmative disclosure will be substituted

Initial Decision

84 F.T.C.

for the warning proposed, it being my opinion that it is truthful, understandable, useful, remedial, and not punitive:

We are subject to the prohibitions of a Federal Trade Commission Order in Docket 8933, that requires us to sell the products which we advertise without attempting to sell you a different item or a higher priced item.

As I have already observed, counsel supporting the complaint's proposed warning would cover all of respondents' advertisements irrespective of whether a specific product is identified therein. In view of respondents' past conduct and because the question as to whether the warning requirement should be retained can be reviewed one year from the date that the order becomes final, I believe it appropriate to require it on all advertising.

It should be pointed out in conclusion that since J.C.B. Dist., ceased operations in late 1972, it appears that all of Specialists' sales activities have taken place inside the boundaries of the State of Maryland (Tr. 741-742). It further appears that the only "commerce" component of these transactions is the coincidental interstate circulation of newspaper advertisements or the interstate transmission of television commercials. For example, approximately 4 percent of the Sunday circulation of the Baltimore News American is interstate (Tr. 613-616).

Specialists argues that the Commission cannot regulate its intrastate business (RPF, Concl. 2). The preamble to the paragraphs of Part I of the order as well as that to the "consumer warning" provision are limited to activities "in connection with the advertising, offering for sale, sale, distribution or installation of carpeting and floor covering, or any other merchandise, in commerce." In my opinion, the order is clearly limited to interstate commerce matters in which respondents may engage in the future, and Specialists' argument is one for compliance and not a matter which affects the Commission's jurisdiction to enter an order based on past, although perhaps discontinued, interstate activities. See *Guziak v. Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007.

ORDER

I

It is ordered, That respondents Wilbanks Carpet Specialists, Inc., a corporation, trading as Mr. Carpet Centers and Design Carpets Consultants, and J.C.B. Distributors, Inc., a corporation, trading as Mr. Carpet Centers or any other trade name or names, their successors and assigns and their officers, and George Wilbanks and Lester L. Miller, individ-

ually and as officers of said corporations, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution or installation of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, orally or in writing, directly or by implication, that respondents are an integrated manufacturing and retailing business organization, or misrepresenting, in any manner, the nature, status, connections, or scope of respondents' business.

2. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

3. Making representations, orally or in writing, directly or by implication, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

4. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

5. Representing, orally or in writing, directly or by implication, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

6. Failing to maintain and produce for inspection and copying for a period of three years following the date of publication of any advertisement, adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

- a. the cost of publishing each advertisement including the preparation and dissemination thereof;

- b. the volume of sales made of the advertised product or service at the advertised price; and

- c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

7. Using the word "Sale," or any other word or words of similar import or meaning not set forth specifically herein unless the price of such merchandise being offered for sale constitutes a reduction,

in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent regular course of their business.

8. (a) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise has been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

9. Failing to maintain and produce for inspection or copying for a period of three (3) years following the date on which any savings claims, sales claims, or other similar representations are made, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraphs Five, Eight and Nine of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

10. Representing, orally or in writing, directly or by implication, that a stated price for carpeting or floor coverings includes the cost of a separate padding and the installation of such padding and carpeting thereof, unless in every instance where it is so represented the stated price for floor covering does, in fact, include the cost of such separate padding and installation thereof; or misrepresenting in any manner, the prices, terms, or conditions under which respondents supply separate padding and provide installation in connection with the sale of floor covering products.

11. Representing, orally or in writing, directly or by implication, that any product or service is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and respondents deliver to each purchaser, prior to the signing of the sales contract, a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, orally or in writing, directly or by implication, made to each such purchaser, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of each such guarantee.

12. Representing, directly or indirectly, orally or in writing, that any price amount is respondents' regular price for any article of merchandise or service unless said amount is the price at which such merchandise or service has been sold or offered for sale by respondents for a reasonably substantial period of time in the recent, regular course of their business and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

13. Representing, directly or indirectly, orally or in writing, that a purchaser of respondents' merchandise or services will receive a "free" vacuum cleaner or kitchen carpeting or any other "free" merchandise, service, prize or award unless all conditions, obligations, or other prerequisites to the receipt and retention of such merchandise, services, gifts, prizes or awards are clearly and conspicuously disclosed at the outset in close conjunction with the word "free" wherever it first appears in each advertisement or offer.

14. Representing, directly or indirectly, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the purchaser of advertised merchandise or services, when, in fact, the

cost of such merchandise or service is regularly included in the selling price of the advertised merchandise or service.

15. Representing, directly or indirectly, orally or in writing, that a "free" offer is being made in connection with the introduction of new merchandise or services offered for sale at a specified price unless the respondents expect, in good faith, to discontinue the offer after a limited time and commence selling such merchandise or service, separately, at the same price at which it was sold with a "free" offer.

16. Representing, directly or indirectly, orally or in writing, that merchandise or service is being offered "free" with the sale of merchandise or service which is usually sold at a price arrived at through bargaining, rather than at a regular price, or where there may be a regular price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

17. Representing, directly or indirectly, orally or in writing, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three such "free" offers shall be made in the same area in any twelve (12) month period. In such period, respondents' sale in that area of the product or service in the amount, size or quality promoted with the "free" offer shall not exceed 50 percent of the total volume of its sales of the product or service, in the same amount, size or quality, in the area.

18. Representing, directly or indirectly, orally or in writing, that a product or service is being offered as a "gift," "without charge," "bonus," or by other words or terms which tend to convey the impression to the consuming public that the article of merchandise or service is free, when the use of the term "free" in relation thereto is prohibited by the provisions of this order.

19. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

20. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the

seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

21. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

[enter date of transaction]
(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED. IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR THE PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [Name of seller], AT [address of seller's place of business] NOT LATER THAN MIDNIGHT OF .
(date)

Initial Decision

84 F.T.C.

I HEREBY CANCEL THIS TRANSACTION.

(Date)

(Buyer's signature)

22. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

23. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

24. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

25. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

26. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

27. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

28. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

29. Advertising the price of carpet, either separately or with padding and installation included, for specified areas of coverage without disclosing in immediate conjunction and with equal prominence the square yard price for additional quantities of such carpet with padding and installation needed.

30. Advertising any carpeting or floor covering using a unit of measurement not usually and customarily employed in the retail

advertising of carpet or which tends to exaggerate the size or quantity of carpeting or floor covering being offered at the advertised price.

Provided, however, That nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by Federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

II

It is further ordered, That respondents Wilbanks Carpet Specialists, Inc., a corporation, trading as Mr. Carpet Centers and Design Carpets Consultants, and J.C.B. Distributors, Inc., a corporation, trading as Mr. Carpet Centers or under any other trade name or names, their successors and assigns, and their officers, and George Wilbanks and Lester L. Miller, individually and as officers of said corporations, and respondents' agents, representatives, and employees, directly or through any corporate, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601. *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the due dates or periods of payments scheduled to repay the indebtedness, as required by Section 226.8(b) (3) of Regulation Z.
2. Failing to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b) (2) of Regulation Z.
3. Failing in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That each of respondents do forthwith cease and desist from disseminating, or causing the dissemination of, any advertisement of merchandise by means of newspapers, or other printed

media, television or radio, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, unless respondents clearly and conspicuously disclose in each advertisement the following notice set off from the text of the advertisement by a black border:

We are subject to the prohibitions of a Federal Trade Commission Order in Docket 8933, that requires us to sell the products which we advertise without attempting to sell you a different item or a higher priced item.

One year from the date this order becomes final or any time thereafter, respondents upon showing that they have discontinued the practices prohibited by this order and that the notice provision is no longer necessary to prevent the continuance of such practices may petition the Commission to waive compliance with this order provision.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisement, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may effect compliance obligations arising out of the order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale, sale of any product, consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliations with a new business or employment. Such notice shall include respondents' current business addresses and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

OPINION OF THE COMMISSION

BY NYE, *Commissioner*:

Counsel supporting the complaint appeal from that part of the order entered by the administrative law judge, denominated a "consumer warning" provision, which provides that respondents must include the following disclosure in all of their advertisements:

We are subject to the prohibitions of a Federal Trade Commission Order in Docket 8933, that requires us to sell the products which we advertise without attempting to sell you a different item or a higher priced item.

Counsel supporting the complaint argue for the text of the following provision, set forth in the amended notice order:

The Federal Trade Commission has found that we engage in bait & switch advertising practices; that is, the salesman makes it difficult to buy the advertised product and he attempts to switch you to a higher priced item.¹

The record in this case, however, does not support the requirement that respondents set forth any form of "consumer warning" text in their advertising; therefore, no such provision should appear in the order. This determination is, of course, without prejudice to the Commission's right to reopen this proceeding to consider the imposition of a "consumer warning" requirement, or to seek imposition of such relief in a

¹ The provision contained in the original notice order was as follows:

The Federal Trade Commission has found that we have engaged in bait & switch advertising solely designed to sell products other than those advertised.

Final Order

84 F.T.C.

civil penalty action against respondents,² should their future conduct warrant either course of action.

In all other respects, the order of the administrative law judge is affirmed.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the initial decision of the administrative law judge, and the matter having been heard upon complaint counsel's appeal brief and oral argument; and

The Commission having rendered its decision determining that the initial decision issued by the judge should be modified in accordance with the views expressed in the attached opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That complaint counsel's appeal from the initial decision of the administrative law judge be, and it hereby is, denied.

It is further ordered, That the initial decision issued by the administrative law judge be modified by striking therefrom the following:

Those portions of the conclusions of law which concern "consumer warning" relief (at pp. 17-19 *sub nom.* "*THE REMEDY*") [pp. 529-532 herein]; and the second "FURTHER ORDERED" paragraph of the order to cease and desist issued by the judge (at pp. 36-37) [pp. 539-540 herein].

As so modified, the initial decision is hereby adopted.

IN THE MATTER OF

FREIGHT LIQUIDATORS, ET AL.

Docket 8937. Interlocutory Order, Sept. 26, 1974

Order denying motion by counsel for three respondents for continuance of oral argument before the Commission but without prejudice to the right of counsel to request a rescheduling of oral argument for reasons consistent with those set out in the denial order.