

*It is further ordered,* That the complaint, insofar as it relates to individual respondents Irving H. Stolz, Seth Harrison and Frank Silver, be, and it hereby is, dismissed.

*It is further ordered,* That respondents 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 the order to cease and desist.

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IN THE MATTER OF  
GIMBEL BROTHERS, INC.

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

*Docket 7834. Complaint, Mar. 21, 1960—Decision, Oct. 17, 1962*

Order requiring the corporate operator of 13 retail department stores in and around the cities of New York, N.Y., Philadelphia and Pittsburgh, Pa., and Milwaukee, Wis., to cease making in advertising deceptive pricing and savings claims for merchandise—including rugs, luggage, Hotpoint refrigerators, and cashmere coats—through use of such words as “comparable value”, “regularly”, “originally”, “list price” with a fictitious price figure; and to cease overstating the size of rugs offered for sale.

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 Gimbel Brothers, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gimbel Brothers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 33rd Street and Broadway in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of floorcoverings, luggage, household appliances, women's wearing apparel and other articles of general merchandise to the public.

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Respondent operates a number of retail department stores and specialty shops throughout the United States. One or more of such stores are located in and around the metropolitan areas of New York, New York; Philadelphia, Pennsylvania; Chicago, Illinois; Detroit, Michigan; San Francisco, California; St. Louis, Missouri, and other localities in the United States.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused its said products, when sold, to be shipped from its various places of business as aforesaid to purchasers thereof located in various other States of the United States and in the District of Columbia. Furthermore, respondent advertises its aforesaid products for sale in various newspapers having interstate circulation. Persons are thereby induced to travel from the various other states into the states in which the aforesaid stores and shops are operated and to purchase and transport, or cause to be transported the aforesaid products into the states from which such persons came. Respondent maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the aforesaid advertisements of said products, respondent has made numerous representations respecting the price of the said products, amount of savings and the size of the floorcoverings.

Typical and illustrative of such representations are the following:

Gimbel's new group of reversible braided rugs \$49.95 sale 9 x 12' oval rugs . . . comparable value \$69.95. (Obscurely printed in one corner of the advertisement is the following: "All sizes approximate")

Never before this low price . . . compares to 9 x 12' all wool braids selling at 197.95 all wool braided rugs sale \$79.00 big 9 x 12' size. (Very obscurely printed in one corner is the following: "All sizes approximate")

Wool-blend braided rugs! Room sizes! Regularly 89.95 9 x 12' and 8 x 10' 39.95. (Obscurely printed in one corner "all sizes approximate")

heavy wool blend oval braid rugs 9 x 12 special! or 8 x 10 \$49. (no statement at all that sizes are approximate)

Sale! Featherweight luggage . . . \$6.98 to \$15.98 . . . sold last week at Gimbel's for \$9.98 to \$24.98 . . . a. 18" weekender, usually \$9.98 \$6.98 etc.

Sale! \$7.95 to \$15.95 comparable luggage is 10.98 to \$24.98 fiberglass reinforced featherweight luggage! Only at Gimbel's . . . 14" train case . . . reg. \$13.98 . . . now \$9.95 etc.

Gimbel's breaks the price on new 1959 Hotpoint Refrigerators . . . Sale . . . Hotpoint 14 cu. ft. Refrigerator . . . \$399 list price \$629.95 . . . Hotpoint 2-door 12 cubic foot refrigerator . . . sale \$329 list price 479.95.

Cashmere coat sale . . . value \$135 to 168 Einiger cashmere . . . \$88 reg. 135 Bernhard Altmann's cashmere . . . \$88 reg. 135 Mongolian cashmere . . . 109 reg. 165.

Wrap up in cashmere and save! Bernhard Altmann cashmere . . . sale \$88 originally \$135 . . . Mongolian cashmere . . . sale \$109 originally \$165.

PAR. 5. Through the use of the aforesaid statements, respondent has represented, directly or indirectly, that:

1. Rugs of like size, grade, quality, design and workmanship generally available for purchase at \$69.95 in the same trade area were being offered for sale by respondent at \$49.95; that rugs of like size, grade, quality, designs and workmanship generally available for purchase at \$197.95 in the same trade area were being offered for sale by respondent at \$79.00; and that rugs sold by respondent in the recent regular course of its business for \$89.95 were being offered for sale at \$39.95. In each of the aforesaid advertisements respondent further represented that said rugs were offered to the purchasers at substantial savings from such prices.

2. Respondent sold certain of said luggage in the recent regular course of its business at the higher amounts stated; that certain of said luggage was of a grade, quality, design and workmanship equal to that of higher priced luggage and that said luggage was offered to purchasers at a substantial savings from said higher prices.

3. The higher price amounts stated for the said refrigerators is the usual and customary retail price of the said refrigerators in the New York trade area and that a reduction in price with a consequent saving to the purchaser has been made by respondent.

4. Said women's coats were offered for sale by respondent in the recent regular course of its business at the higher price amounts and that reduction from respondent's higher prices had been made with consequent savings to the purchaser.

5. The size of said rugs was actually 9 x 12', 8 x 10' and other stated sizes with only minor variations resulting from uncontrollable factors in the manufacturing processes.

PAR. 6. Said statements and representations are false, misleading and deceptive. In truth and in fact:

1. Said rugs were not of a size, grade, quality, design and workmanship equal to rugs selling at the higher prices of \$69.95 or \$197.95; respondent has not offered said rugs for sale in the recent normal course of its business at \$89.95. The prices at which respondent offered said rugs for sale were its usual and regular retail selling prices for such rugs and no savings were afforded to the purchasers thereof.

2. Said luggage has not been offered for sale by respondent in the recent normal course of its business at the higher stated amounts; said luggage was not of a grade, quality, design and workmanship equal to luggage selling at the higher price amounts. The prices at which respondent offered said luggage for sale constituted the respondent's

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usual and customary retail selling price for said luggage and afforded no savings to the purchasers.

3. The higher stated "list price" of said refrigerators is not the usual and customary retail price in the New York trade area. The usual and customary price in the New York trade area of said refrigerators is an amount substantially less than the so-called "list price". Savings or reductions in the amounts indicated are therefore not afforded to the purchaser.

4. Respondent has not sold said women's coats at the higher price amounts in the recent normal course of its business. Savings are, therefore, not afforded to the purchaser of said women's coats in the amounts represented.

5. Said rugs are not of the stated sizes of 9 x 12', 8 x 10' or the other sizes stated by respondents with due allowances for uncontrollable factors in the manufacturing processes. Said rugs are purchased by respondent, invoiced and labelled as being of cut sizes. For example, certain of the aforesaid rugs are invoiced and labelled as 103'' x 139'' for the so-called 9 x 12' size; and 92'' x 116'' for the so-called 8 x 10 foot size. Other kinds and sizes of rugs are purchased, invoiced and labelled as substandard or "cut sizes".

PAR. 7. In the conduct of its business and at all times mentioned herein, respondent has been in substantial competition to commerce, with corporations, firms and individuals in the sale of floorcoverings, luggage, household appliances, women's wearing apparel and other articles of general merchandise of the same general kind and nature as that sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and substantial injury has thereby been and is being, done to competition to commerce.

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

*Mr. Terral A. Jordan* for the Commission.

*Solinger & Gordon*, of New York, N.Y., by *Mr. Eugene H. Gordon* and *Mr. Peter L. Szanton*, for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondent with use of certain misleading advertising in violation of the Federal Trade Commission Act. After the filing of respondent's answer, extended hearings were held at which evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted, oral argument not having been requested, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

2. The respondent, Gimbel Brothers, Inc., a corporation, is the owner and operator of a large retail department store in New York City and also of department stores located in Milwaukee, Philadelphia and Pittsburgh. There is no issue over the elements of interstate commerce and the existence of competition, respondent in its answer having admitted in substance the statements in the complaint in those respects.

3. The first issue raised in the complaint has to do with certain "comparative value" advertising done by respondent in connection with braided rugs. In an advertisement published in one of the New York City daily newspapers on March 8, 1959, respondent advertised certain braided rugs which it was offering for \$49.95 as having a "comparative value" of \$69.95 (Com. Ex. 11). Commission Exhibits 12 and 13 represent similar advertisements in other New York City papers. In another advertisement (Com. Ex. 16), respondent offered certain other braided rugs at \$79.00, stating that the rug "compares to 9 x 12' all wool braids selling at 197.95".

4. Briefly stated, the issue here is whether the rugs advertised by respondent at \$49.95 and \$79.00 were comparable, respectively, to rugs being offered by competing stores in the New York Metropolitan area for \$69.95 and \$197.95. It was to this issue that most of the testimony in the record was directed.

5. Both of respondent's rugs were manufactured in Japan, being designed by and manufactured to the order of a rug company in New York, Couristan, Inc. The \$49.95 rug was marketed under the name "Stoney Creek", while the \$79.00 rug was sold under the name "Bunker

Hill". Both rugs were designed by Couristan to compete with certain American-made rugs which were then being sold by retail stores in the New York City area. The rugs advertised by respondent were purchased by it from Couristan. As to fiber content, the Stoney Creek rug and the rug with which it was compared by respondent in its advertising both contained approximately 35 percent wool, 35 percent rayon, and 30 percent other fibers. The Bunker Hill rug and the rug with which it was compared by respondent were both 100 percent wool, or practically so.

6. The essential difference between respondent's rugs and the rugs with which they were compared lies in the method of construction or manufacture. The American-made rugs in question are of the "flat braid" construction, while the Stoney Creek and Bunker Hill rugs are of the "tubular wrap-around braid" construction. Both the flat braid and the tubular braid are woven around a core or filler which usually is made of wool "shoddy" or some other relatively inexpensive material.

It appears that the flat braid method provides more of an interlacing or interlocking effect and that this may afford a somewhat tighter or more closely woven fabric.

7. The two types of construction are exemplified by two rugs received in evidence (Resp. Exs. 21 and 22). Respondent Exhibit 21 is the flat braid "Wool 0" rug with which respondent compared the Bunker Hill rug in its advertising, and Respondent Exhibit 22 is the Bunker Hill rug. In design, texture, color, appearance, attractiveness, feel, etc., the two rugs are very similar. So far as the record indicates, there is no difference in the quality of the wool used in the two rugs.

8. The only real issue is over the question of wearability. On this issue, wearability, there is testimony from four experts. One is an official of Couristan, Inc., the designer and importer of the Stoney Creek and Bunker Hill rugs. Two are officials of American companies manufacturing and selling braided rugs made in the United States. The fourth is an official of an importing company which imports rugs from Japan and a number of other countries for sale in the United States. All four of the witnesses have had long experience in the manufacture and sale of braided rugs.

9. The Couristan official was of the opinion that the wearability of the Stoney Creek and Bunker Hill rugs is equal to that of the flat-braided rugs with which they were compared. The two American manufacturers were of a contrary view, basing their opinion largely on the fact that there is more interlacing or interlocking of the yarns in a flat-braided rug, thus affording a tighter construction. The other importer was of essentially the same opinion as the Couristan

official, that there is little or no difference in the wearability of the two types of rugs, or at least between flat-braided rugs and the particular tubular-braided rugs here involved.

10. None of the experts is without some self-interest in the proceeding. As already stated, the rugs here involved were designed and imported by Couristan from Japan, and respondent is one of Couristan's customers. The two American rug manufacturers are president and vice president, respectively, of a trade association which has as one of its principal purposes combatting, through tariffs and otherwise, the importation of foreign-made braided rugs into the United States, particularly from Japan. The fourth witness is an importer of rugs, including braided rugs made in Japan. His company has on occasions sold rugs to respondent.

11. It must be remembered that the issue here is not whether the rugs are identical or the same, but only whether they are comparable. Comparable means fit to be compared with or worthy of comparison. What we are here confronted with is a relative, not an absolute, term.

12. As already indicated, and particularly as demonstrated by the rugs received in evidence, the two types of rugs are very similar in appearance, design, texture, color, attractiveness, feel, etc. There is no evidence of any substantial difference in the kind or quality of the materials used.

13. On the sole remaining issue, wearability, the hearing examiner is unconvinced that the record establishes a sound basis for a definite finding or conclusion that either type of rug is materially superior to the other. There is substantial, reliable evidence on both sides, neither side having established its contention by the greater weight of the evidence. The legal principle decisive of the issue is that of burden of proof. In such a situation it necessarily follows that the complaint has not been sustained.

14. Another charge in the complaint is that respondent has misrepresented the size of its rugs. In giving the size of the various rugs referred to in its advertisements (Com. Exs. 11, 12, 13, 16, 34, 35), some of the sizes were stated in inches, which were correct. In the case, however, of some of the larger rugs, the sizes were stated in feet, and the rugs actually were not as large as indicated. For example, the rug listed as having a size of 9' x 12' was, in fact, only 103" x 139". That is, the rug was short by five inches in both width and length.

15. Each of the advertisements carried, in connection with the listing of sizes, the statement "All Sizes Approximate", and all of the

