

IN THE MATTER OF
SEARS, ROEBUCK AND CO., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9104. Complaint, Nov. 4, 1977 — Final Order, April 28, 1980*

This order requires, among other things, a Chicago, Ill. department store chain to cease, in connection with the advertising and sale of dishwashers, representing that its dishwashers will completely clean dishes, pots and pans without prior rinsing and scraping; and claiming without substantiation that items placed in the top rack of the dishwashers will get as clean as those on the bottom rack. The company is prohibited from making claims regarding the performance of any major home appliance unless those claims are supported by reliable and competent tests. Respondent is further barred from misrepresenting the purpose, content or conclusions of tests, studies, reports or surveys, and required to maintain specified records for a period of three years.

Appearances

For the Commission: *Robert Barton, Mitchell Paul, Ronald Bogard, Laurence Kahn and Louise Kotoshirodo.*

For the respondents: *Arthur Medow, Chicago, Ill., Mark Schattner, Wald, Harkrader & Ross, Washington, D.C., Burton Y. Weitzenseld and Frank C. McAleer, Arnstein, Gluck, Weitzenseld & Minow, Chicago, Ill. for respondent Sears, Roebuck and Co.; Howard Abrahms, New York City for respondent J. Walter Thompson Co.*

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW
JUDGE

SEPTEMBER 28, 1979

PRELIMINARY STATEMENT

On November 20, 1977, the Commission served its complaint in this proceeding on Sears, Roebuck and Co. ("Sears") and J. Walter Thompson Company charging them with disseminating deceptive and unfair advertisements in the course of an advertising campaign for Sears' dishwashing machines, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. More specifically, the complaint charged that respondents represented in national magazines

* Complaint previously published at 94 F.T.C. 331.

and newspapers and over radio and television, without having a reasonable basis therefor, that: [2]

1. the Lady Kenmore dishwasher would completely remove, without prior rinsing or scraping, all residue and film from dishes, pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers;

2. dishes in the top rack of the Lady Kenmore dishwashers would get as clean as those in the bottom rack without prior rinsing or scraping;

3. the Lady Kenmore "Sani-Wash" cycle, by giving dishes an "extra-hot 155° final rinse," destroyed all harmful and other bacteria and microorganisms on the dishes and pots and pans.

In addition to the charge that Sears and its advertising agency, J. Walter Thompson, made the foregoing representations without a reasonable basis, the complaint further charged that the advertising was false because Sears' Lady Kenmore dishwasher would not completely remove, without prior rinsing or scraping, all residue and film from all dishes including pots and pans, and because the "Sani-wash" cycle did not destroy all harmful and other bacteria and microorganisms on dishes, pots and pans.

The complaint also charged that respondents' advertisements were false in representing to the public that the demonstrations shown in the advertisements proved that Sears' Lady Kenmore dishwashers would completely remove, without prior rinsing or scraping, all residue and film remaining on dishes, pots and pans after cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers, when the contrary was the truth. Finally, the complaint charged that although respondents represented that pre-rinsing and pre-scraping were not necessary prior to washing eating and cooking dishes in the Lady Kenmore dishwasher, the Sears' Owners Manual, provided to purchasers, instructed them to pre-soak or pre-scour firmly cooked-on or baked-on foods. The complaint charged that these instructions in the Owners Manual were material "in light of the representations made in the advertising," that the advertising did not reveal the instructions, and was therefore deceptive and unfair.

Sears filed its answer to the complaint on January 19, 1978, denying most of the substantive allegations and raising four affirmative defenses. The affirmative defenses were: (1) that the challenged practices were abandoned by Sears; (2) that the challenged practices were industry-wide; (3) that the challenged advertising was insignifi-

cant and *de minimis* in scope; and (4) that the challenged advertising claims did not require prior substantiation because they [3]caused no material adverse effect upon the health or safety of consumers who, after using the product, were able to verify the claims for themselves and, if dissatisfied, could obtain a full refund.

Procedural History

The proceeding involved extensive pretrial activity including much controversy over discovery and motions of various kinds. Pretrial conferences were held on January 25, March 6, March 14, July 14 and September 26, 1978. On March 30 the undersigned denied motions of Sears and J. Walter Thompson seeking broad-scale discovery from third parties. On August 4, after oral argument held July 14, the undersigned granted complaint counsel's motion for partial summary decision with respect to Paragraphs 10, 13, 15, 18, and 20 of the complaint, ruling that the advertising conveyed the representations alleged.

In the meantime, J. Walter Thompson negotiated a consent settlement and on June 13 filed a motion to withdraw the complaint as to it from adjudication. On July 14 complaint counsel joined in this motion. The undersigned certified the motion to the Commission, and on July 19 the matter as to J. Walter Thompson was withdrawn from adjudication.

Hearings on the merits originally scheduled for September 6 were postponed to October 16 on which date the case-in-chief commenced. The presentation of complaint counsel's case took place in Washington, D.C., and concluded on November 20, 1978. Respondent Sears presented its defense in Chicago, Illinois, beginning on December 11, 1978, and concluding on January 26, 1979. Rebuttal hearings were held in Washington, D.C., on February 13-14, 1979.

On March 16, the undersigned excluded certain statistical evidence relative to Sears' advertising which had been received subject to check for accuracy by Sears, and ruled that the evidentiary phase of the case had been completed. In all, there were 28 actual hearing days. The record consists of 6,313 pages of transcript and several hundred exhibits, including a number of multipaged technical studies.

As an addendum to their proposed findings, complaint counsel moved that sanctions under Section 3.38 of the Rules of Practice should be imposed upon Sears, and disciplinary action should be taken against Sears' counsel for conduct related to discovery. Specifically, complaint counsel alleged that counsel for Sears did not comply in good faith with the orders of the undersigned to produce certain material. Sears filed

Initial Decision

separately its response to this motion of complaint counsel, and the undersigned has determined to address this issue in a separate document. The undersigned will not, however, exclude any documents from consideration (see CPF 364).

The proceeding is now before the administrative law judge for decision based upon the allegations of the complaint, the answer, the [4]evidence and the proposed findings of fact, conclusions and legal authority filed by the parties. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein, are rejected. The undersigned law judge, having considered the entire record, and all the contentions of respondent and complaint counsel, makes the following findings and conclusions, and issues the order to cease and desist at the end hereof.

FINDINGS OF FACT

I. Identity of Respondent and Nature of Its Business

1. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at Sears Tower, Chicago, Ill. (Complaint ¶ 1 and Answer, p. 1). Sears, Roebuck and Co. is the world's largest retailer of general merchandise, is one of the nation's largest advertisers (Sears Admissions) and is known to all.

2. Respondent Sears has been and is engaged in the advertising, distribution, and sale of portable and undercounter dishwashers, many of them under the "Lady Kenmore" brand name (Complaint ¶ 3 and Answer, p. 2). Estimated total dishwasher sales by Sears during the fiscal years 1971 through 1975 were as follows: \$73,470,000 in 1971; \$89,650,000 in 1972; \$94,500,000 in 1973; \$97,427,000 in 1974; and \$114,000,000 in 1975 (CX 112A). Sears, in fact, has by far the largest percentage share of U.S. consumer dishwasher sales, its closest competitors being Kitchen Aid and General Electric (see order issued September 26, 1979, in connection with *in camera* transcript pages).

3. In the course and conduct of its business, Sears causes dishwashers when sold to be transported from its place of business in various States of the United States and in the District of Columbia. Sears maintains and, at all times mentioned herein, has maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (Complaint ¶ 4 and Answer, p. 2). In the course and conduct of its business, Sears has been

and is in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of dishwashers (Complaint ¶ 5 and Answer, p. 2).

4. For the purpose of inducing the sale of its dishwashers and other consumer products, Sears has disseminated and caused the dissemination of advertising in national magazines, newspapers and other print media distributed across state lines, and in radio and television broadcasts transmitted by broadcasting stations located in various States of the United States and the District of Columbia [5]having sufficient power to carry such advertising across state lines. In addition, Sears had disseminated advertising in catalogs distributed by mail, and by other means, and through various outlets including point of sale (Complaint ¶ 8 and Answer, p. 3).

5. Respondent Sears, as stated, is the largest marketer of household dishwashing machines in the United States. In general, Sears' dishwashers are marketed under the "Kenmore" and "Lady Kenmore" brand names (Clifford, Tr. 4794), and this proceeding involves an advertising campaign for "Kenmore" and "Lady Kenmore" dishwashers (Tr. 478) which commenced in 1971 and continued through 1975 when the Commission began its investigation.

6. Dishwashers sold by Sears, including those sold during the period 1971 to 1975, were manufactured by Design and Manufacturing Corporation ("D&M"), located in Connorsville, Indiana (Cannon, Tr. 2442-43; Clifford, Tr. 4792; CX 83C, 187). The line of Sears' Kenmore dishwashers marketed from 1971 through 1975 was referred to as the "7200 line" (Clifford, Tr. 4993-94). They were available in both portable and undercounter models (CX 99A, 100A). Sears' 1971-1972 dishwashers ranged in price from \$99.00 to \$284.95 (CX 277C). Sears' 1973-1974 dishwashers ranged in price from \$169.95 to \$309.95 (CX 277Z007). The Lady Kenmore was the top model as well as the most expensive Sears' dishwasher sold from 1971 through 1975 (Cannon, Tr. 2496). Sears top-of-the-line dishwasher model is now called the "Sears Best" Kenmore dishwasher (Clifford, Tr. 4981).

7. Sears' dishwashers are equipped with a "macerator" blade with stainless steel teeth in the drain of the dishwasher (CX 83E, 338). The blade cuts up food so that it can wash down the drain and out of the dishwasher (CX 83E, 338). This blade and system, however, do not amount to a "garbage disposal" unit and Sears' dishwashers cannot be used as such. Sears' 7200 line dishwashers have two internal racks to hold dishes and other utensils. The upper rack is called the Roto-Rack. It is circular and is serviced by an upper spray tube which causes the rack to revolve during water agitation cycles. The lower rack is square

and is serviced by a lower spray arm (Fraser, Tr. 5240; CX 99B, 100B; 277Z008 - Z010).

8. The "7200 line" Lady Kenmore featured a "power wash" cycle in addition to "normal wash" cycle (CX 78B, 99G, 100G). Sears' "7200 line" Kenmore models lower in price than the Lady Kenmore featured only the "normal wash" (compare CX 277Z040-044, 046-049 with CX 277Z050). Sears stated that the "normal cycle" consisted of two wash cycles (phases) and four rinse cycles (phases) (CX 83Z002). In response to a question as to the phases of the "power wash" Sears advised the Commission on November 28, 1975, that the "normal cycle" on the Kenmore was substantially the same as the "power wash cycle" on the Lady Kenmore (CX 85A-C). [6]

II. The Challenged Advertisements Made the Representations Alleged in the Complaint

9. The record contains 54 advertisements for Sears' dishwashers (CX 345, pp. 1-3). The advertisements may be grouped into six categories: print advertisements in magazines of national circulation such as *Time*, *Reader's Digest*, *Family Circle*, *Sports Illustrated*, and *Better Homes and Gardens* (CX 1-3, 72-74); advertisements broadcast over national and local television (CX 4-10); advertisements in Sears' catalogs (CX 11-26); radio advertisements (CX 27-35); point of sale materials (CX 36-38); and newspaper advertisements (CX 39-54). The films and videotapes of the television commercials (CX 55-61, 265-66) are also in the record (CX 345, pp. 3-4, 20). The films of the various TV commercials are identified as follows: "Birthday Cake" (CX 55); "Weekend Clean Up" (CX 56); "Family-Revised" (CX 58); "Vicious Circle" (CX 59); "Freedom Maker" (CX 60); and "Pennypincher" (CX 61). These advertisements, including films and videotapes, were all considered by the undersigned in granting partial summary decision finding that the representations made in Sears' advertisements were as alleged in the complaint. Examples of the advertisement in issue are reprinted herein: CX 1 and CX 2 are print ads which appeared in magazines of national circulation; CX 4 and CX 5 are storyboards of TV ads broadcast over national television.

10. The dissemination schedules of Sears' advertisements are in the record (CX 62-77). Sears admitted the dissemination of CX 1 and CX 4 (Answer, p. 3). At trial, it was stipulated that CX 1-26 and CX 36-38 were disseminated (Tr. 496-97). The undersigned found that the other advertisements were disseminated in receiving CX 1 through CX 61 in evidence (Tr. 512-18). The schedules of publication for the national magazine advertisements (CX 1-3) from 1971 through 1974 were

introduced, respectively, as CX 71 through CX 74. The dissemination schedules for the various television commercials were as follows: CX 64A-F is the schedule for the "Birthday Cake" commercial (CX 4, 55); CX 65 is the schedule for "Weekend Clean Up" (CX 5, 56); CX 66 is the schedule for "Family" (CX 6, 57); CX 67 is the network television schedule and CX 68 is the spot television schedule for "Family-Revised" (CX 7, 58, 265, 266); CX 70 is the schedule for "Vicious Circle" (CX 8, 59); CX 77 is the schedule for "Freedom Maker" (CX 9, 60); and CX 69 is the schedule for "Pennypincher" (CX 10, 61; Tr. 485). These TV commercials were broadcast in the period between 1972 and 1975. The "Birthday Cake" commercial alone was disseminated for two and one-half years, from October 1972 through April 1975 (CX 64 A-F). The dissemination schedules for the catalog ads (CX 11A-26A) are set forth on each exhibit and are verified in CX 76 (Tr. 485). The dissemination schedule for the radio ads (CX 27-35) is shown as well as verified in CX 75 (Tr. 485). The initial dissemination for the point of sale brochures is shown on the face of the brochures (CX 36A-38A), and is verified in CX 63 (Tr. 485-86). The dissemination schedules for the newspaper ads (CX 39-54) are set forth on each exhibit and are verified in CX 62 (Tr. 486).

11. The undersigned granted complaint counsel's pretrial motion for partial summary decision and found, based on an examination of the advertisements in issue, including a viewing of the tapes of the [7] television advertisements, that the advertisements made the representations alleged in the complaint (Order Granting Complaint Counsel's Motion For Partial Summary Decision With Respect to Paragraphs Ten, Thirteen, Fifteen, Eighteen and Twenty Of The Complaint, issued August 4, 1978). Sears' advertisements unequivocally represented to the public that:

1. the Sears Lady Kenmore dishwasher will completely remove, without prior rinsing or scraping, all residue and film from dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers;
2. dishes in the top rack of the dishwasher will get as clean as those on the bottom rack after one complete set of washing and rinsing cycles, without prior rinsing or scraping;
3. the "Sani-Wash" cycle destroys all harmful and other bacteria and microorganisms on dishes, pots and pans;
4. the demonstrations depicted and referred to in CX 1 and CX 4 and other advertisements prove that Sears' Lady Kenmore dishwashers will completely remove, without prior rinsing or scraping, all

