

Syllabus

IN THE MATTER OF
THE RUBBER CITY PAINT COMPANY AND THE BELL
PAINT COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 1757. Complaint, Feb. 7, 1930—Decision, Jan. 5, 1931

Where two corporations, under common family control, engaged in sale by mail order of certain roofing preparations,

- (a) Employed word "manufacturers" on letterheads and falsely represented to purchasers and prospective purchasers that aforesaid products were made by them, and through advertising literature referred to their method of direct sales whereby profits of jobbers, retailers, and salesmen were eliminated, notwithstanding fact that said products were made by and purchased from a separate third company likewise thus controlled, and, to a small extent, from other manufacturers; and
- (b) Included words "liquid asbestos roofing" in designation of their aforesaid products in circulars, cards, and other advertising matter and represented asbestos content thereof as "the finest indestructible rock asbestos" and the product as "fully guaranteed to wear for ten years", and as asbestos product, facts being that said content, of approximately 5.7 per cent, was not sufficient to assist in preventing early disintegration, crawling, and cracking of the paint, to bind and hold the film together, or to add appreciably to the durability thereof, and that it was not composed of finest indestructible rock asbestos, nor an asbestos product, and durability thereof was from 3 to 5 years instead of the 10 claimed;

With tendency and capacity to mislead and deceive purchasers into believing said products to have content of sufficient asbestos to accomplish purpose for which ordinarily employed in roofing compounds, to be fireproof, and to have a life of 10 years, and that in purchasing same from them they were buying from the manufacturer and eliminating middleman's profit, and with tendency and capacity to divert to themselves trade of competitors who do not use such methods:

Held, That such practices, under the circumstances set forth, were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. PGad B. Morehouse for the Commission.

Mr. Ralph Blue, of Cleveland, for respondents.

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SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondents, Ohio corporations with office and principal place of business at the same address in Cleveland, and with same corporate officers, and engaged in the advertisement and sale of a product known as "The Rubber City Liquid Asbestos Roofing" and also as "Bell's Liquid Asbestos Roofing" to purchasers in the various States, with misrepresenting business status and advertising falsely or misleadingly in regard thereto and as to composition and quality or characteristics of product, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondents, as charged, engaged as above set forth, and neither making the aforesaid product, nor owning, controlling, nor operating any factory or plant, making the same, through use of the word "manufacturers" on letterheads and advertising matter, represent themselves to purchasers and prospective purchasers as fabricators of said product, respondent Rubber City Paint Co. further falsely representing through circulars, cards, and other literature sent to purchasers and prospective purchasers that it is located in the city of Akron, the fact being that it only maintains a private forwarding address in said city from which its mail is forwarded to it in Cleveland.

Respondents further, as charged, through use of the word "asbestos" in describing their said liquid roofing, in circulars, cards, and other advertising matter have represented and represent to prospective purchasers and purchasers throughout the various States that said products in whole or in predominant part is asbestos, respondent further representing that the same is made of "the finest indestructible rock asbestos", and that "it is fully guaranteed to wear for ten years, and is one of the few genuine liquid asbestos roofings offered to-day", fact being that product is not made of asbestos either in whole or in predominant part, does not contain "the finest indestructible rock asbestos", and will not wear for ten years.

Said statements, representations, and practices, and each of them, as alleged, "have the capacity and tendency to mislead and deceive purchasers and prospective purchasers into the belief that the said respondents, and each of them, are the manufacturers of the products advertised and sold by them and that the purchasers, when buying from the respondents or either of them, the product so advertised and sold, are purchasing a product made in whole or in predominant

part of asbestos, when such is not the fact; that the product will wear for 10 years, when such is not the fact; that the product contains 'the finest indestructible rock asbestos', when such is not the fact, and that respondent 'The Rubber City Paint Co.' is located at Akron, Ohio, when such is not the fact", and said acts and things, and each of them, as charged, "are to the prejudice of the public and to the competitors of respondents and each of them, and constitute unfair methods of competition in commerce within the intent and meaning of section 5".

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served a complaint upon the respondents, The Rubber City Paint Co., a corporation, and the Bell Paint Co., a corporation, charging them and each of them with the use of unfair methods of competition in interstate commerce, in violation of the provisions of said act.

Respondents having entered their appearance and filed their answers to the complaint herein, hearings were had and evidence was introduced upon behalf of the Commission and respondents, before a trial examiner of the Commission, duly appointed thereto, and said trial examiner having filed his findings of fact herein, and counsel for the respondents having filed his exceptions thereto,

Thereupon this proceeding came on for final hearing on the brief and oral argument of counsel for the Commission and brief of counsel for the respondents, oral argument having been waived by counsel for the respondents, and the Commission having duly considered the record and being fully advised in the premises, makes this its findings as to the facts and conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondents, The Rubber City Paint Co. and The Bell Paint Co. are both corporations organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with principal offices and places of business at 603 Mary Avenue, city of Cleveland, State of Ohio. From 1921 to 1926, The Rubber Paint Co. maintained an office at Akron, Ohio, but in 1926, economizing on account of business depression, it moved to Cleveland, Ohio, after making arrangements with a firm of public accountants, located at 714 North Main Street, Akron, Ohio, whereby such firm received and forwarded this respondent's mail to 603 Mary

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Avenue, Cleveland, Ohio. It is listed in the Akron City Directory, but has no employee nor any of its product in Akron. The name "Rubber City Paint Co." does not appear in the bulletin board in the lobby of the building at 714 North Main Street, Akron, Ohio, nor on any of the doors of the offices of the aforesaid firm of public accountants, nor in the telephone directory. These accountants have the corporate books of the company there. This respondent has no officer or employee in Akron authorized to accept service of legal process. Since the year 1926, this respondent has not been doing business in and from Akron, Ohio, although it has represented during that period, and still represents, that it is so doing business, making such representation because of the severe competition encountered with other paint companies doing business from the city of Cleveland, and because of its present Akron list of mail-order customers, it feels that many of them would be lost through any change in address.

PAR. 2. Each of the respondent companies has the same corporate officers, and the capital stock of each is closely held by the members of one family. This same family also own the stock of, control and operate the Phoenix Oil Co., a separate Ohio corporation (not one of the respondents), located in the same yard or tract of land as the respondents. None of the three mentioned companies, as such, holds or controls any stock of the others. The Phoenix Oil Co. engages in the manufacture of soaps, paints, oils, greases, and other products and has other roofing paint customers than respondents. Respondents are selling agencies for the Phoenix Oil Co., although they also buy about 5 per cent of their paint from other manufacturers than the Phoenix Oil Co.

PAR. 3. Respondents are, and each of them is and has been for several years last past, engaged at Cleveland, Ohio, in the business of advertising and selling a product known as "The Rubber City Liquid Asbestos Roofing", and also known as Bell's Liquid Asbestos Roofing", to purchasers located in the several States of the United States, and in causing said product, when sold, to be transported from its place of business through and into other States of the United States to purchasers thereof. In the course and conduct of its aforesaid business each respondent is in competition with other individuals, partnerships, and corporations engaged in commerce between and among the several States of the United States.

PAR. 4. Respondents sell their paint by means of mail orders. The business of respondent The Bell Paint Co. has averaged about \$50,000 a year for the past five years; and the business of respondent The Rubber City Paint Co. has averaged about \$15,000 a year for the

past five years. Competitors of respondents are very numerous, numbering as many as 50 or 60 in Cleveland alone. When orders are taken by the respondents for the so-called liquid asbestos roofing, they are turned over to the Phoenix Oil Co. and the oil company packs the material and makes shipments to the customers designated upon the orders submitted by respondents. The Phoenix Oil Co. is a much larger concern, its business amounting to about \$600,000 each year. Respondents' products are shipped to practically all parts of the United States.

PAR. 5. In the course and conduct of its aforesaid business, each of the respondents, by the use of the word "manufacturers" on letter-heads, has represented and does represent to its purchasers and prospective purchasers in the various States of the United States that it manufactures, makes or compounds the product aforesaid, and in its advertising literature refers to its method of direct sales whereby the profits of jobbers, retailers, and salesmen are eliminated. The true facts are, that the product so advertised and sold by each respondent is not manufactured, made, or compounded by it, but is manufactured by the Phoenix Oil Co., principally, and in some cases by other manufacturers, purchased by the respondents, and by the latter sold to the purchasers.

PAR. 6. In the course and conduct of their business as aforesaid, each respondent, by the medium of circulars, cards, and other advertising matter, through the use of the word "asbestos" in describing its liquid roofing, has represented and does represent to prospective purchasers and purchasers throughout the various States of the United States that its said product is an asbestos product; that the asbestos content of the product is "the finest indestructible rock asbestos", and that "it is fully guaranteed to wear for ten years". Respondents admit in their respective answers that the product in question is not an asbestos product. As a matter of fact, this product is composed of 28.6 per cent volatile thinner and 71.4 per cent non-volatile material, by weight. The larger part (61.7 per cent) of this nonvolatile matter is bitumen, either coal tar, asphalt, or both; the remainder of the aforesaid 71.4 per cent is determined to consist of mineral filler or ash and free carbon, in proportions of 5.7 per cent and 4 per cent respectively. Respondents' said product contains approximately 5.7 per cent asbestos. Lawrence R. Kleinschmidt, a junior chemist of the Bureau of Standards, of 10 years' experience, the last 2 of which have been devoted to specialization in analyzing and testing bituminous materials, including roofing compounds, testified that he would classify respondents' product as an "asphalt" paint. Hubert R. Snoke, an experienced chemist in charge of the

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bituminous testing laboratory at the Bureau of Standards, explained that similar material covered by Bureau of Standards' specification is known as "asphalt fibrous roof coating". Chester A. Holkesvig, technical director of the Tropical Paint & Oil Co. of Cleveland, Ohio, a competing firm, testified that such products are known to the trade as "roof paint"; that very often asbestos is put in roof paint and it is generally accepted that the paint is thereby improved; that the asbestos content in respondents' product is not considered by his company as sufficient to accomplish the advantages for which asbestos is put in roof paint, namely, to give it body and assist in holding it together rather than letting it crack and disintegrate; and that in his opinion about 15 per cent asphalt content would accomplish those advantages and leave the material thin enough to be practically applied to a roof; that the term "asbestos liquid roofing" does not indicate of itself the nature of the liquid portion of the paint at all, while an asphalt liquid paint, to him, definitely means something; that asbestos in connection with roofing brings a picture of durability and fireproofness, and in his opinion would so indicate to the average person's mind.

Actual tests were made and testified to by G. A. Sward, an expert chemist employed by the American Paint & Varnish Manufacturers' Association in its paint laboratories at Washington, D. C. He testified that the purpose of adding asbestos to bituminous paint is to help prevent crawling of the film, and consequent "cracking". It was demonstrated by these tests that an asbestos content of from 13 per cent to 15 per cent (the added asbestos being of the best grade possible to buy) could be applied, and when subjected to exposure in a testing machine, did give the paint body and did assist in holding it together. The three tests made of respondents' product were with the original asbestos content of 5.7 per cent, with an asbestos content of 13 per cent to 15 per cent, and with an asbestos content of 20 per cent, respectively. These tests showed that as the asbestos content is increased, there is a comparative tendency against the film of the paint crawling into small islands but the evidence shows that there is a point somewhere between 15 per cent and 20 per cent at which the asbestos content, if the other proportions of the paint remain the same, would be too high and make the liquid too plastic for the practical purpose of applying it to a roof with a brush. The respondents' product after being made to contain between 13 per cent and 15 per cent asbestos, the other proportions remaining the same, had some of the characteristics of an asbestos roofing. The result of such tests also show that 5.7 per cent of asbestos is totally insufficient to accomplish the aforesaid advantages. In other words,

the paint improves in durability and appearance proportionately to the amount of asbestos added. When subjected to exposure the film of such product tends to crawl or separate into circles or islandlike spots and as the asbestos content was increased in the tests, the size of these islands decreased. The asbestos fibers, like hair in plaster, tend to prevent the crawling and to retard cracking, because the crawling leaves areas between the islands, which areas have less durability than the thicker film and the whole surface less durability than a film of uniform thickness.

While expressly admitting that it is not an asbestos product, respondents object to ceasing from so designating it for the expressed reason that it gives the buyer the idea that it is possibly more fireproof than an ordinary roof paint would be.

From the entire evidence, the Commission finds that the purpose for which asbestos is put in a product of this kind is to assist in preventing an early disintegration, crawling and cracking of the paint, to bind the film and hold it together. There is nothing in the testimony which shows any fire resistance in respondents' product although respondents deliberately engender such a belief in the customers' minds through the use of the word "asbestos". Considering the testimony of the chemists and that the "expression of one excludes the other", fireproofness is not one of the purposes for which asbestos is put in such a compound. The Commission also finds that respondents' product does not contain an amount of asbestos sufficient to add appreciably to its durability through binding of the film or retarding of crawling and cracking as aforesaid.

Respondents' product is not an asbestos product. It is not made from the finest indestructible rock asbestos and its durability is approximately 3 to 5 years instead of 10 years as advertised by respondents.

PAR. 7. Statements of respondents using the word "asbestos" in describing their products, designating themselves as manufacturers, representing that their product contains the finest indestructible rock asbestos, and that such product is fully guaranteed to wear for 10 years, are false and misleading statements, each of which has the tendency and capacity to mislead purchasers and prospective purchasers into the belief that said respondents and each of them have a product containing an asbestos content sufficient to accomplish the advantage for which asbestos is ordinarily put in roofing compound, namely, to assist in holding the film together and preventing crawling or "cracking"; into the belief that said liquid roofing is a fireproof compound; and into the belief that respondents and each of them

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are manufacturers and that a middleman's profit is thereby eliminated; and into the belief that the product contains the finest indestructible rock asbestos; and into the belief that said product will wear for 10 years, when such are not the facts. Each of the aforesaid practices has the tendency and capacity to divert to respondents and each of them the trade of competitors who do not use such methods.

CONCLUSION

The practices of the said respondents, under the conditions and circumstances described in the foregoing findings, are to the prejudice of the public and respondents' competitors, and are unfair methods of competition in interstate commerce, and constitute a violation of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes".

ORDER TO CEASE AND DESIST

This proceeding having been considered by the Federal Trade Commission on the complaint of the Commission, the answers of respondents thereto, the testimony, evidence, brief, and oral argument of counsel for the Commission, and brief of counsel for the respondents, the oral argument for the respondents having been waived, and the Commission having made its findings as to the facts and its conclusion that respondents have been using unfair methods of competition in interstate commerce, in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

It is now ordered, That the respondents, the Rubber City Paint Co., and the Bell Paint Co., and each of them, and their officers, agents, representatives, and employees, in connection with the advertising, offering for sale and sale, in commerce between and among the several States of the United States and in the District of Columbia, of the product "The Rubber City Liquid Asbestos Roofing" and "Bell's Liquid Asbestos Roofing", respectively, do cease and desist from directly or indirectly—

1. Using the word "asbestos" as a part of the name of such products.

2. Representing to purchasers or prospective purchasers—

- (a) That the respondents (or either of them) manufacture, make, or prepare said product, when such is not the fact.

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(b) That said product contains the "finest indestructible rock asbestos" (either by using the phrase herein quoted or by words of similar import) when such is not the fact.

(c) That the product is fully guaranteed to wear for 10 years, or that it will wear for 10 years, or for any other period, unless and until such product is in fact fully guaranteed to wear for such period so stated and will in fact wear for such period under the normal conditions to which such product is usually exposed in actual use by the consumer.

It is further ordered, That the respondents, The Rubber City Paint Co. and The Bell Paint Co., and each of them, shall, within 60 days after service upon it of a copy of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set forth.

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IN THE MATTER OF

F. L. MENNIE, AN INDIVIDUAL TRADING AS MINERAL
COAL SAVER COMPANY, MENNIE MANUFACTURING
COMPANY, AND M. & K. MANUFACTURING COMPANYCOMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 1770. Complaint, Mar. 10, 1930—Decision, Jan. 13, 1931*

Where an individual engaged in making a powder composed largely of common salt and in the sale thereof to coal dealers and other purchasers, under the name "Mineral Coal Saver",

- (a) Represented in leaflets, placards, circulars, and other advertising matter that said preparation made poor coal good and good coal better, increased the heat from a given quantity of coal in British thermal units, and gave 20 per cent more heat with less coal, and that said preparation was a chemical mixture of proven worth and scientific merit, the facts being that it did not increase the British thermal units, nor accomplish the other results above claimed, and that the alleged proven worth and scientific merit of the product had not been demonstrated through comparative tests thereof with other products under otherwise identical conditions;
- (b) Represented that such preparation was carefully compounded under the supervision of an experienced chemist employed by said individual, the facts being that it was made by hand by said individual, he had never been employed as a chemist nor, excepting his study of the subject in high school long before, practiced such occupation other than in the compounding of the product in question, and of other products such as furniture polish, extracts, etc., and that a neighboring chemist, occasionally consulted, was never present during the mixing of the product; and
- (c) Represented that said preparation prevented and removed soot and that in it modern science had produced a sootless and smokeless treatment for coal, the facts being that the small per cent of increased release of oxygen accomplished could have no substantial effect on prevention of soot and that said representations were grossly exaggerated and misleading;

With capacity and tendency to mislead and deceive prospective purchasers and ultimate consumers as to the property, composition, effect, results, and value of said product:

Held, That such practices, under the circumstances set forth, were to the prejudice of the public and competitors, and constituted unfair methods of competition.

Mr. PGad B. Morehouse for the Commission.

Mr. James H. Hanley, of Omaha, Nebr., and *Mr. Thomas S. Kennedy*, of Washington, D. C., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission, the Commission charged