

IN THE MATTER OF

HAY & PEABODY CEMENT VAULT COMPANY

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

Docket 3157. Complaint, June 18, 1937—Decision, Feb. 16, 1939

Where a corporation engaged in manufacture of cement burial vaults, and in sale thereof to purchasers at various points in other States, in substantial competition with others engaged in manufacture, sale, and distribution of steel, stone, concrete, and other vaults, and including those who, engaged in such manufacture and sale, truthfully advertise their products—

Represented in its advertising of its cement vaults that they afforded positive protection for all time, endured for all time, and were everlasting, and were absolutely waterproof, sweatproof, watertight, airtight, and verminproof, and would not disintegrate but would become stronger and better the longer they remained in the ground;

Facts being concrete, in presence of water, sulphides or alkalies, will corrode and eventually disintegrate, certain amount of moisture is always present in soil at depth at which such vaults are placed, varying from time to time, sulphides and alkalies are also present in soils in varying amounts, and soil conditions vary both as to particular locality and from locality to locality, and while said vaults are carefully and scientifically constructed so as to increase durability in use, and will exclude air, moisture, vermin, and water until natural process of corrosion, which they will resist but cannot prevent, has advanced to stage of producing disintegration permitting penetration, they are not everlasting, absolutely waterproof, sweatproof, verminproof, or airtight when sold and placed in the ground in accordance with practice used, and richer composition of cover than balance of vault may result in causing severance of cover from base;

With effect of misleading substantial portion of purchasing public into erroneous and mistaken belief that all such representations were true and with result that public, acting under mistaken and erroneous beliefs induced by such false and misleading statements and representations, purchased substantial volume of its vaults, and trade was unfairly diverted to it from its competitors who truthfully advertise their products:

Held, That such acts and practices were all to the injury and prejudice of the public and competitors, and constituted unfair methods of competition.

Before *Mr. Edward E. Reardon*, trial examiner.

Mr. William L. Pencke for the Commission.

Mr. M. E. Sturtevant and *Mr. David T. Montague*, of Somerville, Mass., and *Mr. Hazen K. Sturtevant*, of Plymouth, N. H., for respondent.

COMPLAINT

Pursuant to the provisions 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," the

Federal Trade Commission, having reason to believe that the Hay & Peabody Cement Vault Co., a corporation, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and states its charges in that respect.

PARAGRAPH 1. Respondent, the Hay & Peabody Cement Vault Co., is a corporation, organized and existing under and by virtue of the laws of the State of Maine, with its office and principal place of business located at 201-05 Arlington Street, Watertown, Mass. Respondent is now, and has been for several years last past, engaged at said location in the manufacture and sale of cement burial vaults used to encase or enclose coffins in the burial of the dead. The respondent sells and has sold these said vaults to undertakers, who in turn sell the same to ultimate purchasers thereof. These said vaults are so sold in different States of the United States, and when orders are received therefor, they are shipped by respondent from its said place of business into and through other States of the United States to the respective places of business of such undertakers, many of whom are located in States other than the State of Massachusetts. There is now and has been during all of the times herein mentioned, a constant current of trade in said products so sold by said respondent in commerce between and among various States of the United States. In the course and conduct of said business, respondent is in substantial competition with individuals, copartnerships, and corporations, likewise engaged in the manufacture and sale and transportation between and among various States of the United States of steel, stone, concrete and other vaults used in the burial of the dead.

PAR. 2. In aid of the sale of said vaults respondent advertises the same by and through the use of circulars, letters, booklets, pamphlets, catalogs, leaflets, and other printed and illustrated materials, which are furnished by respondent to its said undertaker customers for use in aid of the sale of said vaults to the consuming public, and which are so used. In and through such media respondent makes among others the false and misleading representations that:

(a) Hay & Peabody Cement Burial Vault insures positive protection for all time.

(b) Its cement vault is everlasting, absolutely waterproof, sweat-proof, verminproof, and airtight.

(c) Its cement vault will endure and provide positive protection for all time.

(d) Wood decays; metal rusts and disintegrates, but concrete improves with age and that the older a cement vault and the longer it

Findings

28 F. T. C.

remains in the ground, the better and stronger it becomes, because moisture and other underground conditions further solidify cement.

(e) Its vault is the one vault that will meet all the requirements necessary to insure absolute, permanent protection.

(f) Its vault is an absolutely airtight and watertight vault, a vault that will not disintegrate from burial.

PAR. 3. The statements and representations set forth in the preceding paragraph are false and misleading in that respondent Hay & Peabody's Cement Burial Vault does not insure positive protection for all time. Said vault is not ever-lasting, absolutely waterproof, sweatproof, verminproof, or airtight. It will not endure and provide positive protection for all time and it will not meet all the requirements necessary to insure absolute, or permanent protection. Concrete does not always improve with age, nor does it always get better and stronger the longer it remains in the ground. Moisture and other underground conditions do not always further solidify the cement of which said vault is made. Respondent's said vault will, and often does, disintegrate and permit both air and water to enter the same under burial conditions.

PAR. 4. Said statements and representations so made by respondent as set forth in paragraph 2 above, have, and have had, the tendency and capacity to induce members of the public and prospective purchasers to form the mistaken and erroneous belief that said statements and representations are true, and to purchase respondent's vaults, in and on account of said erroneous and mistaken belief induced as aforesaid. Thereby trade has been, and is, unfairly diverted to respondent from its said competitors who do not make use of similar misrepresentations with respect to their respective products. As a result, injury is done by respondent to competition in commerce among and between the various States of the United States and to the public.

PAR. 5. The above alleged acts and practices are each and all to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in interstate commerce within the meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 18, 1937, issued and on June 21, 1937, served its complaint in this proceeding upon respondent,

Hay & Peabody Cement Vault Co., a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony, and other evidence in support of the allegations of the complaint were introduced by W. F. Pencke, attorney for the Commission, and in opposition to the allegations of the complaint by M. E. Sturtevant, attorney for respondent, before Edward E. Reardon, an examiner of the Commission theretofore duly designated by it, and the said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony, and other evidence, briefs in support of the complaint, and in opposition thereto, and oral argument, and the Commission having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Hay & Peabody Cement Vault Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located at 201-05 Arlington Street, Watertown, Mass.

The respondent is now and has been since the year 1915 engaged in the business of manufacturing and selling to undertakers cement burial vaults used to encase or enclose coffins in the burial of the dead.

Some of said undertakers do business and reside in the State of Massachusetts and others reside and do business in States other than the State of Massachusetts.

When orders are received for respondent's vaults, they are transported by respondent from its place of business in the State of Massachusetts into and through other States of the United States to the purchasers thereof located at various points in States of the United States other than the State from which said shipments are made.

There is now and has been during all of the times herein mentioned a course of trade and commerce in said vaults so sold by respondent between and among the various States of the United States.

Respondent is now and has been in substantial competition with other corporations, individuals, and partnerships also engaged in the manufacture, sale, and transportation of steel, stone, concrete, and

other vaults used in the burial of the dead, between and among the various States of the United States.

Respondent does a gross business of approximately \$35,000 a year. Respondent has sold as many as 1,200 vaults in 1 year, and in the year 1937 respondent sold approximately 1,100 vaults.

PAR. 2. Respondent, in order to sell its vaults, advertises the same by and through the use of illustrated catalogs, leaflets, blotters, and pamphlets. This advertising matter was furnished by respondent to its undertaker customers for use by them in advertising and selling respondent's vaults to the consuming public.

The following statements are illustrative of the representations respondent makes concerning its concrete vaults, but are not all inclusive:

The Hay & Peabody Cement Burial Vault, most substantial in construction, insures positive protection for all time.

The Hay & Peabody Cement Burial Vault is without question the finest, the strongest, and most substantial vault obtainable today. It is everlasting, absolutely waterproof, sweatproof, verminproof, and airtight. It will endure and provide positive protection for all time. Wood decays; metal rusts and disintegrates, but concrete improves with age. The older a cement vault and the longer it remains in the ground, the better and stronger it becomes, because moisture and other underground conditions further solidify the cement.

The Hay & Peabody vault is absolutely watertight.

The complete Hay & Peabody vault consists of a heavy, waterproof concrete box and cover. It is constructed upon sound scientific principles from properly proportioned "Super-Cement," clean sand, crushed stone, and water. * * * Both laboratory tests and actual practice have proved that this special "Super-Cement" mixture forms an absolutely airtight and watertight vault, and a vault that will not disintegrate from burial.

The Hay & Peabody Burial Vault is exceptionally strong and positively waterproof.

In all of its advertising literature, respondent represents, through statements and representations herein set out, and through statements of similar import and effect, that,

1. Its cement vaults are everlasting, waterproof, sweatproof, verminproof, and airtight;
2. Its cement vaults will not disintegrate from burial but will get stronger the longer they remain in the ground; and
3. Its cement vaults insure absolute positive and permanent protection for all times.

PAR. 3. Respondent manufactures vaults in 12 different sizes.

Respondent's vaults are made in two separate parts, the base, which is box-like in shape and appearance, and a cover. The cover is concave on its inner surface and convex on its outer surface, excepting that part of the top or outer surface of the cover which is a rectangular

flat surface less than the full length and width of the cover as it rests on the base. The base is made with a built-in shoulder into which the cover fits when in position. The segment of cover outlined by the flat surface is slightly thicker than the rest of the cover and is reinforced by three metal rods running lengthwise and imbedded in its center, the flat surface being less than the full length and width of the cover and the convex ends and sides of the cover when in position, sloped from the base, leaving a small V-shaped space between the cover and the shoulder on the base of the vault.

Respondent's vaults vary in weight from 1,600 pounds to a ton.

When a coffin is placed inside the base of respondent's vault, a space of from 2 to 3 or 4 inches is left between the sides of the vault and the coffin. When a coffin is enclosed for burial in respondent's vault, the cover of the vault is sealed to the base by filling in the V-shaped space with a cement or concrete of a richer mix than is used in the manufacture of the vault. The covers of the vaults sold by respondent are sealed in all cases by an employee of respondent who accompanies the vault to the cemetery when interment takes place.

Concrete is made of a mixture of cement, sand, and ground stone. The concrete used by respondent in the manufacture of its vaults is a 1-2-1½ mix, which means one part cement, two parts sand, and 1½ parts ground stone. This is a rich mixture. The cement which respondent uses and designates as "Super-Cement" is a standard portland cement with gypsum and tannin added. It has the same properties as other cements. The average mixture used in building and construction work is in a 1-3-6 proportion, that is, one part cement, three parts sand, and six parts ground stone.

Respondent's vaults, when used in burials, are sunk into the ground anywhere from 4½ to 7 feet. Thus, the tops of the vaults are in all cases placed from 1½ to 2 feet below the surface of the ground. The earth on top of the vaults when buried weighs approximately 1 ton.

The testimony shows and the Commission finds that the vaults manufactured and sold by respondent are not everlasting, absolutely waterproof, sweatproof, verminproof, or airtight, when sealed by respondent and placed in the ground in the manner above stated.

Soil conditions with reference to the type of soil and the amount of moisture present in soil vary from locality to locality. Similarly, the type of soil and the amount of moisture will vary in the same cemetery. Certain parts of a cemetery are lower than other parts of the same cemetery and the soil, because of this difference in location and ground elevation, may be saturated with water. Soils also contain sulphides and alkalies in varying amounts.

Findings

28 F. T. C.

There is always a certain amount of moisture in the soil at the depth at which respondent's vaults are placed because of the seepage of water caused by normal rainfall. The amount of moisture varies from time to time with the result that the soil at the depth at which respondent's vaults are placed is alternately wet and dry, dependent upon rainfall, snowfall, frost, thawing, and freezing.

The Commission finds that concrete in the presence of water, sulphides, or alkalis will corrode and eventually disintegrate.

The rate of deterioration or disintegration is slow in some soils and more rapid in others, depending upon the climatic conditions of the locality and the chemical and mineral composition and content of the soil in a particular place.

The Commission further finds that respondent's concrete vaults when placed in soil in such a manner as to subject them to contact with water, sulphides, or alkalis will corrode and eventually disintegrate.

Respondent's vaults are carefully and scientifically constructed in such a manner as to increase their durability in underground service. There vaults will exclude air, moisture, vermin, and water until the natural process of corrosion, which these vaults will resist, but cannot prevent, has advanced to the stage of producing disintegration of the vaults which will permit penetration.

Concrete placed in soil that is alternately wet and dry will corrode and disintegrate. Concrete, however, continuously exposed to the same moisture conditions will last a longer period of time than concrete placed in soil subject to alternate wetting and drying, but will also corrode and eventually disintegrate.

The Commission finds that respondent's vaults are not waterproof or watertight.

The concrete used by respondent in sealing its vaults is of a richer mixture than the concrete of which the cover and the base of respondent's vaults are made. This difference in grade between the concrete used in sealing the cover to the base of the vault and the concrete used in the construction of the base and cover may result in causing a severance of the cover from the base. This severance would be caused by alternations of wetting and drying, freezing, and thawing. Such a severance might be a complete severance of the cover from the base of the vault or a partial and imperceptible severance of the cover from the base. Even in the case of a partial or an imperceptible severance, there would be an increased corrosion at the point of severance, with the result that moisture and air and, upon further corrosion and disintegration, vermin, would enter the vault.

PAR. 4. There are among the competitors of respondent corporations, individuals, firms, and partnerships also engaged in the business of manufacturing and selling in commerce similar steel, stone, concrete, and other vaults used in the burial of the dead who truthfully advertise their vaults.

PAR. 5. Each and all of the false and misleading statements and representations made by respondent in its advertising in illustrated catalogs, pamphlets, leaflets, in offering for sale and selling its vaults, had, and now has, the tendency and capacity to, and does, mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that all of said representations are true. Acting under the mistaken and erroneous beliefs induced by the false and misleading statements and representations herein referred to, the public has purchased a substantial volume of respondent's vaults, with the result that trade has been unfairly diverted to respondent from its competitors who truthfully advertise their vaults.

CONCLUSION

The aforesaid acts and practices of respondent are all to the injury and prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony, and other evidence taken before Edward E. Reardon, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and oral arguments by William L. Pencke, counsel for the Commission, and by Hazen K. Sturtevant, counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, Hay and Peabody Cement Vault Co., its officers, representatives, agents, and employees, directly or indirectly in connection with the offering for sale, sale and distribution of concrete burial vaults in interstate commerce or in the District of Columbia, do forthwith cease and desist from representing that:

1. Said vaults afford positive protection for all time, endure for all time, or are everlasting.

Order

28 F. T. C.

2. Said vaults are absolutely waterproof, sweatproof, watertight, airtight, and verminproof.

3. Said vaults will not disintegrate but will become stronger and better the longer they remain in the ground.

It is further ordered, That the respondent shall, within 60 days after service upon it 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 this order.

Syllabus

IN THE MATTER OF
JACOB SHERMAN, TRADING AS CHICAGO MATTRESS
COMPANY

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

Docket 3324. Complaint, Feb. 3, 1938—Decision, Feb. 16, 1939

Where an individual engaged in manufacture of mattresses, and sale and distribution thereof to purchasers in other States, in competition with others also engaged in sale and distribution of new and renovated mattresses in commerce among the various States, and including those who do not in any manner represent their said products as of a retail value or price in excess of the actual one, and place in the hands of customers mattresses bearing fictitious and grossly marked up prices, and misrepresent kind or quality of contents thereof—

- (a) Represented, designated, described, and referred to certain of his said mattresses as being composed entirely of new material, and attached and caused to be attached thereto labels reading "Official Statement. *Manufactured of New Material.* Materials Used in Filling Manufactured and Guaranteed by Chicago Mattress Co. 1500 W. Roosevelt Rd., Chicago, Ill.," and "This mattress must not be exposed for sale or sold without this label being attached under severe penalties", notwithstanding fact certain of the mattresses thus advertised, labeled, sold, and distributed by him as being composed of all new materials were actually composed in whole or in part of second-hand and used materials and not of new and unused materials; and
- (b) Attached and affixed to mattresses thus made, sold, and distributed by him in commerce as above set forth, and which were grossly inferior in quality and workmanship to such products generally available on the market at the various retail prices set forth on labels thereof, woven and printed labels and tags which represented the retail prices of such products as being substantially in excess of the actual retail value or price thereof, and substantially in excess of the retail prices at which such mattresses were customarily and regularly sold, and in substantial excess of those at which they were offered and intended to be offered to purchasing public by dealers in and retailers thereof;

With effect of misleading and deceiving purchasing and consuming public as to actual value of said products or as to regular, usual, and customary retail selling prices thereof, and with intent so to do, and result of placing in hands of unscrupulous dealers and merchants instrumentalities for deception of purchasing public, and effect of misleading and deceiving such public in aforesaid respects, and as to the grade, quality, and prices of such mattresses, and of aiding and enabling dealers to sell same to consuming public as and for new products at prices purporting to constitute substantial, but in fact false and fictitious, reductions, and with result, as consequence of such mistaken and erroneous beliefs, that number of purchasing public bought substantial volume of mattresses sold by him, and trade was unfairly diverted to him from his competitors likewise engaged in manufacture, sale, and distribution of such products, and who truthfully advertise and represent the contents and values thereof: