

Syllabus

IN THE MATTER OF

H. G. PAYNE, INDIVIDUALLY, AND TRADING AS
H. G. PAYNE COMPANY

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

Docket 3175. Complaint, July 16, 1937—Decision, Feb. 27, 1939

Where an individual engaged in sale and distribution of penknives, hunting knives, automatic razors, watches, clocks, and various other articles to wholesalers, jobbers, and retailers—

Supplied or furnished his customers with various devices and plans of merchandising which involved operation of games of chance, gift enterprises, or lottery schemes, by which said merchandise was distributed to purchasing public wholly by lot or chance and which involved sale and distribution of punchboards and push cards, separately and with merchandise, for sale and distribution of his said products under a plan in accordance with which purchasers for 5 cents of chance on 1,500-hole punchboard, divided into 60 sections, received certain articles of merchandise as prizes or nothing, in accordance with success or failure in securing certain numbers, and last punch in each section entitled purchaser to 25 cents as a prize, and purchaser thus secured or failed to secure article of merchandise, value of which, in any event, exceeded that of cost of punch, and combined value of all of which articles was much less than the sum produced by sale of all punches, and under which plan, in some instances, customer received postcard for the 5 cents paid, with right to punch number from board; and

Supplied thereby to and placed in the hands of others, means of conducting lotteries in the sale and distribution of his said merchandise in accordance with aforesaid and similar sales plans involving game of chance or sale of a chance to procure articles of merchandise at prices much less than normal retail prices thereof; contrary to established public policy of the United States Government, and in violation of the laws of several states, and in competition with many who are engaged in sale and distribution of like or similar articles and who are unwilling to offer or sell their said merchandise by any method or sales plan which involves game of chance, gift enterprise, or lottery scheme, or any method contrary to public policy, and refrain therefrom;

With effect of inducing purchaser of his said merchandise to buy same in preference to like or similar merchandise offered and sold by competitors who do not use such plans or methods in sale and distribution of their products, and with result that many members of the purchasing public were attracted by element of chance involved in his said sales plan or method and thereby induced to purchase his said products in preference to like and similar merchandise of competitors who do not use same or equivalent methods, and with result that wholesalers and jobbers, by reason of such preference, were induced and persuaded to buy his said products in preference to like or similar articles sold or distributed by

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- his competitors and substantial quantities of his said merchandise were sold as result thereof, and trade was unfairly diverted to him from his competitors aforesaid:

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

Before *Mr. Robert S. Hall* and *Mr. William C. Reeves*, trial examiners.

Mr. DeWitt T. Puckett, *Mr. Henry C. Lank* and *Mr. D. C. Daniel* for the Commission.

Nash & Donnelly, of Chicago, Ill., 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 H. G. Payne, individually and trading as H. G. Payne Co., hereinafter referred to as respondent, 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 stating its charges in that respect as follows:

PARAGRAPH 1. The respondent is an individual doing business under the trade name and style of H. G. Payne Co. and has his principal office and place of business at 312-314 Broadway, in the city of Nashville, State of Tennessee. He is now, and for some time last past has been, engaged in the sale and distribution of penknives, hunting knives, automatic razors, safety razors, watches, clocks, cigarette lighters, smoking pipes, cigar holders, flashlights, fountain pens, automatic pencils, cameras, opera glasses, and various other articles of merchandise, to wholesale dealers, jobbers, and retail dealers. Respondent's customers are located at points in the various States of the United States, and respondent causes his said merchandise when sold to be transported from his principal place of business in Nashville, Tenn., to purchasers thereof in other States of the United States at their respective places of business. There is now, and has been for some time last past, a course of trade and commerce by said respondent in such merchandise between and among the States of the United States. In the course and conduct of said business, respondent is in competition with other individuals and with partnerships and corporations engaged in the sale and distribution of similar or like articles of merchandise in commerce between and among the various States of the United States.

PAR. 2. In the sale and distribution of his said merchandise, respondent has furnished various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes, by which said merchandise is distributed to the ultimate consumers thereof wholly by lot or chance. Said devices or plans of merchandising consist of a variety of punchboards and push cards or similar devices, the use of which by retail dealers or individuals in connection with the sale and delivery to the purchasing public of respondent's said merchandise or products was and is substantially as follows:

Said punchboards consist of boards of various shapes and sizes with from 100 to 3,000 holes. Into each of the holes has been inserted a small slip of paper bearing a printed number, the printed slips bearing consecutive numbers according to the number of holes contained in the board but not arranged in numerical sequence, and said slips are so placed and secreted in said punchboards that they cannot be seen by the customer except when they are punched from the board. The punchboards bear legends indicating the numbers which entitle the purchasing public to an article of merchandise or prize, and in some cases the last punch in each board receives a prize. Customers pay 1 cent, 5 cents, or 10 cents for each punch from the board, and the purchasers of punches who receive numbers calling for an article of merchandise receive such article, and purchasers who receive numbers other than those enumerated on the board, or who do not qualify by purchasing the last punch on the board, receive nothing for their money. The said articles of merchandise vary in value, but each of said articles of merchandise is of greater value than the cost of a single punch from the said board, and the combined value of the articles of merchandise is much less than the cost of the total punches on the board. On some of the boards furnished by respondent certain punches are free.

The push cards furnished by the respondent involve the same principle, but vary in detail.

The purchasing public is thus induced and persuaded into purchasing punches from said boards or pushes from said cards in the hope of making a prize-winning selection and thus obtain an article of merchandise for a sum less than the normal retail value thereof. The various articles of merchandise are thus distributed to the purchasing public wholly by lot or chance.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells his merchandise resell the same to retail dealers, together with the punchboards or push cards furnished by respondent, and such retail dealers and the retail dealers to whom respondent sells direct

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offer for sale and sell said merchandise to the purchasing public by means of said punchboards of push cards in accordance with the aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of his merchandise in accordance with the sales plans hereinabove set forth, and said sales plans have the capacity and tendency of inducing purchasers thereof to purchase respondent's said merchandise in preference to like or similar merchandise offered for sale and sold by his competitors.

PAR. 4. The sale and distribution of merchandise to the purchasing public, as above alleged, involves a game of chance or the sale of a chance to procure such articles of merchandise in the manner alleged. The use by respondent of said methods in the sale of his merchandise, and the sale of such merchandise by and through the use thereof and by the aid of said methods, is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy, and is contrary to an established public policy of the Government of the United States. Many persons, firms and corporations who sell and distribute merchandise in competition with the respondent, as above alleged, are unwilling to offer for sale or sell merchandise by any method involving a game of chance or the sale of a chance to win something by chance, or any other method that is contrary to public policy, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of merchandise as distributed by respondent are attracted by respondent's said methods or sales plans and by the element of chance involved in the sale or purchase thereof in the manner above described, and are thereby induced to purchase said merchandise of respondent in preference to merchandise offered for sale and sold by competitors of respondent who do not use the same or equivalent methods. The use of said methods or sales plans by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from his said competitors who do not use the same or equivalent methods; to exclude from said trade all competitors who are unwilling to and who do not use the same or equivalent methods because the same are unlawful; to lessen competition in said trade, and to tend to create a monopoly of said trade in respondent and such other distributors as use the same or equivalent methods; and to deprive the purchasing public of the benefit of free competition in said trade. The use of said methods or sales plans by respondent has the tendency and capacity to eliminate from said trade all actual competitors, and to exclude therefrom all potential competitors who do not adopt and use said methods or equivalent methods.

PAR. 6. The aforementioned methods, acts, and practices of the respondent are all to the prejudice of the public and of respondent's competitors, as hereinabove alleged. Said methods, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning 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."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on July 16, 1937, issued and thereafter served its complaint in this proceeding upon respondent, H. G. Payne, individually, and trading as H. G. Payne Co., charging him 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 said complaint were introduced by DeWitt T. Puckett, Henry C. Lank, and D. C. Daniel, attorneys for the Commission, and in opposition to the allegations of the complaint by Horace J. Donnelly, Jr., and John A. Nash, attorneys for the respondent, before Robert S. Hall and William C. Reeves, examiners of the Commission theretofore duly designated by it, and 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, brief in support of the complaint (respondent having filed no brief and not having requested oral argument), and the Commission, having duly considered the matter and being 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, H. G. Payne, is an individual doing business under the trade name of H. G. Payne Co., with his principal place of business located at 312-314 Broadway, Nashville, Tenn. For several years last past respondent has been engaged in the sale and distribution of penknives, hunting knives, automatic razors, safety razors, watches, clocks, cigarette lighters, pipes, cigarette holders, flashlights, fountain pens, automatic pencils, cameras, opera glasses, lottery devices, and various other articles to wholesale dealers, jobbers, and retail dealers. Respondent has caused his said

merchandise, when sold, to be shipped or transported to purchasers thereof located in various States of the United States at their respective points of location from his aforesaid place of business in Nashville, Tenn.

Respondent has been at all times mentioned herein in substantial competition with other individuals and with partnerships and corporations engaged in the sale and distribution of like or similar articles of merchandise in commerce between and among the various States of the United States.

PAR. 2. In so carrying on his said business as described in paragraph 1 hereof, respondent has supplied or furnished his customers with various devices and plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes, by which said merchandise has been distributed to the purchasing public wholly by lot or chance. The devices sold and distributed by respondent are what are commonly known as punchboards and push cards. One of said punchboards is operated substantially as follows: This board contains 1,500 small holes, into each of which has been inserted a small slip of paper with a number printed thereon, and the said slips are so placed and secreted in said punchboard that they cannot be seen by the customer until after they have been punched from the board. There are a number of cut-outs on the board, in which are placed articles of merchandise. The punchboard bears legends or statements explaining the operation thereof. Sales are 5 cent each, and each purchaser is entitled to punch one of said numbers from the board, which board is divided into 60 sections, and certain designated numbers entitle the purchasers thereof to designated articles of merchandise as prizes, and the last punch in each section entitles the purchaser thereof to 25 cents as a prize. Purchasers who do not qualify by punching one of the numbers designated as prize-winning numbers, or the last number in one of the sections, receive nothing for their money. The said articles of merchandise vary in value, but each of said articles of merchandise is of greater value than the cost of a single punch from the said board, and the combined value of the articles of merchandise is much less than the sum produced by the sale of all the punches on the board. In the above-described manner respondent's merchandise is distributed to the purchasing public wholly by lot or chance. In some instances, customers of respondent buy post cards for sale and distribution in connection with the above-described punchboard, and when such post cards are used, each purchaser, for the sum of 5 cents receives one of said post cards, and is entitled to punch one number from said board.

Respondent has furnished various punchboards, together with merchandise to be sold thereby, to his customers located in various States of the United States, but said punchboards involve the same principle of operation as the one hereinabove described, and vary only in detail. In so carrying on said business, respondent also has sold and distributed to his said customers, separately and apart from said merchandise, a device commonly known as a push card, which push card is operated on the same principle as the punchboard hereinabove described, and varies only in detail. Respondent has also furnished and supplied his customers with said punchboards separately and apart from said merchandise. Many dealers have used said devices purchased from respondent in making up lottery deals from their own assortments of merchandise, and said merchandise has been sold to the general public by means of said devices.

PAR. 3. The wholesale dealers and jobbers to whom respondent sells his merchandise, together with said punchboards, resell the same to retail dealers, who in turn sell and distribute said merchandise by means of said punchboards to members of the purchasing public in accordance with the aforesaid sales plans. Respondent has thus supplied to, and placed in the hands of, others, the means of conducting lotteries in the sale and distribution of his said merchandise, in accordance with the sales plans hereinabove described. Said sales plans have the capacity and tendency to induce, and have induced purchasers of respondent's merchandise to purchase the same in preference to like or similar merchandise offered for sale and sold by respondent's competitors who do not use such sales plans or methods in the sale and distribution of their said merchandise.

PAR. 4. The sale and distribution of merchandise to the purchasing public in the manner hereinabove found involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail prices thereof. The sale and distribution of merchandise in the manner hereinabove described is a practice of the sort which is contrary to an established public policy of the Government of the United States, and is in violation of the laws of several States of the United States. Among the respondent's competitors there are many persons, firms, and corporations who sell and distribute like or similar articles of merchandise in competition with respondent as hereinabove found, and said competitors are unwilling to offer for sale or sell their said merchandise by any method or sales plan which involves a game of chance, gift enterprise, or lottery scheme, or any other method that is contrary to public policy, and such competitors refrain therefrom, and as a result are placed at a disadvantage in competition.

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PAR. 5. Many members of the purchasing public were attracted by the element of chance involved in the respondent's said sales plan or method, and were thereby induced to purchase respondent's merchandise in preference to the like or similar merchandise of respondent's competitors who did not or do not use the same or equivalent methods. Because of said preference on the part of members of the purchasing public, wholesale dealers and jobbers have been induced and persuaded to purchase respondent's said merchandise in preference to like or similar articles of merchandise sold or distributed by respondent's said competitors, and as a result respondent has sold substantial quantities of his said merchandise, and trade has been unfairly diverted to respondent from his said competitors.

CONCLUSION

The aforesaid acts and practices of respondent as hereinabove found 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 Robert S. Hall and William C. Reeves, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, brief filed by attorney for the Commission (respondent having filed no brief nor requested oral argument), 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, H. G. Payne, individually, and trading as H. G. Payne Co., or trading under any other name, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of penknives, hunting knives, automatic razors, safety razors, watches, clocks, cigarette lighters, pipes, cigarette holders, flashlights, fountain pens, automatic pencils, cameras, opera glasses, lottery devices, or any other articles of merchandise in commerce as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others any merchandise together with punchboards, push or pull cards, or any other lottery

device, for the purpose of enabling such persons to dispose of or sell said merchandise by the use thereof.

2. Supplying to or placing in the hands of others punchboards, push or pull cards, or other lottery devices, for the purpose of enabling such persons to dispose of or sell any merchandise by the use thereof.

3. Mailing, shipping, or transporting to his agents or to distributors or to members of the public punchboards, push or pull cards, or other lottery devices so prepared or printed as to enable said persons to sell or distribute any merchandise by the use thereof.

4. Selling or otherwise disposing of any merchandise by the use of punchboards, push or pull cards, or other lottery devices.

It is further ordered, That the respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF
SWAMP AND DIXIE LABORATORIES, INC.

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

Docket 3680. Complaint, Dec. 29, 1938—Decision, Feb. 27, 1939

Where a corporation engaged in sale of "Swamp Chill and Fever Tonic" and "Dixie Fever and Pain Powder" to retail druggists and others in various States and in the District of Columbia; in false advertisements which it disseminated through the mails and through insertion in newspapers and periodicals of general circulation, and through circulars and other printed matter distributed in commerce and in said District—

- (a) Represented, directly and by implication, that said "Swamp Chill and Fever Tonic" medicinal preparation was a doctor's prescription which constituted a safe, certain, and permanent cure for malaria and every kind of fever and ague, and that it would break up malaria in 3 days and was a general tonic, and a remedy or competent and effective treatment for colds, chills, poor appetite, and run-down condition, and that it regulated the bowels and purified the system, facts being said representations were grossly exaggerated, misleading, and untrue, said preparation was not a safe, certain, and permanent cure for malaria, etc., as above set forth, or general tonic, nor remedy for colds, etc., and would not accomplish other results above claimed, and while each of certain ingredients therein contained might be beneficial at some stage in treatment of malaria, it might be unnecessary and perhaps definitely counter-indicated in other stages, and in other cases, and preparation was not a wholly safe drug for use by lay public in self-medication; and
- (b) Represented that its "Dixie Fever and Pain Powder" was a safe remedy or treatment for sleeplessness, neuralgia, rheumatism, grippe, or influenza, cold in the head, catarrh, and all kinds of fever, facts being such representations were grossly exaggerated, misleading, and untrue, said preparation was not such a remedy or treatment for sleeplessness and for other ailments and conditions above set out, and was not a wholly safe drug for use by lay public in self-medication;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that such false statements, representations, and advertisements were true, and into purchase of its said medicinal preparations as a result of such statements, representations, and advertisements:

Held, That such acts and practices were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

Mr. Gerard A. Rault for the Commission.

Warner & Warner, of Fort Smith, Ark., for respondent.

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