

Syllabus

IN THE MATTER OF
HENRY P. KINNEKE, TRADING AS MILWAUKEE
IMPORTING COMPANY

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

Docket 4980. Complaint, June 18, 1943—Decision, Oct. 5, 1943

Where an individual, who was engaged in the packaging and interstate sale and distribution of "Malt Cereal" coffee substitute purchased by him from malsters, and who had taken over an extensive mail order business developed by his father, numerous customers of which had become accustomed, over a period of many years, due to the reputation of the product, and that of the firm for satisfactory service, to prepay orders sent through the mails—

Solicited orders by means of advertising urging potential customers to place their requirements "now" for the next 6 months since, when raw materials were depleted, he could not guarantee delivery "because of inability to manufacture until the law so provides" and setting forth that in view of past service of the particular customer he "would again appreciate the pleasure of serving you"; and in all instances in which those replying placed orders and made prepayment therefor, retained the payments but frequently failed to ship the merchandise ordered; and, to forestall complaints due to non-delivery, adopted practice of sending to customers postal cards giving various false and fraudulent reasons, including asserted shortages of material, offer that "if you wish to cancel the order * * * your money or invoice will be cancelled, though we dislike to have this information, as, many customers have purchased for the past 30 to 40 years," and assertion that the firm, having secured a number of carloads of choice material was malting and roasting 24 hours a day to fulfill delinquent orders;

The facts being he did no malting or roasting but, as aforesaid, merely purchased and repacked the finished product for shipment to customers; the real reason for his failure to fulfill orders was that he had spent the money received in payment thereof and was unable to buy either the product or sacks in which to package it for resale; and his sources of supply were at all times ready, willing and able to supply the product and necessary sacks or bags, provided payment was forthcoming;

With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations were true, and into purchase of and prepayment for substantial quantities of product in question as a result of such erroneous beliefs:

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

Before *Mr. J. E. Cox*, trial examiner.

Mr. Merle P. Lyon for the Commission.

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Henry P. Kinneke, an individual, trading as Milwaukee Importing Co., hereinafter referred to as the respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Henry P. Kinneke, is an individual, trading as Milwaukee Importing Co., with his office and place of business located at 2039 North Thirty-fourth Street, Milwaukee, Wis.

Said respondent is engaged in the sale and distribution of Malt Cereal, a coffee substitute. Respondent causes, and has caused, his said Malt Cereal, when sold, to be shipped or transported from his place of business in the State of Wisconsin to the purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Respondent's Malt Cereal is purchased by respondent from various maltsters in Milwaukee and elsewhere, and packaged and sold by respondent to individual customers throughout various States of the United States. Said Malt Cereal is used as a substitute for coffee by numerous individuals who wish to avoid the use of a caffeine beverage. Prior to the year 1933 an extensive mail order business in this product was developed by respondent's father, and numerous individuals became accustomed over a period of many years, due to the reputation of the product and the reputation of the firm for prompt and satisfactory service, to prepay orders sent through the mails for said product. In 1933 the business was taken over by respondent and he has operated it as his individual enterprise since that time.

PAR. 3. During recent years, and particularly since 1939, the respondent has solicited orders for his product from prospective customers by means of advertising material sent through the United States mails. Contained in such advertising material are statements such as the following:

* * * I would suggest placing your order NOW for your requirements for the next six months; when raw materials are depleted [all fresh stock] I cannot guarantee delivery of Malt Cereal because of the inability to manufacture until the Law so provides.

Our records indicate we have served you in the past and therefore would again appreciate the pleasure of serving you.

In response to such solicitation many persons have ordered the said product from respondent, and a large number have paid respondent for the merchandise at the time their orders were placed. In all such instances respondent has retained the payments, but in many instances has not shipped the merchandise ordered.

In order to forestall complaints from customers, due to nondelivery of the merchandise, respondent has adopted the practice of sending postal cards to his customers giving various false and fraudulent reasons and excuses for failure to fill the orders received. Among and typical of the various subterfuges and excuses offered by respondent for his failure to fill prepaid orders are the following:

Your order for pounds of Malt Cereal has been duly received and entered for shipment as rapidly as possible. Due to the shortage of Malt Cereal and the inability to obtain Burlap which is an import of India and also jute we cannot guarantee immediate delivery, we are endeavoring to solve this problem at the present time. Paper cartons cannot be available; we are attempting to work some solution with cotton; it is questionable as to whether they may be strong enough. It is very distasteful to inform you of the prevailing conditions, however we are at mercy.

Your order for pounds of Malt Cereal has been duly received and entered for shipment as rapidly as possible; Due to shortage of Malt Cereal, in fairness to all concerned all orders are filled in rotation. We are doing our best to fulfill orders as rapidly as possible; however we will not sacrifice speed in preference to quality. If you wish to cancel the order, please notify us and your money or Invoice will be cancelled, though we dislike to have this information, as many customers have purchased for the past 30 to 40 years.

We have been very fortunate in securing several car-loads of choice Chevalier Barley and are now Malting and Roasting 24 hours per day to fulfill the delinquent orders. Our product will be of standard quality as heretofore, as we do not wish to furnish an inferior Malt Cereal because of speed. Therefore your shipment of pounds will go forward on or about 1941.

PAR. 4. In truth and in fact, there is not and never has been any shortage of malt cereal or bags in which to ship the same. Respondent does no malting or roasting, but merely buys the finished product from his sources of supply, and repacks same for shipment to individual customers. The real reason for the failure of respondent to fill orders was that he had spent the money received in payment thereof and was unable to buy either the malt cereal or bags or sacks in which to package it for resale. His sources of supply have been at all times ready, willing, and able to supply the product and necessary sacks or bags provided payment therefor was forthcoming from respondent.

PAR. 5. The representations hereinbefore set out in the solicitation by respondent of orders for his malt cereal have had, and now have, the capacity and tendency to, and do, mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such

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representations are true, and into the belief that respondent is ready, willing, and able to fill orders in a reasonably near future, and into the purchase of, and prepayment for, substantial quantities of respondent's product as a result of such erroneous beliefs.

PAR. 6. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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, 1943, issued and thereafter served its complaint in this proceeding upon said respondent, Henry P. Kinneke, an individual, trading as Milwaukee Importing Co., charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. On July 9, 1943, the respondent filed his answer in this proceeding. Thereafter, at a hearing duly scheduled and held on August 20, 1943, it was agreed by the respondent and counsel for the Commission that, subject to the approval of the Commission, a statement of facts read into the record in this proceeding may be taken as the facts in lieu of testimony in support of the charges in the complaint or in opposition thereto, and that the said Commission may proceed upon said statement of facts to make its report stating its findings as to the facts and conclusion based thereon, and enter its order disposing of the proceeding without the filing of a trial examiner's report, the presentation of argument, or the filing of briefs. Thereafter, this proceeding regularly came on for final hearing before the Commission on said complaint, answer, and stipulation (said stipulation having been approved and accepted); 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. Respondent, Henry P. Kinneke, is an individual, trading as Milwaukee Importing Co., with his office and place of business located at 2039 North Thirty-fourth Street, Milwaukee, Wis.

Said respondent is engaged in the sale and distribution of malt cereal, a coffee substitute. Respondent causes and has caused his said malt cereal, when sold, to be shipped or transported from his place of business in the State of Wisconsin to the purchasers thereof located in

various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained a course of trade in said product in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Respondent's malt cereal is purchased by respondent from various maltsters in Milwaukee and elsewhere, and packaged and sold by respondent to individual customers throughout various States of the United States. Said malt cereal is used as a substitute for coffee by numerous individuals who wish to avoid the use of a caffeine beverage. Prior to the year 1933 an extensive mail order business in this product was developed by respondent's father and numerous individuals became accustomed over a period of many years, due to the reputation of the product and the reputation of the firm for prompt and satisfactory service, to prepaying orders sent through the mails for said product. In 1933 the business was taken over by respondent, and he has operated it at his individual enterprise since that time.

PAR. 3. During recent years, and particularly since 1939, the respondent has solicited orders for his product from prospective customers by means of advertising material sent through the United States mail. Contained in such advertising material are statements such as the following:

* * * I would suggest placing your order NOW for your requirements for the next six months; when raw materials are depleted [all fresh stock] I cannot guarantee delivery of Malt Cereal because of the inability to manufacture until the Law so provides.

Our records indicate we have served you in the past and therefore would again appreciate the pleasure of serving you.

In response to such solicitation many persons have ordered the said product from respondent, and a large number have paid respondent for the merchandise at the time their orders were placed. In all such instances respondent has retained the payments, but in many instances has not shipped the merchandise ordered.

In order to forestall complaints from customers due to nondelivery of the merchandise, respondent has adopted the practice of sending postal cards to his customers giving various false and fraudulent reasons and excuses for failure to fill the orders received. Among and typical of the various subterfuges and excuses offered by respondent for his failure to fill prepaid orders are the following:

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present time. Paper cartons cannot be available; we are attempting to work some solution with cotton; it is questionable as to whether they may be strong enough. It is very distasteful to inform you of the prevailing conditions, however, we are at mercy.

Your order for pounds of Malt Cereal has been duly received and entered for shipment as rapidly as possible; due to shortage of Malt Cereal, in fairness to all concerned all orders are filled in rotation. We are doing our best to fulfill orders as rapidly as possible; however we will not sacrifice speed in preference to quality. If you wish to cancel the order, please notify us and your money or Invoice will be cancelled, though we dislike to have this information, as many customers have purchased for the past 30 to 40 years.

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PAR. 4. In truth and in fact, there is not and never has been any shortage of malt cereal or bags in which to ship the same. Respondent does no malting or roasting, but merely buys the finished product from his sources of supply and repacks same for shipment to individual customers. The real reason for the failure of respondent to fill orders was that he had spent the money received in payment thereof and was unable to buy either the malt cereal or bags or sacks in which to package it for resale. His sources of supply have been at all times ready, willing, and able to supply the product and necessary sacks or bags, provided payment therefor was forthcoming from respondent.

PAR. 5. The representations hereinbefore set out in the solicitation by respondent of orders for his malt cereal have had and now have the capacity and tendency to and do mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations are true, and into the belief that respondent is ready, willing, and able to fill orders in a reasonably near future, and into the purchase of and prepayment for substantial quantities of respondent's product as a result of such erroneous beliefs.

CONCLUSION

The aforesaid acts and practices of the respondent as herein found are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices 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 the respondent.

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ent, and a stipulation as to the facts entered into between the respondent herein and counsel for the Commission which provides, among other things, that without further evidence or other intervening procedure the Commission may issue and serve upon the respondent herein findings as to the facts and conclusion based thereon and an order disposing of the proceeding; 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, Henry P. Kinneke, individually, and trading under the name Milwaukee Importing Co., or trading under any other name, and his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of respondent's malt cereal or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Accepting and retaining money sent in prepayment of merchandise ordered when for any reason the merchandise is not shipped pursuant to order.

2. Making false and fraudulent excuses and pretexts for failure to fill prepaid orders for merchandise.

3. Representing to customers that failure to fill orders or ship merchandise is due to war conditions, shortages of labor or raw materials, or to any other cause which does not in fact exist.

4. Representing that the malt cereal sold by respondent is malted or roasted in respondent's plant.

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.

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IN THE MATTER OF
J. E. TODD, INC.

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

Docket 4549. Complaint, July 29, 1941—Decision, Oct. 12, 1943¹

Where a corporation engaged in interstate sale and distribution of its "Todd's Capsules," ingredients of which, according to labels on the containers, were represented as including magnesium oxide, olibanum, sodium bicarbonate, and calcium bicarbonate; by statements in newspapers, periodicals, and reprints of testimonial letters, folders, and other advertising material, directly and by implication—

Represented falsely that its said preparation had curative properties in the treatment of rheumatism, arthritis, neuritis, and similar diseases, and would relieve the symptoms of pain associated therewith; the facts being that the therapeutic value of said preparation, if used in adequate amounts, was limited to neutralizing the acids of the stomach contents and the action of a mild laxative;

With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that said representations were true, because of which mistaken belief it purchased substantial quantities of its said preparation:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce.

As respects the only testimony offered by the seller of a preparation, which it recommended and advertised as an effective therapeutic agent and analgesic in the treatment of rheumatism, arthritis, and neuritis and similar diseases, ingredients of which, labeled as including magnesium oxide, olibanum, sodium bicarbonate, and calcium bicarbonate, as found by the Commission on the basis of the testimony of well-qualified physicians, had no therapeutic or analgesic value in the treatment of said ailments: such testimony, which indicated a limited knowledge of pharmacology, came from two osteopathic physicians who testified without knowledge as to the causative factors of arthritis and on the theory, long disproved by modern medicine and not now accepted by the consensus of opinion of the medical profession, that they are due to toxic conditions of the gastro-intestinal tract, and who mistakenly attributed the preparation's alleged therapeutic value to the element olibanum.

Before *Mr. John W. Addison*, trial examiner.

Mr. R. P. Bellinger for the Commission.

Nash & Donnelly, of Washington, D. C., for respondent.

¹Original findings not published. The original order, which was not modified and is published herewith, was made as of July 27.