

Syllabus

IN THE MATTER OF

PHILIP SMITHLINE, MAX SILPE, AND JOSEPH MILLER,
TRADING AS SMITHLINE COATS AND SMITHLINE COAT
CO.

COMPLAINT, FINDINGS, ORDER, AND OPINION IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914,
AND THE WOOL PRODUCTS LABELING ACT OF 1939

Docket 5506. Complaint, July 23, 1947—Decision, July 28, 1948

Where misbranding occurs with respect to products subject to the provisions of the Wool Products Labeling Act, the law contemplates corrective action by the Commission regardless of whether such misbranding is based upon willfulness, negligence, or other causes, and a defense in the nature of a plea of "confession and avoidance" based upon a respondent's alleged good faith and lack of intent to violate the law, is not an appropriate one to such a corrective proceeding.

The Wool Products Labeling Act places the responsibility on the manufacturer and distributor of products subject thereto to label them correctly and in accordance with the terms of said act, and further provides that if the seller does not so label the goods he is guilty of an unfair method of competition and an unfair and deceptive act or practice in commerce within the meaning of the Federal Trade Commission Act. If sellers charged with misbranding certain wool products could plead as an effective defense the fact that they had sold a large number of other wool products which were not misbranded, it would be an unreasonable burden on those charged with its enforcement, and would likewise make the act ineffective. Enforcement must necessarily be on the basis of a sampling of the products of a large number of sellers, and if violation is indicated it would obviously be most impractical and unnecessary to test several thousand or even several hundred of the products of a seller in order to establish the same.

Where three partners engaged in the manufacture and interstate sale and distribution of women's coats—

Sold some 137 coats which they had misbranded in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder by attaching to them labels bearing the name of the purchaser and the words "Smithline Coats 100% Wool Interlining 100% Cotton"; when in fact the fabric composing the body of the coats was not "100% wool," but was actually 52% wool and 48% rayon:

Held, That such acts and practices of respondents in labeling their coats as above set forth, were in violation of said Wool Products Labeling Act and Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce.

As respects respondents' contention in said proceeding that they were under the mistaken belief that the fabric in question was all wool, that the price paid therefor was within the range of the then current prices for all-wool fabrics, that they did not profit financially through the mistake, that the 137 coats

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amounted to only about 1 percent of those sold during the particular year, that they did not know of the misbranding until it was brought to their attention by representatives of the Commission, and that none of the large number of other coats sold by them were misbranded, and the further assertion that they had taken certain specified steps to prevent any future misbranding; there being no contention, however, that the fabric involved was misbranded when received by them, either through failure to place the required label thereon or through any misstatement of fiber content on any such label:

Their testimony that no other coats were misbranded was necessarily viewed in the light of the testimony that the first knowledge they had of the misbranding of the 137 coats came from a representative of the Commission, the facts were such as to indicate a negligent course of procedure by them in labeling the wool products which they sold, and the act requires that fabrics such as those involved shall bear a tag or label showing the fiber content.

While the initiation of a criminal action against respondents charged with violation of the Wool Products Labeling Act would be in order had they intended to misbrand their wool products, in the corrective proceeding in question intent was not charged in the complaint, was not at issue, and did not need to be proved to establish such a case under the act. The contention of respondents, therefore, that during the period involved they sold about 41,000 coats which were not to their knowledge misbranded, is not an appropriate defense in said proceeding, and especially so in view of the fact that they had no knowledge that the 137 coats concerned were misbranded until the matter was discovered and brought to their attention by a Commission inspector.

In said proceeding, in which respondents offered a defense in the nature of a plea in "confession and avoidance," based upon their alleged good faith and lack of intent to violate the law, asserted that during a two-year period covering that herein concerned, they sold about 41,564 coats, and contended that every business has a small margin of error and that their error was not such as to merit the issuance of an order to cease and desist; but in which the record unquestionably showed that they were guilty of misbranding 137 ladies' coats which they sold and distributed to various dealers throughout the country in interstate commerce; the statute, by virtue of such act, regardless of their intent, was violated, and issuance of a cease and desist order for the protection of the public against future misbranding of wool products by them, was believed justified. Should respondents, however, not again violate the act in misbranding their products, they would not be subject to any penalty because of such proceeding.

Before *Mr. Clyde M. Hadley*, trial examiner.

Mr. J. W. Brookfield, Jr. and *Mr. George M. Martin* for the Commission.

Mr. Jerome N. Wanshel, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, and by virtue of the au-

thority vested in it by said acts, the Federal Trade Commission, having reason to believe that Philip Smithline, Max Silpe, and Joseph Miller, individuals and copartners trading as Smithline Coats and Smithline Coat Co., hereinafter referred to as respondents, have violated the provisions of said acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, 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. The respondents, Philip Smithline, Max Silpe, and Joseph Miller are copartners trading as Smithline Coats and Smithline Coat Co., and have their office and principal place of business at 252 West 38th Street, New York, N. Y. Respondents are now, and for more than 1 year past have been, engaged in the manufacture and sale of women's coats.

Respondents cause, and for more than 1 year last past have caused, certain of said coats when sold by them to be transported from their said place of business in the State of New York to purchasers thereof, at their various points of location in the various States of the United States and in the District of Columbia. The respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said coats in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. Respondents are engaged in the introduction and manufacture for introduction into commerce and in the offering for sale, sale, transportation, and distribution of wool products, as such products are defined in the Wool Products Labeling Act of 1939, in commerce as "commerce" is defined in said act and in the Federal Trade Commission Act. Many of respondents' said products are composed in whole or in part of wool, reprocessed wool, or reused wool, as those terms are defined in the Wool Products Labeling Act of 1939 and such products are subject to the provisions of said act and the rules and regulations promulgated thereunder. Since July 15, 1941, respondents have violated the provisions of said act and said rules and regulations in the introduction and the manufacture for introduction into commerce and in the offering for sale, sale, transportation, and distribution of said wool products in commerce by causing said wool products to be misbranded within the intent and meaning of said act and the rules and regulations.

PAR. 3. Among the wool products introduced and manufactured for introduction into commerce and offered for sale, sold, transported, and distributed in commerce as aforesaid, were certain women's coats.

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Exemplifying respondents' practice of violating said act and the rules and regulations promulgated thereunder is their misbranding of the aforesaid wool products in violation of the provisions of said act and said rules and regulations by failing to affix to said wool products a stamp, tag, label or other means of identification, or a substitute in lieu thereof, as provided by said act, showing (a) the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 percentum of said total fiber weight of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said per centum by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers; (b) the maximum percentage of the total weight of the wool product of nonfibrous loading, filling, or adulterative matter; (c) the percentages in words and figures plainly legible by weight of the wool contents of such wool product where said wool product contains a fiber other than wool; (d) the name of the manufacturer of the wool product, or the manufacturer's registered identification number and the name of a seller or reseller of the product as provided for in the rules and regulations promulgated under such act, or the name of one or more persons subject to section 3 of the said act with respect to such wool product.

PAR. 4. The acts, practices, and methods of respondents, as above alleged, were and are in violation of the Wool Products Labeling Act of 1939, and the rules and regulations promulgated thereunder, 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 and the Wool Products Labeling Act of 1939, the Federal Trade Commission on July 23, 1947, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939. After the issuance of said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner of the Commission theretofore designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding came on for final hearing before the Commission on the said complaint, answer, testimony, and other evidence, recommended decision of the trial

examiner and exceptions thereto, and briefs of counsel (oral argument not having been requested); 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. Respondents Philip Smithline, Max Silpe, and Joseph Miller, individuals, are copartners trading as Smithline Coats and as Smithline Coat Co., with their office and principal place of business at 252 West 38th Street, New York, N. Y. They are now, and for several years last past have been, engaged in the manufacture, sale, and distribution of women's coats.

PAR. 2. In the course and conduct of their aforesaid business, respondents have caused, and cause, coats made by them, when sold, to be transported from their place of business in the State of New York to purchasers thereof at their various points of location in other States of the United States and in the District of Columbia. Said respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said coats in commerce among and between various States of the United States and in the District of Columbia.

PAR. 3. On or about October 16, 1945, respondents purchased from Action Fabrics, Inc., a number of bolts of a certain fabric, which fabric was used by respondents in making approximately 137 coats. The coats made therefrom were sold by respondents to customers located in various States other than the State of New York and were shipped to said purchasers in commerce as aforesaid. Before such shipment respondents placed on each of said 137 coats a tag or label bearing the name of the purchaser and the following:

SMITHLINE COATS
100% WOOL
Interlining 100% Cotton
MFR. 449

As a matter of fact, the fabric composing the body of the coats was not "100% wool" as represented on said tags or labels. Its fiber content was actually 52 percent wool and 48 percent viscose rayon. Said coats were thus misbranded within the meaning of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder.

PAR. 4. Although respondents do not deny that the coats in question were misbranded, they contend by way of justification that they were

under the mistaken belief that the fabric of which the coats were made was all wool, that the price paid for the fabric was within the range of the then current prices for all-wool fabrics, that they did not profit financially through such mistake, that the 137 coats amounted to only about 1 percent of the coats sold by them during the particular year, that they did not know of the misbranding of these coats until it was brought to their attention by representatives of this Commission, and that none of the large number of other coats sold by them were misbranded. Respondents further assert that in order to prevent any future misbranding all purchase orders for fabrics specify that they are to be all wool, upon receipt all piece goods are examined to see that they are all wool, and the tags showing the fiber content of the piece goods are removed from the fabric and preserved by respondents.

PAR. 5. The Wool Products Labeling Act of 1939 requires that fabrics such as that bought and used by respondent in making the 137 coats involved in this proceeding shall bear a tag or label showing the fiber content. There is no contention by respondents that the fabric in question was misbranded when received by them, either through failure to place the required label on it or through any misstatement of fiber content on any such label. The facts are such as to indicate a negligent course of procedure by respondents in labeling the wool products sold by them. Respondents' testimony that no other coats were misbranded is necessarily viewed in the light of the testimony that the first knowledge respondents had of the misbranding of the 137 coats involved in this proceeding came from a representative of this Commission.

CONCLUSION

The acts and practices of respondents in labeling their aforesaid coats in the manner heretofore found were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, 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 respondents, testimony, and other evidence taken before an examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner and exceptions thereto, and briefs filed herein (oral argument not having been requested), and the Commission having

made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and the provisions of the Federal Trade Commission Act:

It is ordered, That respondents Philip Smithline, Max Silpe, and Joseph Miller, copartners trading as Smithline Coats and as Smithline Coat Co., or under any other name or names, jointly or severally, their representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce or the sale, transportation, or distribution of such products in commerce, as "commerce" is defined in the aforesaid acts, do forthwith cease and desist from misbranding women's coats or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or are represented as containing "wool," "reprocessed wool," or "reused wool," as those terms are defined in said act, by failing to show in a clear and conspicuous manner by tag, label, or other means of identification securely fixed to such products or by a stamp placed thereon:

1. The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding 5 percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is 5 percentum or more, and (5) the aggregate of all other fibers.

2. The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter.

3. The name of the manufacturer of such wool product; or the manufacturer's registered identification number and the name of a seller of such wool product; or the name of one or more persons introducing such wool product into commerce, or engaged in the sale, transportation, or distribution thereof in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939.

Provided, however, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of section 3 of the Wool Products Labeling Act of 1939: *And provided, further*, That nothing contained in this order shall be construed as limiting any applicable provisions of said act and the rules and regulations promulgated thereunder.

It is further ordered, That the respondents shall, within 60 days after service upon them of this order, file with the Commission a report

in writing setting forth in detail the manner and form in which they have complied with this order.

OPINION OF COMMISSIONER EWIN L. DAVIS

The respondents' Philip Smithline, Max Silpe, and Joseph Miller, trading as Smithline Coats and Smithline Coat Co. have their place of business in New York City and are engaged in the manufacture, sale and distribution of women's coats in interstate commerce. The Commission in July of 1947 issued a complaint charging respondents with violation of the Wool Products Labeling Act in that they misbranded certain wool products sold by them in interstate commerce.

The proceeding is before the Commission for consideration upon the complaint, answer of the respondents, testimony and other evidence appearing in the trial record, the recommended decision of the trial examiner and exceptions thereto, together with briefs of counsel.

The facts in this case are that respondents manufactured and sold in interstate commerce 137 women's coats which were labeled as follows:

"SMITHLINE COATS

100% WOOL.

Interlining 100% Cotton

MFR 449"

The coats which were labeled as described above were cut from the same lot of a fabric which respondents purchased from another concern. According to a report of the Bureau of Standards which appears as evidence in the record, the fabric composing the body of the coats which respondents represented as being 100 percent wool was in fact composed of 52 percent woolen fiber and 48 percent viscose rayon. One of the respondents testified that when they purchased this fabric they were under the impression that the fabric was 100 percent wool. On cross-examination, however, this respondent testified that he did not remember definitely whether or not the salesman who sold him the fabric stated that it was all wool.

In any event, the facts outlined above were in effect admitted by the respondents and are not at issue in this proceeding.

The defense offered by respondents to this proceeding is in the nature of a plea in "confession and avoidance" based upon their alleged good faith and lack of intent to violate the law. Respondents state that they did not intend to violate the law and they contend that between January 1, 1945, and January 1, 1947, they sold approximately 41,564

coats. They further contend that every business has a small margin of error and that the error of respondents was not of such nature to merit the issuance of an order to cease and desist.

The trial examiner in his recommended decision stated that the alleged practice of misbranding upon the part of the respondents was discontinued prior to the issuance of the complaint, and inasmuch as the record shows that respondents had no intent to violate the provisions of the Wool Act, he recommends that the complaint be dismissed.

The question of intent to violate the law is not at issue in this proceeding inasmuch as the complaint makes no such charge, nor is the proving of "intent" necessary in establishing a case of this type under the Wool Act. The act does provide, however, that any person who "wilfully" misbrands products subject to such act is guilty of a misdemeanor and the Commission shall certify the facts to the Attorney General for appropriate action. In other words, if respondents intended to misbrand their wool products, the initiation of a criminal action against respondents would be in order.

Where misbranding occurs with respect to products subject to the provisions of the act, the law contemplates corrective action by the Commission regardless of whether such misbranding is based upon wilfulness, negligence, or other causes.

The contention of respondents that during the period mentioned above they sold approximately 41,000 coats which were not to their knowledge misbranded is not an appropriate defense to this proceeding, especially in view of the fact that respondents had no knowledge that the 137 coats presently under question were misbranded until the matter was discovered and brought to their attention by a Commission inspector.

It would be an unreasonable burden on those charged with the enforcement of this act and it would likewise make the act ineffective, if sellers charged with misbranding certain wool products could plead as an effective defense the fact that they had sold a large number of other wool products which were not misbranded. The enforcement of this act must necessarily be made on the basis of a sampling of the products of a large number of sellers. If violations are indicated it would obviously be most impractical and unnecessary to test several thousand or even several hundred of the products of a seller in order to establish a violation of the act. The act places the responsibility on the manufacturer and distributor of products subject thereto to label them correctly and in accordance with the terms of said act and further provides that if the seller does not so label the goods he is guilty of an unfair method of competition and an unfair and deceptive

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act or practice in commerce within the meaning of the Federal Trade Commission Act.

The record herein unquestionably shows that respondents were guilty of misbranding 137 ladies' coats which they sold and distributed to various dealers throughout the country in interstate commerce. By virtue of such acts, regardless of respondent's intent, the statute has been violated and an order to cease and desist is believed justified. The issuance of such an order is for the protection of the public against future misbranding of wool products by respondents. If, however, respondents do not again violate the Wool Products Labeling Act in misbranding their products, they will not be subject to any penalty because of this proceeding.

In view of the above, the Commission is issuing its findings as to the facts and order to cease and desist in this case.

Syllabus

IN THE MATTER OF
CROWN MANUFACTURERS ASSOCIATION OF AMERICA
ET AL.

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

Docket 4602. Complaint, Sept. 30, 1941—Decision, Aug. 4, 1948

In a proceeding in which the manufacturer-sellers of a certain product knowingly made concurrent use of a freight equalization plan or system under which (having brought about uniformity in base prices and terms and conditions) the manufacturer making the sale either credited the purchaser—who customarily paid the freight—upon the invoice, or otherwise allowed him the difference between his actual freight from the manufacturer-seller and the rate to his location from the nearest manufacturer, with the result that the price paid was the same regardless of which manufacturer made the sale: the contention of the manufacturers that in so matching prices with each other at any given destination they were merely “meeting competition” was not a valid one. In the use of said plan, and in order to produce such matched prices, sellers of the product were required, at numerous destinations, to accept net receipts for their products which varied according to the freight absorbed as a result of the closer proximity to the purchaser of some other seller, and each participant consciously intended that no attempt be made to exclude any seller from the natural freight-advantage territory of another, and by the use of the plan invited other sellers to share the available business in his natural market in return for similar treatment for itself in the trade territories of all other participating sellers. The price rigidity existing in the industry concerned since 1938, and the failure of prices to respond in any way to changing conditions of supply and demand were not consistent with the existence of effective competition, and the complete standardization of the product as a result of admitted efforts made by the manufacturer-sellers involved, and other circumstances showing an overriding desire on their part to present to a prospective customer a completely united front insofar as products, prices, and terms of sale were concerned indicated the total absence of such competition. And when, as in such an industry, the price of the seller nearest the purchaser is always accepted by other sellers and there is no bargaining on any basis between buyers and sellers, fundamental requirements of a true competitive market are lacking, and prices are not the result of market action in the economic sense, but are mere expressions of an artificial and monopolistic price structure.