

Syllabus

IN THE MATTER OF
THE RUBEROID CO.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (A) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED
BY AN ACT APPROVED JUNE 19, 1936

Docket 5017. Complaint, July 26, 1943—Decision, Jan. 20, 1950

Where one of the largest manufacturers of asbestos and asphalt roofing, insulating materials and allied products in the United States, with principal office and place of business in New York and branch warehouses and sales offices in Baltimore, Mobile, Erie, Pa.; Millis, Mass.; and Chicago, engaged in the competitive interstate sale and distribution of said products to wholesalers, retailers, and building or roofing contractors, or "applicators," many of whom were competitively engaged with one another and with customers of said manufacturer's competitors in the resale of said products within the several trade areas concerned—

Discriminated in price between purchasers of its said products who competed keenly in the resale thereof as roofing contractors or applicators and as retailers, and under conditions where a difference of a dollar in the price of a roofing job as between equally reputable applicators could be decisive in securing the business for the one offering the lower price, through granting to some, with no contention of cost justification, an additional 5 percent discount not extended to others for products of like grade and quality;

With the result that customers who receive such preferential discounts had a material advantage over the others, and that such discrimination might substantially lessen competition in the line of commerce concerned and injure, destroy, or prevent competition between those receiving the benefit of such discriminatory prices and those from whom such prices were withheld:

Held, That such discriminations in price, under the circumstances set forth, were violative of subsection 2 (a) of the Clayton Act as amended.

In said proceeding in which there was sharp disagreement between counsel as to whether the record established discriminations by respondent among wholesalers, the trial examiner, in the opinion of the Commission, was correct in his conclusion that there was insufficient evidence to establish such discrimination.

As respects the fact, in said proceeding, that the particular designations given purchasers were not always controlling as indicating the functions actually performed by them—as, for example, in the case of a roofing contractor or applicator who sold quantities to other applicators, and a purchaser classified as a wholesaler who also functioned as an applicator—and the confusion for which this was responsible with respect to the question of whether or not discrimination by respondent among wholesalers was established; the fundamental and controlling factor in the proceeding was that the record established price discriminations by respondent among purchasers who were in fact competing with one another in the resale of the products in question, and the Commission was of the view that the particular designations applied

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to the various purchasers was of little importance, and that the corrective action taken by it in the matter should be sufficiently comprehensive to stop the discriminations irrespective of such designations.

Before *Mr. Charles B. Bayly*, trial examiner.

Mr. James I. Rooney for the Commission.

Hannon & Evans, of New York City, and *Covington, Burling, Rublee, Acheson & Shorb*, of Washington, D. C., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has been since June 19, 1936, and is now violating the provisions of subsection (a) of section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, The Ruberoid Co., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, New York, N. Y. Respondent corporation is now and has been since June 19, 1936, engaged in the business of processing, manufacturing, offering for sale, selling, and distributing asbestos and asphalt roofing, insulating materials, and allied products in all parts of the United States.

The respondent is one of the largest manufacturers and distributors of asbestos and asphalt roofing, insulating materials and allied products in the United States. It maintains and operates branch warehouses and sales offices at Baltimore, Md.; Mobile, Ala.; Erie, Pa.; Millis, Mass.; and Chicago, Ill. The respondent sells its products directly to wholesalers, retailers, and "applicators." The term "applicators" herein used applies to corporations, individuals, partnerships, and firms known as building or roofing contractors who apply the products purchased from the respondent to buildings. The "applicators" usually sell the respondent's products to consumers on a contract basis, charging the consumer for the materials used and the labor employed in connection with the applying of the asbestos and asphalt roofing and insulating materials to buildings.

PAR. 2. Respondent sells and distributes its products in commerce between and among the various States of the United States and in the District of Columbia and preliminary to or as a result of such sales, causes such products to be shipped and transported from the place of

production or origin of the shipment to the purchasers thereof who are located in various States of the United States and in the District of Columbia other than the State of origin of the shipment and there is and has been at all times herein mentioned a continuous current of trade and commerce in said products across State lines between respondent's plants, factories or warehouses and the purchasers of such products. Said products are then sold and distributed for use and resale within the various States of the United States and within the District of Columbia.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent has been and is now in substantial competition in commerce with other manufacturers and sellers of asbestos and asphalt roofing and insulating materials and allied products and who for many years prior hereto have been and are now engaged in manufacturing, selling and shipping such products in commerce across State lines to purchasers thereof located in the various States of the United States.

Many of respondent's customers are competitively engaged with each other and with the customers of respondent's competitors in the resale of said products within the several trade areas in which respondent's said customers respectively offer for sale and sell the said products purchased from respondent.

PAR. 4. In the course and conduct of its said business, since June 19, 1936, respondent has been and is now discriminating in price between different purchasers buying said products, by selling them to some of its customers at higher prices than it sells products of like grade and quality to other customers who are competitively engaged in the resale of said products within the United States with customers receiving the lower prices.

The respondent grants and allows to all of its customers a cash discount of 2 percent if the invoice is paid within a specified time.

PAR. 5. The respondent has discriminated in price by the use of a so-called trade discount schedule whereby it has sold to some customers at higher prices than it has sold goods of like grade and quality to other customers who are in competition with them in the resale of said products within the United States. The so-called trade discount schedule includes two types of discounts, one known as a "distributor commission" and the other known as a "wholesaler discount." The trade discount schedule used by the respondent is more particularly described as follows:

(a) The respondent grants to some of its customers who are engaged in the resale of asphalt roofing products of like grade and quality in

competition with other of respondent's customers, a "distributor commission" ranging from 5 to 10 percent to be deducted from the invoice price and a "wholesaler discount" of 5 percent off the invoice price.

The "wholesaler discount" of 5 percent allowed by the respondent to its favored customers is in addition to the "distributor commission" ranging from 5 to 10 percent granted and allowed to the same customers.

(b) The respondent grants to some of its customers who are engaged in the resale of asbestos shingles and siding of like grade and quality in competition with other of respondent's customers, a "distributor commission" of 5 percent, and in some instances 6 percent, to be deducted from the invoice price and a "wholesaler discount" of 6 percent off of the invoice price. The "wholesaler discount" of 6 percent allowed by the respondent to its favored customers is in addition to the "distributor commission" of 5 percent, and in some instances 6 percent granted and allowed to the same customers.

The "distributor commission" and "wholesaler discount" herein referred to are allowed to some and withheld from other customers of the respondent who purchase from the respondent asphalt roofing products and asbestos shingles and siding and allied products and who are in competition with each other.

PAR. 6. The effect of the discrimination in price generally alleged in paragraph 4 hereof and of the discriminations specifically set forth in paragraph 5 hereof has been, or may be, substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged and to injure, destroy or prevent competition between purchasers receiving the benefit of said discriminatory prices and those from whom they are withheld. The effect also has been or may be to tend to create a monopoly in those purchasers receiving the benefit of said discriminatory prices in the said line of commerce in the various localities or trade areas in the United States where said favored customers and their disfavored competitors are engaged in business.

Such discriminations in price by respondent between different purchasers of commodities of like grade and quality in interstate commerce in the manner and form aforesaid are in violation of the provisions of subsection 2 (a) of section 1 of said act of Congress approved June 19, 1936, entitled "An Act to amend section 2 of an act entitled, 'An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes' approved October 15, 1914, as amended, U. S. C. Title 15, Section 13 and for other purposes."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C., Sec. 13). The Federal Trade Commission on July 26, 1943, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with violation of subsection (a) of section 2 of that act as amended. After the filing by respondent of its answer to the complaint and after certain evidence in support of the complaint had been introduced before a trial examiner of the Commission theretofore duly designated by it, counsel supporting the complaint and counsel for respondent agreed that the matter might be determined upon the evidence introduced up to that time, without the necessity of further evidence. Thereafter, the proceeding regularly came on for final consideration by the Commission upon the complaint, answer, evidence, recommended decision of the trial examiner, the briefs of counsel, and oral argument; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, The Ruberoid Co., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 500 Fifth Avenue, New York, N. Y. Respondent is now and since June 19, 1936, has been engaged in the business of processing, manufacturing, offering for sale, selling, and distributing asbestos and asphalt, roofing, insulating materials, and allied products.

Respondent is one of the largest manufacturers and distributors of asbestos and asphalt roofing, insulating materials, and allied products in the United States. It maintains and operates branch warehouses and sales offices at Baltimore, Md.; Mobile, Ala.; Erie, Pa.; Millis, Mass.; and Chicago, Ill. Respondent sells its products directly to wholesalers, retailers, and "applicators." The term "applicator" herein used applies to purchasers known as building or roofing contractors, who apply to buildings the products purchased from respondent. The applicator usually sells respondent's products to consumers on a contract basis, charging the consumer for the material

used and the labor employed in connection with the applying of the products to buildings.

PAR. 2. Respondent sells and distributes its products in commerce between and among the various States of the United States and in the District of Columbia, and preliminary to or as the result of such sales causes such products to be shipped and transported from the place of production or origin of the shipment to the purchasers thereof who are located in various States of the United States and in the District of Columbia. There is, and at all times mentioned herein has been, a continuous current of trade and commerce in such products across State lines between respondent's plants, factories, or warehouses and the purchasers of such products. The products are then sold and distributed for use and resale within the various States of the United States and the District of Columbia.

PAR. 3. In the course and conduct of its business, respondent has been and is in substantial competition with other manufacturers and sellers of similar products who have been and are engaged in the sale of such products in commerce between and among the various States of the United States.

Many of respondent's customers are competitively engaged with one another and with the customers of respondent's competitors in the resale of asbestos and asphalt roofing, insulating materials, and allied products within the several trade areas in which respondent's customers respectively offer for sale and sell the products purchased from respondent.

PAR. 4. In the sale of its products in commerce, as aforesaid, respondent has discriminated in price by selling its products to some of its customers at prices lower than those at which it sells products of like grade and quality to other customers who compete with such favored customers in the resale of such products. Among the specific instances of discrimination disclosed by the record are the following, all of the purchasers involved being located in the New Orleans, La., trade area:

On March 12, 1941, respondent sold A. H. White Roofing Co. 17 squares of jade green, 16-inch hexagonal asbestos roofing shingles at \$6.72 per square, and granted a 6 percent discount on this item. On March 13, 1941, respondent sold National Roofing Co. 25 squares of the same type of shingles as it sold A. H. White Co. at \$6.72 per square, and granted it a 6 percent discount and a further discount of 5 percent.

On March 17, 1941, respondent sold A. H. White Roofing Co. 15 rolls of 30-pound asphalt felt at \$1.50 a roll, and granted a 6 percent dis-

count on this item. On the same date respondent sold F. J. Villars & Son 100 rolls of the same type of asphalt felt as it sold the A. H. White Co. at \$1.50 a roll, and granted it a 6 percent discount and a further discount of 5 percent.

On February 8, 1941, respondent sold Jordy Bros., 13 squares of tile red, 16-inch hexagonal asbestos roofing shingles and the A. H. White Co., 15 squares of the same type of shingles at \$6.52 per square, and granted a 6% discount on this item. On February 7, 1941, respondent sold Brandin Slate Co. 10 squares of the same type of shingle that it sold Jordy Bros. and the A. H. White Co. at \$6.52 per square, and granted to this purchaser both a 6 and a 5 percent discount.

On September 29, 1941, respondent sold A. H. White Roofing Co. 50 rolls of 15-pound asphalt at \$1.66 per roll. On the same date it sold the National Roofing Co. 50 rolls of the same type of felt at \$1.66 per roll, and granted a 5 percent discount.

On June 30, 1941, respondent sold Joseph Modenbach & Sons 30 rolls of 30-pound asphalt felt at \$1.50 a roll. On June 24, 1941, respondent sold National Roofing Co. 75 rolls of this same type of asphalt at \$1.50 a roll, and granted a 5 percent discount.

On August 4, 1941, respondent sold Joseph Modenbach & Sons 25 squares of blue-black, 16-inch hexagonal asbestos roofing shingles at \$6.52 per square and 30 rolls of 30-pound asphalt felt at \$1.58 per roll, and granted a 6 percent discount on the shingles. On August 23, 1941, respondent sold F. J. Villars & Son 22 squares of the same type of shingles at \$6.52 per square and 65 rolls of the same type of asphalt felt at \$1.58 per roll and granted a 6 percent discount and a further discount of 5 percent on the shingles and a 5 percent discount on the asphalt felt.

On April 22, 1941, respondent sold A. H. White Roofing Co. 50 squares of Snow White, 12-inch asbestos colonial siding at \$5.88 per square, and granted a 6 percent discount. On the same date it sold the National Roofing Co. 3 squares of the same type of siding at \$5.88 per square, and granted both a 6 percent discount and a 5 percent discount.

On May 13, 1941, respondent sold A. H. White Roofing Co. 25 squares of Snow White, 12-inch asbestos colonial siding at \$5.88 per square, and granted a 6 percent discount. On the same date it sold Brandin Slate Co. 14 squares of the same type of siding at \$5.88 per square, and granted both a 6 percent discount and a 5 percent discount.

The respective purchasers of respondent's products referred to above were competing in the resale of these products as roofing contractors or applicators and as retailers. The competition among these customers of respondent was keen. Respondent recognized that a difference of 2½ percent was material to its customers in the possible diversion of trade. In fact, a difference of a dollar or more in the price of a roofing job as between equally reputable applicators could be decisive in securing the business for the applicator offering the lower price. In these circumstances customers receiving preferential discounts had a material competitive advantage over customers to whom such discounts were denied.

There is no contention on the part of respondent that the preferential discounts were justified by lower costs.

PAR. 5. There is a sharp disagreement between counsel as to whether the record establishes discriminations by respondent among wholesalers. In the opinion of the Commission, the trial examiner is correct in his conclusion that there is insufficient evidence to establish such discriminations. However, as the trial examiner points out, there is some confusion on this point due to the fact that the particular designations given purchasers are not always controlling as indicating the functions actually performed by such purchasers. For example, one purchaser, although engaged primarily as a roofing contractor or applicator, sold quantities of the products to other applicators. And another purchaser, although classified by respondent as a wholesaler, also functioned as an applicator.

The Commission is of the view that the particular designations applied to the various purchasers is of little importance. The fundamental and controlling factor in the proceeding is that the record establishes price discriminations by respondent among purchasers who are in fact competing with one another in the resale of the products in question, and the particular terms used to describe the various purchasers are immaterial. The corrective action taken by the Commission in the matter should be sufficiently comprehensive to stop the discriminations, irrespective of the designations applied to the purchasers.

PAR. 6. The effect of the discriminations in price referred to herein may be substantially to lessen competition in the line of commerce in which the purchasers receiving and those denied the benefits of such discriminatory prices are engaged, and to injure, destroy, or prevent competition between the purchasers receiving the benefit of such discriminatory prices and those from whom such prices are withheld.

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CONCLUSION

The discriminations in price by respondent as herein found are violative of subsection (a) of section 2 of the aforesaid Clayton Act, as amended.

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, evidence introduced before a trial examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner, briefs filed by counsel supporting the complaint and counsel for respondent, and oral argument, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act) as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C. Sec. 13):

It is ordered, That the respondent, the Ruberoid Co., a corporation and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale of asbestos or asphalt roofing materials in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating in price:

By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products.

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.

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IN THE MATTER OF

WILBUR F. DARNELL AND GEORGE W. DARNELL TRADING AS DARNELL DRUG COMPANY

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

Docket 5621. Complaint, Nov. 22, 1948—Decision, Feb. 2, 1950

Where two individuals engaged in the interstate sale and distribution of a product designated "Glancaps," compounded under two formulae with two directions supplied for use; through advertisements in newspapers and otherwise—

- (a) Represented falsely that said product, used as directed, constituted a competent and effective treatment for diseases of the prostate, kidneys and bladder, and would restore the normal functions thereof when impaired for any reason;
- (b) Represented falsely that use thereof would clear the entire system, and particularly said organs, of poisons; and
- (c) Represented falsely that it would build up the strength and energy of the user, and was safe and harmless;
- (d) Failed to reveal in said advertisements facts material with respect to the consequence which might result from the use of said product under customary conditions in that the irritant diuretics therein contained, were likely to result in serious and irreparable injury to injured or diseased kidneys and prolonged use was likely to cause serious injury to normal kidneys; and
- (e) Falsely represented through use of the trade name "Glancaps," that the preparation was of value in the treatment of the body glands;

With tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous belief that such representations were true, and thereby induce the purchase of substantial quantities of said product:

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

Before *Mr. John L. Hornor*, trial examiner.

Mr. Charles S. Cox for the Commission.

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 Wilbur F. Darnell and George W. Darnell, individuals, hereinafter referred to as respondents, have violated the provisions of the 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: