

Complaint

106 F.T.C.

IN THE MATTER OF
AMERICAN SOCIETY OF SANITARY ENGINEERING

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3169. Complaint, Oct. 3, 1985—Decision, Oct. 3, 1985

This consent order requires, among other things, that a Bay Village, Ohio organization ("ASSE"), whose members consist of manufacturers of plumbing products and others associated with the plumbing industry, to cease refusing written requests for issuance of a standard or modification of an existing standard for a product because the product is patented or produced by only one or a limited number of manufacturers. The order also bars the society from failing to take sought action when it has already issued a standard, modification of a standard or a seal of approval covering a competing product and the applicant has demonstrated that its product adequately meets required performance goals. Should ASSE fail to issue the requested standard, modification or seal of approval, it is required to provide the applicant with a statement of the justification and bases for the failure, together with a reasonable opportunity to respond, and to maintain copies of relevant submissions and responses. Additionally, the society is required to incorporate the requirements of Parts I and II of the order into its Bylaws, and publish them in both its *Yearbook* and *Standards Handbook*.

Appearances

For the Commission: *Eugene R. Curry.*

For the respondents: *Sanford Schwartz, Rippner, Schwartz & Carlin, Cleveland, Ohio.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that respondent American Society of Sanitary Engineering, a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act and that this proceeding is in the public interest, hereby issues this complaint.

PARAGRAPH 1. Respondent American Society of Sanitary Engineering ("ASSE") is a non-profit District of Columbia corporation, with its principal place of business in Bay Village, Ohio. ASSE's membership consists of plumbers, plumbing equipment manufacturers, plumbing designers, plumbing contractors, plumbing inspectors, sanitary inspectors, health officers, architects, and engineers.

PAR 2 ASSE together with its members is engaged in the business

of developing, promulgating, promoting, and selling of plumbing product standards and seals of approval.

PAR. 3. Many members of ASSE are engaged in providing plumbing equipment and services for profit. A substantial portion of ASSE's activities relate to standards development and product approval that is of commercial benefit to many of its members. ASSE is now, and at all times relevant herein has been, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. ASSE, its members and its officers:

(a) develop standards that are distributed and adopted throughout the United States;

(b) send by mail plumbing standards and other publications dealing with plumbing to plumbing professionals located throughout the United States;

(c) collect dues from members located throughout the United States.

ASSE's business is now, and at all times relevant herein has been, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 5. Members of ASSE are now and have been in competition among themselves and with others who design, install or manufacture plumbing equipment.

PAR. 6. ASSE standards for plumbing products prescribe implicit and explicit performance and design requirements for various types of plumbing products, and set forth the test methods to be used to measure performance against those requirements.

PAR. 7. Manufacturers of plumbing products participate in the development of ASSE standards by:

(a) providing technical expertise upon which standards are based;

(b) participating in drafting proposed standards;

(c) underwriting the costs of standards development;

(d) participating in various ASSE committees which review proposed standards and applications for standards; and

(e) chairing ASSE committees, serving on the ASSE Board of Directors, and holding other key administrative and policy positions within ASSE.

PAR. 8. ASSE promotes reliance on its standards and seal of approval program by building code and regulatory officials as a substitute for the evaluation of plumbing products by those officials and as a basis for approval of these products for sale in their jurisdictions. ASSE represents that its standards and seal of approval program provides an objective, independent, expert analysis of the acceptability of plumbing products covered by ASSE standards. In addition,

ASSE represents that it is the leader among standards developers in developing new standards to incorporate the state of the art in technology and innovative designs.

PAR. 9. As a result, and because most state and local building code and regulatory officials do not have the technical or financial resources to evaluate the performance characteristics of plumbing products, there is extensive reliance upon ASSE standards and seals of approval. Thirty states and numerous local jurisdictions have adopted ASSE standards into their building codes. In those jurisdictions, evidence of compliance with ASSE standards is the sole means of obtaining approval for sale. In addition, ASSE standards and seals of approval are relied upon by model code groups (i.e., organizations which develop model building codes for adoption by state and local authorities), federal agencies, and foreign governments as a means of determining the acceptability of plumbing products.

PAR. 10. Because of extensive reliance upon the ASSE standards program, evidence of compliance with an ASSE standard is essential for manufacturers of plumbing products to do business in many markets. Evidence of compliance with ASSE standards confers important competitive benefits upon manufacturers by easing entry into markets, even where compliance to an ASSE standard is not required by law.

PAR. 11. ASSE promulgates a group of standards for backflow prevention products. Backflow is the unintended reversal of the flow of possibly contaminated water back into the potable water distribution system. ASSE represents that it has the most complete group of backflow prevention standards in the world.

PAR. 12. In 1964, ASSE, with the support of eighteen manufacturers of plumbing devices, developed a standard, ASSE 1002, for ballcock valves which control the supply of water into toilet flush tanks. Valves performing this function are referred to as toilet tank fill valves. A ballcock valve is opened or closed by means of a float or similar device. ASSE 1002 specifies that ballcock valves must be equipped with a vacuum breaker or air gap to prevent backflow. ASSE 1002 is the only standard developed by ASSE for toilet tank fill valves.

PAR. 13. As a result of ASSE's representations as to its expertise in plumbing generally, and in all types of backflow prevention devices in particular, and its representations as to its leadership in incorporating innovative technology into its standards program, many building code and regulatory officials and others are led to believe that ASSE-approved ballcock valves are the only appropriate, acceptable, and adequate means of preventing backflow from toilet tanks

ry officials and others rely on ASSE 1002 as the only standard for evaluating the acceptability of toilet tank fill valves.

PAR. 14. J.H. Industries, Inc., (J.H.) a California corporation with its principal place of business at 980 Rancheros Drive, San Marcos, California, manufactures an innovative toilet tank fill valve, under the brand name Fillpro. The Fillpro valve differs from ballcock valves in that it uses a pressure sensitive diaphragm to control the water level and a double check valve to prevent backflow rather than an air gap or vacuum breaker. J.H., in marketing the Fillpro valve, represents that its design offers performance advantages over ballcock valves. These include: that use of the Fillpro valve by toilet manufacturers would permit greater flexibility in design of toilets resulting in lower material costs; that the Fillpro valve is safer than ballcock valves because it is less likely than ballcock valves to be incorrectly installed so as to allow backflow; that the Fillpro valve has fewer moving parts than ballcock valves and therefore needs replacement less frequently; that the Fillpro valve operates more quietly than ballcock valves; and that the Fillpro valves can be adjusted to regulate the water level in the flush tank to conserve water.

PAR. 15. Because ASSE 1002 specifies ballcocks equipped with vacuum breakers or air gaps as the only acceptable design for a toilet tank fill valve, the Fillpro valve is, by ASSE's definition, nonstandard. Without an ASSE standard for evaluating the Fillpro valve, J.H. has no means to establish to building code and regulatory officials and others who rely on ASSE standards that the Fillpro valve adequately prevents backflow.

PAR. 16. J.H. has developed credible evidence to demonstrate that the Fillpro valve protects against backflow at least as well as ballcock valves. On the basis of this evidence, several model code groups, local jurisdictions, and foreign countries have approved the Fillpro valve for sale. This evidence includes:

- (a) testing by Truesdail Laboratories, Inc., an independent laboratory, against a version of ASSE 1002 modified by J.H. to reflect the design differences between the Fillpro valve and ballcock valves that resulted in a finding that the Fillpro valve adequately prevented backflow;

- (b) testing by the National Sanitation Foundation, which is accredited by ASSE for testing products according to ASSE standards, against a new standard, developed by J.H. with the assistance of an independent expert, based on performance requirements of two ASSE standards that determined that the Fillpro valve provided adequate protection against backflow; and

- (c) the expert opinion of ASSE's Standards Coordinator who assist-

ed in drafting the standard described in (b), above, and who stated that, after reviewing the test results based upon that standard "the Fillpro valve has demonstrated its backflow preventing capabilities."

PAR. 17. ASSE has refused to modify or develop a standard for evaluating the Fillpro valve. As a result, J.H. has been hindered or prevented from marketing the Fillpro valve in jurisdictions which rely on ASSE standards. These restrictions limit J.H.'s sales in the market for replacement valves installed by plumbers and consumers and in the market for valves installed as original equipment by manufacturers of toilets.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs 1 through 17 are incorporated by reference herein as if fully set forth verbatim.

PAR. 18. In 1975, J.H. requested that ASSE modify ASSE 1002 to permit the use of a double check valve as a means of preventing backflow in toilet tank fill valves. J.H. supported its request with the evidence described in Paragraph 16(a), above. ASSE rejected the revision proposed by J.H. on the ground that J.H.'s proposal "was contrary to established practices for the prevention of backflow" and that ASSE-approved ballcocks were the only acceptable means for preventing backflow. ASSE did not address or identify any inadequacies in the evidence offered in support of the proposed revision, nor did ASSE provide any evidentiary support for exclusive reliance on the existing design (i.e., ballcocks with air gaps or vacuum breakers) to prevent backflow.

PAR. 19. In adopting the policies and engaging in the acts and practices described in Paragraph 18, ASSE has acted as a combination of or in a combination with one or more of its manufacturer members.

PAR. 20. ASSE had no reasonable basis or justification for rejecting the innovative design and relying on ballcocks with vacuum breakers or air gaps as the only acceptable design for toilet tank fill valves. Therefore, ASSE's refusal constitutes a concerted refusal to deal with J.H.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs 1 through 17 are incorporated herein as if set forth verbatim.

PAR. 21. In 1978, J.H. developed a standard for evaluating its product by drawing from applicable portions of existing ASSE standards. J.H. has requested that ASSE adopt this standard on several occasions and supported that request with the evidence described in

Paragraph 16. ASSE has refused to adopt the proposed standard or even to consider the standard and supporting evidence. ASSE justified its refusal on the ground that ASSE has a policy of refusing to develop a standard for a product which is patented or manufactured by only one manufacturer.

PAR. 22. In adopting the policies and engaging in the acts and practices described in Paragraph 21, ASSE has acted as a combination of or in a combination with one or more of its manufacturer members.

PAR. 23. ASSE has no reasonable basis or justification for its refusal to develop standards for products manufactured by only one manufacturer. Therefore, ASSE's refusal constitutes a concerted refusal to deal with J.H.

PAR. 24. The purposes or effects of the acts and practices described in Paragraphs 17 through 23 are and have been to unreasonably restrain trade and hinder competition in the manufacture and sale of plumbing devices in numerous geographic markets, and to unreasonably deprive consumers of the benefits of competition in the following ways, among others:

(a) an innovative product has been excluded from various geographic markets of the United States;

(b) building code and regulatory officials and buyers of toilet tank fill valves have been misled to believe that the product will not perform adequately to prevent backflow when compared to ballcock valves; and

(c) building and regulatory code officials and buyers of toilet tank fill valves have been deprived of information about the performance of the product.

PAR. 25. The policies, acts, and practices described in Paragraphs 17 through 23 are in or affect commerce as commerce is defined in the Federal Trade Commission Act.

PAR. 26. The policies, acts and practices and combination described above were and are to the prejudice or injury of the public, and constituted and now constitute unfair acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct is continuing in nature and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of the draft complaint which the Bureau of Consumer Protection

proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and also containing waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested parties pursuant to Section 2.34 of the Rules and having revised the consent order in response to these comments to clarify the intended operation of the order, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent is organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at P.O. Box 9712, in the Town of Bay Village, in the State of Ohio.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions shall apply:

ASSE means the American Society of Sanitary Engineering, its successors and assigns.

Competent and reliable testing criteria means a method or methods of testing or evaluation to measure whether the performance of a given product satisfies the implicit or explicit performance goals that underlie a standard. A rebuttable presumption of competence and reliability shall exist for testing criteria that are developed by a testing laboratory or expert that has been relied upon by ASSE to judge the acceptability of other products covered by standards

Competing products means products sold or available in the market that can be used for substantially the same end use as the applicant's product.

Reasonable standard-setting criteria means criteria which are consistently applied in the development or modification of a standard and which promote the legitimate self-regulatory goals of ASSE, such as assuring a reasonable and adequate level of safe and effective performance for a product. It shall not be reasonable for ASSE to require that the performance level for an applicant's product exceed the performance level required of competing products.

I.

It is ordered, That respondent American Society of Sanitary Engineering, its successors and assigns, and respondent's officers, agents, representatives, employees, and committees, directly or through any corporate or other device, in connection with any standard or seal of approval in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (hereinafter standard or seal of approval), do forthwith cease and desist, from directly or indirectly failing to issue a new standard, a modification of an existing standard, or a seal of approval for any reason, including that the product to be covered by the requested standard, modification or seal is patented or produced by only one manufacturer or a limited number of manufacturers, whenever

- (1) ASSE has received a written application requesting such action,
- (2) ASSE has already issued a standard, modification of a standard or a seal of approval covering any competing product(s),
- (3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing product(s) (e.g., the applicant has proposed competent and reliable testing criteria for the product and, under the proposed criteria, has demonstrated that the product meets the existing standard's performance goals), and
- (4) ASSE does not at that time possess or rely upon a justification for failing to issue the requested standard, modification, or seal of approval that would satisfy reasonable standard-setting criteria.

II.

It is further ordered, That whenever (1) ASSE receives for any product a written application requesting that ASSE issue a new stan-

dard, a modification of an existing standard, or a seal of approval, (2) ASSE has already issued a standard, a modification of a standard, or a seal of approval covering any competing product(s), (3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing products, and (4) ASSE fails to issue the requested standard, modification, or seal of approval, ASSE shall:

A. provide to the applicant a written statement of the justification and bases for the failure, including the identification of the standard setting criteria and tests or other evidence or information upon which ASSE relied;

B. provide to the applicant a reasonable opportunity to respond;

C. if the applicant responds in writing, provide the applicant a written statement of the justifications and bases for the final decision which addresses all the issues raised by the applicant's response, including the identification of the standard-setting criteria and tests or other evidence or information upon which ASSE relied; and

D. maintain copies of the applicant's submissions, of all responses made to the applicant, of the applicant's responses thereto, if any, and of the justifications and bases for the final decisions.

III.

It is further ordered, That ASSE shall incorporate the requirements of Parts I and II of this order in its Bylaws and publish the requirements of Parts I and II of this order in the ASSE Standards Handbook and the ASSE Yearbook.

IV.

It is further ordered, That ASSE shall:

A. maintain in a separate file for a period of at least ten (10) years after the date of service of this order and, upon request, make available to the Federal Trade Commission for inspection and copying every application for issuance or modification of an ASSE standard or issuance of a seal of approval and all documents that discuss, refer, or relate thereto;

B. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent that may affect compliance obligations arising out of this order, including but not limited to dissolution, assignment, a sale resulting in the emergence of a successor organization, or the creation or dissolution of subsidiaries; and

C. within sixty (60) days from the date of service of this order submit a report, in writing, to the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this order.

Modifying Order

106 F.T.C.

IN THE MATTER OF

ATLAS SUPPLY CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION AND CLAYTON ACTS*Docket 5794. Order, July 19, 1951—Modifying Order, Oct. 8, 1985*

The Federal Trade Commission has denied a request from Atlas Supply Co. and its parent companies to set aside a 1951 cease and desist order (48 F.T.C. 53), but has modified the order by deleting one provision that restricted the joint purchasing activities of respondents.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JULY 19, 1951

On June 7, 1985, Atlas Supply Company ("Atlas") and its shareholders, Amoco Oil Holding Company, The Standard Oil Company (Ohio), Chevron U.S.A. Inc., and Exxon Corporation filed a "Request To Reopen And Set Aside Cease And Desist Order" ("Request"), pursuant to Section 5(b) of The Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding and terminate the cease and desist order issued on July 19, 1951 ("the order").

The order contains five substantive ordering paragraphs. The first two ordering paragraphs require Atlas and its shareholders to cease and desist from receiving or transmitting commissions, brokerage, or other compensation in connection with their purchases of automobile tires, tubes, batteries or other automobile parts or accessories ("TBA") in violation of Section 2(c) of the Robinson-Patman Act. The third and fourth ordering paragraphs require respondents to cease and desist from knowingly inducing or accepting discriminatory prices in connection with their TBA purchases in violation of Section 2(f) of the Robinson-Patman Act unless a cost saving or good faith meeting of competition justification exists. The fifth ordering paragraph, which was issued pursuant to Section 5 of the Federal Trade Commission Act, prohibits respondents from using their combined purchasing power in connection with their TBA purchases to obtain any "price, discount, rebate, allowance or other treatment from a seller which is preferential to that allowed, afforded or made available by such seller" to competitors of any of the respondents. After reviewing the Request, the Commission has concluded that respondents have not made a satisfactory showing that changed circumstances or public interest considerations require that the Robinson-Patman Act provisions of the order be terminated. The Commission has determined,