

ALL ORTHOPEDIC APPLIANCES, INC., ET AL.

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

Docket C-2108. Complaint, Nov. 26, 1971—Decision, Nov. 26, 1971

Consent order requiring a manufacturer of orthopedic appliances and supports of Miami, Fla., to cease suggesting different resale prices to different classes of patients, including Medicare, Insurance, and Industrial Commission patients, and using any deception or subterfuge as a means of affecting the retail prices of its products.

COMPLAINT

The Federal Trade Commission, having reason to believe that corporate respondent All Orthopedic Appliances, Inc. (hereafter AOA, Inc.) and individual respondent Stephen A. Michelson (hereafter Michelson), have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent AOA, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 75 N.E. 74th Street, (formerly located at 6887 N.E. 3rd Avenue), Miami, Florida.

Complaint

79 F.T.C.

PAR. 2. Respondent AOA, Inc. is now, and for several years has been engaged in the manufacture and sale of orthopedic appliances and supports, including such items as slings, braces, splints, and anklets, hereinafter collectively referred to as orthopedic products. It sells these orthopedic products to its customers, such as physicians, hospitals, drugstores, and others, which customers resell to the ultimate consuming public. For the fiscal year ending July 31, 1970, respondent AOA, Inc. had net sales of approximately \$747,000, and total assets of approximately \$299,000.

PAR. 3. In the course and conduct of its business respondent AOA, Inc., has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent now causes, and has caused, its said orthopedic products, when sold, to be shipped from its plant and facilities in the State of Florida to purchasers thereof located in various states other than the state of origin or manufacture of such products. In addition, AOA, Inc., is purchasing and has purchased raw materials and other products for use in the manufacture of its orthopedic products from sellers located in states other than the State of Florida.

PAR. 4. Respondent Stephen A. Michelson is president and sales manager of AOA, Inc. He formulates, directs and controls the acts, practices and policies of AOA, Inc., and actively participates therein. He formulated, directed, encouraged, promoted, adopted, and acquiesced in the acts and practices hereinafter set forth.

PAR. 5. Respondent AOA, Inc., at all times mentioned herein has been and now is in substantial competition in commerce with individuals, firms, and corporations engaged in the sale and distribution of orthopedic products of the same general kind and nature as those manufactured, distributed and sold by respondent.

PAR. 6. In the course and conduct of its business as aforesaid, respondent AOA, Inc., caused to be printed and circulated to its customers a "Confidential Resale Price List" which suggested higher prices on its orthopedic products for patients covered by Medicare, Insurance, and Industrial Commission programs than for other kinds of patients or purchasers. In so doing, respondent AOA, Inc., made several written statements and representations regarding its suggested prices, indicating that it had received "numerous requests for pricing schedules," that it had "consulted many accounts throughout the country to get a cross-section of prices now being charged and the justification for these charges," and that it had found certain of its customers charging "as much as four times cost." Respondent AOA, Inc., further indicated that the price list was the result of a mean

average of the views solicited from its customers and that the suggested prices shown on the price list were influenced by the "(a) Add-on cost of ordering, receiving and storing material. (b) Time spent in application of material and instruction for use. (c) Cost of billing and time-lapse before payment. (d) Allowance for anticipated percentage of uncollectable billings."

PAR. 7. By making the statements and representations as set forth in Paragraph Six, and such others as may not be expressly set forth herein, respondent AOA, Inc., has represented, and now represents directly or by implication, that each of the statements respecting its suggested prices (including the price list itself) has been substantiated by AOA, Inc., by adequate and well-designed studies or surveys prior to the making of such statements, and that such prices are reasonable, fair and customary.

PAR. 8. The foregoing statements and representations were and are false, misleading, and deceptive, either in and of themselves, or by omission. In truth and in fact, AOA, Inc., never received numerous requests for pricing schedules, but only requests for prices on individual items. Furthermore, the mean average prices contained in the schedule were based not only on the factors (a) through (d) listed in Paragraph Six, but were also intended to include a profit for the seller.

In truth and in fact, the aforesaid statements and representations respecting the "Confidential Resale Price List," have not been substantiated by respondent AOA, Inc., by adequate studies or surveys prior to the making of such statements. On the contrary, said statements were based wholly or for the most part on prices arrived at by respondent AOA, Inc., and its president, respondent Michelson, independent of any specific studies or surveys.

PAR. 9. The making of any statement of representation directly or by implication, that the "Confidential Resale Price List" was based on the actual consultation of customers and was influenced by the four factors listed as (a) through (d) in Paragraph Six, or any other statement or representation regarding the basis or accuracy of such price list, when such statements or representations are not supported by empirical data developed from prior, fully documented, adequate and well-researched studies or surveys is unfair, misleading, and deceptive. In addition, or in the alternative, such statements or representations, where not supported by proper data, may result in discriminatory treatment or charges to the different classes of patients described in the "Confidential Resale Price List."

PAR. 10. The use by respondent of the aforesaid false, misleading and deceptive statements and representations may have had, and may now

Complaint

79 F.T.C.

have, the capacity and tendency to mislead the customers of AOA, Inc., into believing that they can successfully sell respondent AOA, Inc.'s, orthopedic products to certain classes of patients or purchasers at higher than normal, but nevertheless justified, prices. For that reason or reasons, such customers may have purchased or may now purchase substantial quantities of AOA, Inc.'s, orthopedic products. As a result thereof, substantial trade in such products may have been or potentially may be unfairly diverted to AOA, Inc., from its competitors.

PAR. 11. By distributing a "Confidential Resale Price List" to its customers suggesting higher resale prices to Medicare patients, or to patients enrolled in Medicare programs, which suggested prices were represented to be based on a mean average and were distributed for use in more than one state or locality, AOA, Inc., placed in the hands of its customers an instrumentality which suggested that and/or enabled said customers to violate the statutes and/or regulations administered by the United States Department of Health, Education, and Welfare. Said statutes and/or regulations provide that products used in the treatment of patients under Medicare programs shall be purchased or reimbursed only on the basis of reasonable charges or under the established criteria for determination of reasonable charges.

PAR. 12. Respondent AOA, Inc., in distributing its "Confidential Resale Price List," and in supplying to, and placing in the hands of others, the means of, or an instrumentality for, the violation of federal laws and/or regulations, has engaged and is engaging in acts or practices which are contrary to public policy and in violation of Section 5 of the Federal Trade Commission Act.

PAR. 13. The aforesaid acts and practices of respondents AOA, Inc. and Michelson, as herein alleged, were and are all to the prejudice and injury of the public and of respondent AOA, Inc.'s competitors, and have constituted and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

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 a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 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 thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent All Orthopedic Appliances, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 75 N.E. 74th Street (formerly located at 6887 N.E. 3rd Avenue), Miami, Florida. Respondent Stephen A. Michelson is president of All Orthopedic Appliances, Inc., and actively participates in the direction and policies thereof.

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

I.

It is ordered, That respondent, All Orthopedic Appliances, Inc., a corporation, its officers, agents, representatives, employees, successors and assigns, and respondent Stephen A. Michelson, individually, and as an officer of All Orthopedic Appliances, Inc., directly or indirectly, through any corporate or other device, in connection with the manufacture, distribution or sale of orthopedic and related products in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist, either unilaterally or through any agreement, understanding, or common course of action, between respondents and another or others not party hereto, from engaging in or performing any of the following:

1. Making any misrepresentation, or using any kind of decep-

Decision and Order

79 F.T.C.

tion or subterfuge, oral or written, as a means of affecting the retail prices of its orthopedic and related products, including orthopedic appliances and supports.

2. Suggesting different resale prices to different classes of patients or to different members of the consuming public by any means or methods, including but not limited to the following:

(a) written price lists, and

(b) oral suggestions by employees, including salesmen, sales representatives, contact men, or others.

3. For a period of two years, suggesting resale prices to any dealers or customers by any means or methods, including but not limited to the following:

(a) written price lists, and

(b) oral suggestions by employees, including salesmen, sales representatives, contact men, or others.

II.

It is further ordered, That respondents All Orthopedic Appliances, Inc., and Stephen A. Michelson, shall, within ninety (90) days after service upon them of this order, destroy any remaining originals or copies of the "Confidential Resale Price List," which are in any way within their possession or under their control.

III.

It is further ordered, That respondent All Orthopedic Appliances, Inc., shall, within ninety (90) days after service upon it of this order, serve by certified or registered mail, or by personal delivery:

1. On each of its domestic dealers or customers with whom it is presently dealing or with whom it has dealt since June 18, 1970, a copy of Letter A attached to this order, signed by its president or other responsible official.

2. On all of its salesmen, sales representatives, contact men, or others who ordinarily deal with its dealers or customers the following:

(a) a copy of this order, and

(b) a copy of Letter B attached to this order, signed by the president or other responsible official (with copy of Letter A also attached).

IV.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate

respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect its compliance obligations arising out of the order. Further, respondents shall instruct and notify any prospective purchaser about the existence of this order, and about the fact that the Federal Trade Commission intends to enforce the obligations created thereunder.

V.

It is further ordered, That each respondent herein shall, within ninety (90) 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 and will comply with this order. In this regard, where any copies of Letter A required to have been served, are served by personal delivery, the compliance report shall be accompanied by affidavits executed by the appropriate salesmen or others, describing the cities, towns, or states in which personal delivery was made, and attesting to the fact that said copies of Letter A were indeed properly addressed and served on dealers and customers in those areas, as required by Paragraph III of the order.

LETTER A

(Company Letterhead)

DATE

DEAR :

You may have been one of the accounts which received from our company a "Confidential Resale Price List", suggesting different prices to different kinds of patients, including those covered by Medicare, Insurance, or Industrial Commission programs. We have recently been ordered by the Federal Trade Commission to discontinue the distribution of this list, and to notify all of our accounts that the practice of charging different prices to different kinds of patients, if not based on valid costs of doing business, can be discriminatory and unfair, and therefore illegal.

Furthermore, we understand, and wish to call to your attention, the fact that federal laws or regulations provide, in the case of Medicare patients, that charges to such patients must be reasonable, and in conformance with the regulations promulgated by the United States Department of Health, Education, and Welfare. Where any doubt arises concerning the charges to be made to Medicare patients, you may wish to consult a representative of the above Department.

Very truly yours,

President, or Responsible
Official.

Decision and Order

79 F.T.C.

LETTER B
(Company Letterhead)

DATE

DEAR :

Because you are a salesman, sales representative, or other person frequently in touch with our accounts, we want to inform you of the fact that we have recently been ordered by the Federal Trade Commission to cease suggesting resale prices for any of our orthopedic products to any of our customers or accounts for a period of two years, and to refrain from using any sort of deception or subterfuge as a means of affecting the retail prices of our products.

In accordance with the Order of the Commission we recently sent to our accounts a letter explaining our new policy in relation to the "Confidential Resale Price List" which we distributed in the past. A copy of that letter and a copy of the Commission's Order are enclosed herein for your information.

You should read the Commission's Order carefully, and if you have any questions regarding it or its effect on your responsibilities, you should immediately contact for further instructions.

Disobedience of the Order by either the company, or any of its employees, can subject the company to severe monetary penalties for each violation. Therefore, any disregard of the provisions of the Order by any of our employees will result in appropriate disciplinary action.

Very truly yours,

President, or Responsible
Official.

Enclosures.

IN THE MATTER OF

HAROLD BURDUMY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE TRUTH
IN LENDING AND THE FEDERAL TRADE COMMISSION ACTS

Docket C-2109. Complaint, Nov. 26, 1971—Decision, Nov. 26, 1971

Consent order requiring a used-car dealer of Philadelphia, Pa., to cease violating the Truth in Lending Act by failing, in consumer credit transactions and advertisements, to make all disclosures in the manner, form, and amount