

IN THE MATTER OF

FRITO-LAY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC.
2 OF THE CLAYTON ACT

Docket 9066. Complaint, Jan. 6, 1976 — Decision, June 24, 1977

This consent order, among other things, requires a Dallas, Texas ready-to-eat snack food producer and distributor to cease engaging in discriminatory pricing practices by selling its products to certain retailers at prices higher than those paid by a competitive establishment. Further, the order stipulates that in any enforcement action, respondent must assume the burden of proving all defenses raised.

Appearances

For the Commission: *Gordon Youngwood and Robert W. Rosen.*

For the respondent: *John Kirby, Mudge, Rose, Guthrie & Alexander,* New York City, *Miles J. Alexander, Emmet J. Bondurant and Susan A. Cahoon, Kilpatrick, Cody, Rogers, McClatchey & Regenstein,* Atlanta, Ga. and *Ronald R. Kranzow,* Dallas, Tex.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Frito-Lay, Inc., a wholly-owned division of PepsiCo, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices located at Frito-Lay Tower, Exchange Park, Dallas, Texas.

PAR. 2. Respondent has approximately 49 plants in 25 states which produce a varied line of snack food products, including corn chips, potato chips, tortilla chips, pretzels and several more lines.

Respondent sells its corn chips and other snack food items of like grade and quality to a large number of purchasers located throughout the States of the United States who purchase such products for use and resale therein.

PAR. 3. Respondent is now, and has been, transporting corn chips and other snack food products from the state or states where such products are manufactured or stored in anticipation of sale to purchasers located

in other States of the United States. Respondent is therefore engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, respondent sells its products of like grade and quality to purchasers who are in substantial competition with each other in the resale and distribution of respondent's like products.

PAR. 5. In the course and conduct of its business in commerce, respondent has been discriminating in price between different purchasers of its snack food products of like grade and quality by selling such products to some purchasers at higher and less favorable prices than the prices charged competing purchasers for such products of like grade and quality.

Illustrative of respondent's discriminatory pricing practices is the following:

Respondent has for several years had in effect a quantity discount program in the Central Division of its Great Lakes Zone whereby any account purchasing \$200 up to \$499.99 within a calendar month is entitled to a 3 percent discount on total purchases of respondent's products delivered at regular store-door prices; any account purchasing \$500 or more within a calendar month is entitled to a 5 percent discount on total purchases of such products. Discounts earned under this policy are paid by check on a calendar quarter basis. Under said pricing program multiunit accounts are permitted to accumulate purchases of each unit in order to realize the maximum discount. The discriminations resulting from this program favor the retail stores, among others, of The Kroger Co.'s Indianapolis Division, in respondent's Great Lakes Zone. Many competitors of The Kroger Co. and other non-favored customers, were discriminated against in that they did not receive the maximum discount, although their store units purchased in greater volume than did individual units of the favored customers.

PAR. 6. The effect of the discriminations in price by respondent in the sale of its snack food products, as set forth hereinabove, has been or may be substantially to lessen competition or tend to create a monopoly in the sale of said products, or to injure, destroy or prevent competition between retailers that pay higher prices and competing retailers that pay lower prices for respondent's said products.

PAR. 7. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having issued its complaint on January 6, 1976, charging that the respondent named in the caption hereof has violated

the provisions of Section 2 of the Clayton Act, as amended, (15 U.S.C. 13); and

Respondent and complaint counsel, by joint motion filed October 26, 1976, having moved to have this matter withdrawn from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued November 9, 1976, having withdrawn this matter from adjudication pursuant to Section 3.25(c) of its Rules; and

The respondent and counsel supporting the complaint having executed an agreement containing a consent order, which includes an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the complaint, and waivers as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreements containing consent orders having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Frito-Lay, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Frito-Lay Tower, Exchange Park, Dallas, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent for this purpose, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Frito-Lay, Inc., a corporation, and its officers, agents, representatives, employees, successors and assigns, directly or indirectly, through any corporate or other device, in connection with its sale of

store-door delivered processed snack food products which are sold in a ready to eat state (that is which do not require further preparation by the purchaser before consumption) including, by way of example, rather than by limitation, potato, corn and tortilla chips; fried pork rinds; cheese puffs; pretzels; popcorn; chip dips; nut meats; peanut butter and cheese crackers; brownies; marsh-

mallow, raisin, fig and oatmeal cookies; dried meat sticks and jerky (hereinafter referred to as "products")

in commerce, as "commerce" is defined in the Clayton Act, as amended, do cease and desist from:

Discriminating in the price of such products of like grade and quality by selling to any purchaser which is a retailer and which purchases for resale in its grocery store, market or similar competitive retail establishment (hereinafter referred to as "purchaser"), at a net price which directly or indirectly is higher than the net price charged any other purchaser who competes in the resale of respondent's products with the purchaser paying the higher price.

II

It is further ordered, That nothing herein contained shall prevent price differentials which make only due allowance for differences in the cost of manufacture, sale or delivery, resulting from the differing methods or quantities in which such products are sold or delivered to such purchasers or which are made in good faith to meet an equally low price of a competitor; nor shall anything herein contained prevent price changes from time to time where made in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned; and it is further provided that all other defenses legally available to a charge of price discrimination under Section 2(a) of the amended Clayton Act are not waived by this order.

III

It is further ordered, That in any enforcement action brought to enforce the provisions of this order, respondent shall assume the burden of proving all defenses described or referenced in Part II of this order.

IV

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in corporate structure of 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 compliance obligations arising out of the order.

Decision and Order

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It is further ordered, That respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order and shall file such other reports as may, from time to time, be required to assure compliance with the terms and conditions of this order.

IN THE MATTER OF
AMERICAN GENERAL INSURANCE COMPANY, ET AL.
ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC.
7 OF THE CLAYTON ACT

Docket 8847. Complaint, June 17, 1971 — Final order, June 28, 1977

This order, among other things, requires a Houston, Texas insurance company to divest itself completely of the Fidelity & Deposit Co. of Maryland, subject to F.T.C. approval, and prohibits the firm, for a ten-year period, from acquiring any U.S. company engaged in fidelity or surety underwriting, without prior Commission consent.

Appearances

For the Commission: *Jere W. Glover, Lawrence E. Gray, Karen G. Bokar and Harold E. Kirtz.*

For the respondent: *Leroy Jeffers, John L. Murchison, Jr., David T. Harvin, Vinson, Elkins, Searls, Connally & Smith, Houston, Texas. Michael J. Henke, of counsel, Washington, D.C. and George F. Reed, Houston, Texas.*

For intervenor: *Decatur H. Miller and Richard F. Over, Baltimore, Md., Fidelity & Deposit Co. of Maryland.*

COMPLAINT

The Federal Trade Commission, having reason to believe that American General Insurance Company has violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by reason of its merger with Fidelity & Deposit Company of Maryland hereby issues this complaint pursuant to Section 11 of said Act, 15 U.S.C. 21 stating its charges in that respect as follows:

I

DEFINITIONS

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

a. *Property-liability insurance* consists of a broad range of insurance coverage designed to protect the policyholder ("insured") by indemnification against loss or damage to his property resulting from fire, accident, natural perils and crime, liability to others for bodily injury, illness, death or property damage and loss resulting from the default of others.

b. *Fidelity* is a category of property-liability insurance gener-