

Complaint

97 F.T.C.

IN THE MATTER OF
AMERICAN HOSPITAL SUPPLY CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF
THE CLAYTON ACT

Docket C-3067. Complaint, June 2, 1981—Decision, June 2, 1981

This consent order requires, among other things, American Hospital Supply Corporation ("AHSC"), an Evanston, Illinois manufacturer and distributor of health care products, to timely divest, in accordance with the terms of the order, either 100 percent of the stock of American Latex Corporation ("ALC") or, all assets and properties constituting ALC together with all the assets of American Cystoscope Makers, Inc. The order further requires respondents to maintain ALC as a viable business entity pending divestiture; offer to purchase for a period of one year all urological catheters from the acquirer of ALC; and refrain for five years from acquiring more than 1 percent of stock or any interest in an entity engaged in the manufacture and distribution of urological catheters.

Appearances

For the Commission: *Norman A. Drezin, Karen G. Bokar, Randall S. Leff and Peter A. Sklarew.*

For the respondent: *Seymour D. Lewis, Rosenman Colin Freund Lewis & Cohen, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent, subject to the jurisdiction of the Commission, has acquired all the assets of American Cystoscope Makers, Inc. in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and having found that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the term *urological catheters* means any flexible product designed, promoted, and sold for insertion into the urethral orifice of a human or other animal in order to

drain, irrigate or otherwise provide access to the urinary bladder of said human or animal.

2. The term *urological catheter products* means all urological catheters sold separately and all urological catheter *kits* or *trays* that include a urological catheter and accessories used in conjunction with the insertion of a urological catheter.

II. RESPONDENT

3. American Hospital Supply Corporation (AHSC) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at One American Plaza, Evanston, Illinois.

4. In 1979 AHSC, including its foreign subsidiaries, had consolidated revenues of approximately \$2.04 billion and consolidated assets of approximately \$1.28 billion.

5. AHSC is a multinational manufacturer and distributor of a wide range of products used and consumed in the health care field including medical supplies, pharmaceuticals, medical and surgical instruments and laboratory supplies.

6. AHSC has been engaged in the manufacture and distribution of urological catheters through its American Pharmaseal Division and in the distribution of urological catheters through its American Hospital Supply Division and its American V. Mueller Division.

III. THE ACQUIRED CORPORATION

7. American Cystoscope Makers, Inc. (ACMI) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 300 Stillwater Avenue, Stamford, Connecticut. Prior to the acquisition of ACMI by respondent AHSC, American Latex Corporation (ALC) was a subsidiary of ACMI, organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business in Sullivan, Indiana.

8. In 1979 ACMI, including its foreign subsidiaries, had consolidated revenues of approximately \$40.2 million and consolidated assets of \$27.3 million.

9. ACMI is engaged primarily in the research, development, manufacture, and marketing of endoscopes.

10. ACMI through its subsidiary, American Latex Corporation, is engaged in the manufacture and sale of urological catheters.

IV. JURISDICTION

11. At all times relevant herein, respondent AHSC and ACMI have been and are engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

V. THE ACQUISITION

12. On October 10, 1980, respondent AHSC acquired substantially all of the assets of ACMI for approximately \$38.5 million, including 100% of the stock of ALC.

VI. TRADE AND COMMERCE

13. For the purpose of this complaint, the relevant product market is the manufacture and sale of urological catheter products and the relevant geographic market is the United States.

14. Urological catheters are comprised primarily of urethral and Foley type catheters used to drain and/or irrigate the urinary bladder.

15. Sales to hospitals of urological catheter products in the United States in 1979 are estimated to have been approximately \$70.4 million.

16. Prior to the acquisition of ACMI by AHSC, AHSC and ACMI were actual competitors in the manufacture and sale of urological catheter products. In 1979, AHSC, through its American Pharmaseal Division, ranked approximately fifth in total sales among all urological catheter product manufacturers. AHSC's share of urological catheter products sales is estimated to have been approximately 8.1% and ACMI's share approximately 3.6% in 1979.

17. The urological catheter products market is highly concentrated. In 1979 the four top ranking firms accounted for approximately 82.7% of domestic sales.

VII. EFFECTS OF THE ACQUISITION; VIOLATIONS CHARGED

18. The effects of the acquisition by AHSC of ACMI may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of urological catheter products in the United States in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways among others:

- a. Actual competition between respondent and ACMI in the manufacture and sale of urological catheter products will be eliminated;
- b. ACMI as a substantial, independent competitive factor in the manufacture and sale of urological catheter products will be eliminated;
- c. Concentration in the manufacture and sale of urological catheter products will be increased, and the possibility of deconcentration may be diminished; and
- d. Additional acquisitions and mergers in the industry may be encouraged.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition of American Cystoscope Makers, Inc. by American Hospital Supply Corporation, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton and Federal Trade Commission Acts; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 respondent 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 respondent has violated the said Acts, 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, 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. Respondent American Hospital Supply Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois with its office and the principal place of business located at One American Plaza, Evanston, Illinois.

American Cystoscope Makers, Inc., was a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at 300 Stillwater Avenue, Stamford, Connecticut.

American Latex Corporation was a subsidiary of American Cystoscope Makers, Inc., organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business in Sullivan, Indiana.

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

ORDER

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent, through its officers, directors, employees, subsidiaries, affiliates, divisions, successors, and assigns, shall within eighteen (18) months from the date on which this order becomes final divest absolutely and in good faith either 100% of the stock of American Latex Corporation (hereinafter "ALC") or all assets, properties, rights, and privileges, tangible and intangible, of ALC, including but not limited to corporate name, real property, plant, equipment, machinery, raw material inventory, product inventory, lists of customers, product trade names, product trademarks, patents, licenses, manufacturing specifications and procedures, marketing materials, sales training materials, research and development projects, and together therewith shall also divest those assets of American Cystoscope Makers, Inc. (hereinafter "ACMI") intrinsically related to the manufacture, distribution, sale, research or development of the products manufactured by ALC including but not limited to copies of all customer lists, records of sales in the previous two years, market projections and surveys, marketing plans and studies, and promotional or advertising materials. Such divestiture shall be made to a third party which represents that it intends to use the assets in the manufacture, distribution or sale of urological catheters in the United States.

II

It is further ordered, That, at the option of the acquirer of the stock or assets of ALC, respondent (including its newly acquired ACMI subsidiary or any successor organization) shall, for a period of one

year from the date of compliance with Paragraph I of this order, purchase from ALC all catheters that respondent purchases during such one year period for resale under any trademark or trade name of ACMI of a type which ACMI obtained from ALC at the time of the acquisition of ACMI by respondent.

III

It is further ordered, That, pending the divestiture required by this order, respondent shall not cause, and shall use its best efforts to prevent, any diminution of the value of the products or assets of ALC and shall preserve ALC as a viable, ongoing business.

IV

It is further ordered, That, pursuant to the requirements of Paragraph I above, none of the assets of ALC shall be divested directly or indirectly to anyone who is, at the time of divestiture, an officer, director, employee, or agent of, or under the control, direction, or influence of, respondent or any of respondent's subsidiaries or affiliated corporations, whether direct or indirect, or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of respondent.

V

It is further ordered, That, for a period of five (5) years from the date this order becomes final, neither respondent, nor its subsidiaries, affiliates, divisions, successors or assigns shall, without the prior approval of the Federal Trade Commission, directly or indirectly acquire more than one percent (1%) of any stock, share capital, or equity interest in any concern, corporate or noncorporate, engaged in, or any of the assets of such concern relating to, the manufacture, distribution, or sale in the United States of urological catheters.

VI

It is further ordered, That respondent shall, within ninety (90) days after the date of service of this order, and every ninety (90) days thereafter until respondent has fully complied with the divestiture provision of this order, and annually thereafter, for the duration of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent intends to comply, is complying or has complied with this

order. Until divestiture is accomplished, all compliance reports shall include, among other things that are from time to time required, a summary of contacts or negotiations with anyone for the disposition of the assets or stock specified in Paragraph I of this order, the identity of all such persons and copies of all written communications between such persons and respondent.

VII

It is further ordered, That respondent notify the Federal Trade 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 compliance obligations arising out of this order.

IN THE MATTER OF
THE COCA-COLA COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket D. 8824. Decision, Oct. 26, 1976—Modifying Order, June 4, 1981

This order reopens the proceeding and modifies the order issued by the Commission on October 26, 1976, 88 F.T.C. 666, 41 FR 53653, by deleting certain language from Paragraph 1(c) which required respondent to maintain *all* entry forms submitted in games or contests and by adding language limiting the applicability of the recorded retention requirement to games of skill.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND
DESIST ORDER

Petitioner, The Coca-Cola Company, seeks the modification of a record-keeping provision of the Order to Cease and Desist issued by the Commission on October 26, 1976.

The Order Paragraph in question currently prohibits petitioner from:

Engaging in, promoting the use of, or participating in any . . . promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:

* * * * *

(c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in connection therewith, full and adequate records *including all entry forms submitted by participants therein*, which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto; which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative. (Emphasis supplied.)

Petitioner is required by this provision to retain all entry forms submitted in all contests—including games of chance and games of skill—in which it engages. Petitioner requests that the Commission modify the Order by limiting the applicability of this requirement to games of skill. Specifically, petitioner proposes that the Commission delete the underscored language, requiring the maintenance of entry forms, from Paragraph (c), and add a new paragraph requiring the retention of entry forms in connection with games of skill.

The purpose of the requirement that petitioner keep entry forms