

IN THE MATTER OF

ARMSTRONG CORK COMPANY

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT*Docket C-1010. Consent Order, Nov. 3, 1965—Modifying Order, Sept. 10, 1984*

This Order reopens the proceeding and modifies an FTC Consent Order issued on November 3, 1965, 68 F.T.C. 849, which alleged that a manufacturer and distributor of floor-covering products had conspired with its wholesalers to reduce competition by fixing resale prices and conditions of product sale to retailers and flooring contractors, and by discriminating in price between competing buyers. After considering company petitions, supporting materials and other relevant information, the Commission concluded that hardships to the company and the public outweighed any benefit derived from the prohibition against imposing "terms or conditions" on resale of products, and deleted the language "terms or conditions" from paragraphs 1, 2, and 4 of Part I of the Order. The Commission also deleted the word "rebates" from paragraph 2 after finding that such modification would also be in the public interest since it would permit the company to funnel "direct-to-consumer" rebates through its wholesalers and retailers. However, the Commission declined to set or modify other parts of the Order, holding that the firm had failed to demonstrate any change of law, fact, or public interest consideration that would justify further modification.

ORDER REOPENING AND MODIFYING FINAL ORDER

By petition of October 21, 1983, as supplemented and refiled on February 28, 1984, Armstrong World Industries, Inc. (formerly Armstrong Cork Company and hereinafter "Armstrong") asked the Commission to reopen and modify the Commission order issued against Armstrong on November 3, 1965. Armstrong requested that the Commission (1) modify Part I of the order by (a) deleting provisions prohibiting certain non-price vertical restraints; and (b) limiting the geographic scope of the resale price maintenance prohibitions; (2) set aside Parts II and III of the order; (3) set aside or modify Part IV of the order; and (4) substitute "Armstrong World Industries, Inc." for "Armstrong Cork Company" as the respondent to the order. Armstrong's October 21, 1983 and February 28, 1984 submissions were placed on the public record and no comments were received.

Upon consideration of Armstrong's petition and supporting materials, and other relevant information, the Commission finds that a modification of the order to delete the words "terms or conditions" from paragraphs 1, 2, and 4 of Part I is in the public interest. Armstrong has sufficiently demonstrated that the prohibition against Armstrong's imposing any terms or conditions on the resale of its

products by Armstrong's customers has caused hardships to Armstrong and the public that outweigh any benefits that may be derived from the prohibition. The "terms or conditions" language of the order, which was intended to reach only price terms, not non-price restraints, was overly broad in this case. Thus, modification of the order to delete the words "terms or conditions" is both in the public interest and consistent with the treatment of non-price vertical restraints in *Continental T.V. Inc. v. GTE-Sylvania, Inc.*, 433 U.S. 36 (1977).

The Commission also finds that deletion of the term "rebates" from paragraph 2 of Part I of the order is in the public interest. Armstrong states that it views the presence of the term "rebates" in that paragraph as prohibiting it from funnelling "direct-to-consumer" rebates through wholesalers and retailers. Armstrong has demonstrated that permitting it to offer rebates in this manner will benefit both Armstrong and consumers. And, permitting Armstrong to funnel "direct-to-consumer" rebates through wholesalers and retailers should not affect the wholesalers' and retailers' ability to independently determine the resale price of the product. Moreover, if Armstrong should use the rebates to engage in resale price maintenance, it would violate the order provisions prohibiting resale price fixing. Thus, because deleting "rebates" from paragraph 2 of Part I of the order should benefit both Armstrong and consumers without permitting resale price maintenance, granting Armstrong's requested modification is in the public interest.

However, the Commission has denied Armstrong's request to set aside paragraph 3 of Part I of the order. That paragraph is an integral part of the order's prohibition of resale price maintenance and Armstrong has demonstrated no change of law or fact or public interest considerations sufficient to require setting it aside.

The Commission has also declined to set aside paragraph 5 of Part I of the order. That paragraph does not require Armstrong to incur the costs it states it has incurred in fashioning a program to comply with the order. Nor does the order prohibit wholesalers from supplying inventory information in the least costly fashion possible. Rather the order simply prohibits Armstrong from *requiring* or *requesting* purchasers of its products to supply Armstrong with information concerning the resale prices charged by these purchasers. On the other hand, permitting Armstrong to request or require its purchasers of Armstrong's products to provide reports showing the prices at which they resell these products could affect its purchasers' pricing practices because they could view such reports as a means of monitoring their pricing. Thus, the benefits of this provision outweigh its *de minimis* costs, particularly when the order does not *require* either Armstrong or its customers to incur such costs.

Additionally, the Commission has refused Armstrong's request to limit the geographic scope of the order's resale price maintenance provisions to "within the United States." The Foreign Trade Antitrust Improvements Act of 1982, which clarified the extraterritorial application of domestic antitrust laws and the Federal Trade Commission Act, substantially addressed the concerns expressed by Armstrong in its petition. Moreover, Armstrong has failed to demonstrate any need to impose a limitation on the extraterritorial application of the order beyond that provided by statute.

The Commission also has found it unnecessary to set aside Parts II and III of the order. By their terms these provisions impose no prospective obligations on Armstrong.

Armstrong also asked the Commission to set aside or modify Part IV of the order, but the Commission has declined to do so because Armstrong has not demonstrated a change of law or fact or public interest considerations sufficient to require setting aside or modifying that Part. Part IV of the order only requires that Armstrong treat competing customers equally or be able to justify any differences in treatment by means of one of the statutory defenses or the defense applicable to sales to the United States government. See *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952). Thus, the Commission sees no need to set aside or limit the term of Part IV. Moreover, if Armstrong is uncertain whether a proposed course of conduct would violate Part IV of the order, Armstrong may ask the Commission for an advisory opinion under Section 2.41 of the Commission's Rules, 16 C.F.R. 2.41 (1984).

Finally, Armstrong asked that the order be modified to substitute "Armstrong World Industries, Inc." for "Armstrong Cork Company" as the respondent to the order. The Commission finds that this modification is unnecessary because the order expressly binds the successors and assigns of Armstrong Cork Company and Armstrong's request therefore is denied.

Accordingly,

It is ordered, That this matter be reopened and that paragraphs 1, 2, and 4 of Part I of the order in Docket No. C-1010 be modified, as of the date of service of this order. Those paragraphs will now provide:

1. Engaging in, participating in, continuing, carrying out or enforcing any contract, agreement, arrangement or understanding, with any wholesalers, distributors, or other purchasers of Armstrong floor covering products, which directly or indirectly establishes, maintains or fixes prices of resale of such products by such wholesalers, distributors, or other purchasers.

2. Enforcing or attempting to enforce the price or prices or suggest-

ed prices or discounts for the resale of Armstrong floor covering products.

* * * * *

4. Circulating to or exchanging with any wholesaler or distributor or other purchaser, any circulars, price lists, suggested price lists, policy letters or other information, the effect of which is to create a contract, agreement, arrangement, or understanding which fixes or establishes a price or prices at or upon which any Armstrong floor covering products shall be resold.

IN THE MATTER OF

WILLIAM H. RORER, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT*Docket 8599. Final Order, Aug. 21, 1967—Modifying Order, Sept. 14, 1984*

This Order modifies the August 21, 1967 Order issued against a pharmaceutical manufacturer, 72 F.T.C. 412, pursuant to the March 20, 1967 decision of the Court of Appeals for the Second Circuit, 374 F.2d 622 (1967). After reviewing respondent's request and other relevant information, the Commission denied the request to vacate the Order in its entirety and retained the provision that prohibited the company from charging different prices for its products to competing customers. The Commission noted that the Order "in essence requires compliance with Section 2(a) of the Robinson-Patman Act," and the firm had not shown that complying with an order that essentially requires adherence to the law is causing it injury. However, the Commission determined that retaining certain "fencing-in" provisions that had been in effect for 17 years "placed the firm at a disadvantage with respect to its competitors by increasing its compliance costs unnecessarily." Therefore, in accordance with its conclusions, the Commission modified the Order by deleting requirements that the company promptly inform the Commission when it charged competing retailers different prices for its products, submit to the Commission a written statement containing justification for price differences, and publicize to all its retail customers that prices to some are higher than to others, together with reasons and details of the price differences or discounts.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED AUGUST 21, 1967

On March 2, 1984, respondent William H. Rorer, Inc. ("Rorer") filed a "Request To Reopen Proceeding And Vacate 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 vacate the cease and desist order issued on August 21, 1967 ("the Order") in its entirety.

After reviewing respondent's Request and other relevant information, the Commission has concluded that respondent has not made a satisfactory showing that changed conditions of law or fact or public interest considerations require that the Order be vacated in its entirety. The Commission has found, however, that it is in the public interest to modify the Order to terminate certain of its provisions.

The Order against Rorer prohibits price discrimination in the sale of prescription and nonprescription pharmaceutical products and in essence requires compliance with Section 2(a) of the Robinson-Patman Act. Additionally, the Order contains certain provisions de-