

IN THE MATTER OF
CARL'S DRUG CO., INC.

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

Docket C-3257. Complaint, July 12, 1989—Decision, July 12, 1989

This consent order prohibits, among other things, the Rome, N.Y. based corporation from entering into any agreement with other pharmacy firms to withdraw from or refuse to enter into any participation agreement. It further prohibits respondent, for a period of ten years, from communicating to another pharmacy firm their decision or intention to enter or refuse to enter into such a participation agreement. In addition, for eight years, it prohibits respondent from advising another pharmacy firm on whether to enter into any participation agreement.

Appearances

For the Commission: *Karen Bokat and Michael D. McNeely.*

For the respondent: *Tod Bogan and Fred Feola, in-house counsel, Rome, N.Y. and Garret G. Rasmussen, Patton, Boggs, & Row, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Brooks Drug, Inc., Carl's Drug Co., Inc. and Genovese Drug Stores, Inc. have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Brooks Drug, Inc. ("Brooks") 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 75 Sabin Street, Pawtucket, Rhode Island. In 1986, the retail sale of prescription drugs accounted for a significant portion of the sales of the approximately 60 pharmacies that respondent Brooks operated in New York State. In 1986, respondent Brooks was a member of the Chain Pharmacy Association of New York State, Inc. ("Chain Association").

PAR. 2. Respondent Carl's Drug Co., Inc. ("Carl's") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office address at Box 203 Success Drive, Rome, New York. In 1986, the retail sale of prescription drugs accounted for a significant portion of the sales of the approximately 42 pharmacies that Carl's operated in New York State. In 1986, respondent Carl's was a member of the Chain Association.

PAR. 3. Respondent Genovese Drug Stores, Inc. ("Genovese") 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 80 Marcus Drive, Melville, New York. The retail sale of prescription drugs accounts for a significant portion of the sales of the approximately 72 pharmacies that respondent Genovese operates in New York State. In 1986, respondent Genovese was a member of the Chain Association.

PAR. 4. Except to the extent that competition has been restrained as alleged herein, respondents have been and now are in competition with other pharmacy firms and other health care providers in the state of New York.

PAR. 5. Respondents' general business activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 6. Customers often receive prescriptions through health benefit programs under which a third-party payer compensates the pharmacy for the prescription according to a predetermined formula. The New York State Employees Prescription Program is a prescription drug benefit plan made available by the State of New York to its employees, its retirees, certain other persons, and their dependents. There were approximately 500,000 beneficiaries covered by the Employees Prescription Program in 1986. Since July 1, 1986, The Equitable Life Assurance Society of the United States has insured the Employees Prescription Program, and PAID Prescriptions, Inc., a wholly-owned subsidiary of Medco Containment Services, Inc., has administered it.

PAR. 7. Pharmacies are solicited to participate in the Employees Prescription Program. Pharmacies that participate in the Employees Prescription Program accept as payment in full a reimbursement of the ingredient cost of the drug and a professional fee for dispensing the drug. The Employees Prescription Program provides a formula for

determining the reimbursement of the ingredient cost of drugs dispensed.

PAR. 8. Absent collusion between or among pharmacy firms, each pharmacy firm would decide independently whether to participate in the Employees Prescription Program, and the State of New York would enjoy the benefits of competition among pharmacy firms.

PAR. 9. In May 1986, PAID Prescriptions, Inc. formally solicited pharmacy participation in the Employees Prescription Program under terms to become effective on July 1, 1986. Among the proposed terms were changes in the reimbursement level for ingredient costs, an increase in the professional fee, and the offer of additional reimbursement for the use of generic drugs. The proposed terms were intended to reduce the price the State paid for the Employees Prescription Program, and thus minimize costs, and yet to offer reimbursement high enough to attract a sufficient number of participating pharmacies to ensure that Employees Prescription Program beneficiaries would have adequate access to medication.

PAR. 10. In 1986, respondents participated in many prescription drug benefit plans offered by third-party payers, including the Employees Prescription Program as it existed prior to July 1. Respondents purchased prescription drugs at a cost which on average was below the Employees Prescription Program's proposed level of reimbursement for ingredient costs. Each respondent would have suffered a significant loss of customers had its competitors participated in the Employees Prescription Program at a time when it was not participating.

PAR. 11. Even before PAID formally solicited pharmacy participation in the Employees Prescription Program, New York State began to inform pharmacists' associations of the proposed terms. In or before March 1986, the Chain Association became aware of the proposed terms of the Employees Prescription Program, and, in response, communicated to members that the extent to which pharmacies participated in the Employees Prescription Program could affect state officials' consideration of the reimbursement level. The Chain Association held meetings at which some pharmacy firms informed other pharmacy firms that they would not participate in the proposed Employees Prescription Program. Respondents were involved with other pharmacy firms in exchanges of information regarding firms' intentions concerning participation in the Employees Prescription Program. The Chain Association communicated to Chain Association

members and other pharmacy firms information regarding the intentions of Chain Association members and other pharmacy firms concerning participation in the Employees Prescription Program. Through these exchanges of information and other acts, respondents and other pharmacy firms agreed to refuse to participate in the Employees Prescription Program at the proposed reimbursement level, for the purpose of increasing the level of reimbursement offered by the State of New York under the Employees Prescription Program.

PAR. 12. Respondents have restrained competition among pharmacy firms by conspiring with other pharmacy firms, or by acting with other pharmacy firms as a combination, to increase the price paid to participating pharmacies under the Employees Prescription Program and to deny to the State the benefits of competition.

PAR. 13. The combination of conspiracy and the acts and practices described above have unreasonably restrained and continue unreasonably to restrain competition among pharmacists and pharmacies in New York, and have injured consumers in the following ways, among others:

A. Price competition among pharmacy firms with respect to third-party prescription benefit plans has been and continues to be reduced;

B. The State of New York was coerced into raising the prices paid to pharmacies under the Employees Prescription Program; and,

C. The State of New York has been and continues to be forced to pay substantial additional sums for prescription drugs provided to Employees Prescription Program beneficiaries.

PAR. 14. The combination or conspiracy and the acts described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracy, or the effects thereof, are continuing, will continue, or will recur in the absence of the relief herein requested.

Commissions Azcuenaga and Machol dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of the 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 Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft 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 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, 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 Carl's 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 Box 203 Success Drive, Rome, New York.

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.

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

A. "*Carl's*" means Carl's Drug Co., Inc., its directors, officers, agents, employees, divisions, subsidiaries, successors and assigns;

B. "*Third-party payer*" means any person or entity that provides a program or plan pursuant to which such a person or entity agrees to pay for prescriptions dispensed by pharmacies to individuals described in such plan or program as eligible for such coverage ("*Covered Persons*"), and includes, but is not limited to, health insurance

companies; prepaid hospital, medical, or other health service plans, such as Blue Cross and Blue Shield plans; health maintenance organizations; preferred provider organizations; prescription service administrative organizations; and health benefit programs for government employees, retirees or dependents;

C. "*Participation agreement*" means any existing or proposed agreement, oral or written, in which a third-party payer agrees to reimburse a pharmacy for the dispensing of prescription drugs to Covered Persons, and the pharmacy agrees to accept such payment from the third-party payer for such prescriptions dispensed during the term of the agreement;

D. "*Pharmacy Firm*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more pharmacies, including the directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers, employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures, but excludes any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, which own, are owned by, control or are under common control with Carl's. The words "subsidiary", "affiliate", and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

II.

It is ordered, That Carl's, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Agreeing or combining, attempting to agree or combine, or taking any action in furtherance of any agreement or combination, advocating an agreement, or organizing or cooperating with any Pharmacy Firm(s) to (1) boycott, refuse to enter into, withdraw from, or not participate in, any Participation Agreement or (2) threaten to boycott, threaten to refuse to enter into, threaten to withdraw from, or threaten not to participate in, any participation agreement;

B. For a period of ten (10) years after the date this order becomes final, stating or communicating in any way to any pharmacy firm the

intention or decision of Carl's with respect to entering into, refusing to enter into, threatening to refuse to enter into, participating in, threatening to withdraw from, or withdrawing from any existing or proposed participation agreement into which Carl's and the other pharmacy firm have entered, could enter or are considering entering;

C. For a period of eight (8) years after the date this order becomes final, advising any pharmacy firm with respect to entering into, refusing to enter into, participating in, or withdrawing from any existing or proposed participation agreement into which Carl's and the other pharmacy firm have entered, could enter or are considering entering.

Provided, that nothing in this order shall prevent Carl's from:

(1) Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding;

(2) Subcontracting, preparing joint bids, or otherwise jointly undertaking with pharmacy firms to provide prescription drug services under a participation agreement if requested to do so in writing by the third-party payer;

(3) Communicating to the public truthful, nondeceptive statements concerning any existing or proposed participation agreement.

III.

It is further ordered, That Carl's:

A. Provide a copy of this order within thirty (30) days after the date this order becomes final to each officer, director, employee pharmacist who is employed in New York state, and each employee whose responsibilities include recommending or deciding whether to enter into any participation agreement, and each employee who regularly attends meetings on Carl's behalf that include representatives of other pharmacies; and

B. For a period of five (5) years after the date this order becomes final, provide each new director and each employee who enters a position described in Paragraph A a copy of the order within ten (10) days of the date the employee or director assumes the new position.

IV.

It is further ordered, That Carl's:

A. File a verified, written report with the Commission within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to Carl's, require, setting forth in detail the manner and form in which it has complied and is complying with this order;

B. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice all documents generated by Carl's or that come into Carl's possession, custody, or control regardless of source, that embody, discuss or refer to the decision or upon which Carl's relies in deciding whether to enter into any participation agreement in which Carl's participates, has participated, or has considered participating; and

C. Notify the Commission at least thirty (30) days prior to any proposed change in Carl's such as, assignment or sale resulting in the emergence of a successor corporation or association, change of name, change of address, dissolution, the creation, sale or dissolution of a subsidiary, or any other change that may affect compliance with this order.

Commissioners Azcuenaga and Machol dissenting.

GENOVESE DRUG STORES, INC.

IN THE MATTER OF

GENOVESE DRUG STORES, INC.

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

Docket C-3258. Complaint, July 12, 1989—Decision, July 12, 1989*

This consent order prohibits, among other things, the Melville, N.Y. based corporation from entering into any agreement with other pharmacy firms to withdraw from or refuse to enter into any participation agreement. It further prohibits respondent, for a period of ten years, from communicating to another pharmacy firm their decision or intention to enter or refuse to enter into such a participation agreement. In addition, for eight years, it prohibits respondent from advising another pharmacy firm on whether to enter into any participation agreement.

Appearances

For the Commission: *Karen Bokat and Michael D. McNeely.*

For the respondent: *Edward J. Brady, Brady & Tarpey, New York City.*

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of the 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 Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft 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

*Complaint previously published at 112 FTC 15 (1989).