

IN THE MATTER OF

BOISE CASCADE CORPORATION

MODIFIED FINAL ORDER, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 2 OF THE CLAYTON ACT AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9133. Final Order, Feb. 11, 1986—Modified Final Order, June 20, 1991*

This modified final order prohibits the Idaho-based distributor of office products from knowingly inducing, receiving, or accepting wholesale discounts on such products that Boise resells to end-users in the future. The Commission's original order prohibited the respondent from knowingly receiving prices discriminatorily lower than those available to its competitors in the sale of office products to end-users.

Appearances

For the Commission: *Chris M. Couillou.*

For the respondent: *Victor E. Grimm, Bell, Boyd & Lloyd,*
Chicago, IL.

MODIFIED FINAL ORDER

Boise Cascade Corporation having filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the order to cease and desist issued herein on February 11, 1986, 107 FTC 76, 224, and reissued on November 1, 1990, and the Commission having before it a proposal of Boise Cascade to terminate the proceeding for judicial review upon the Commission's entry of the following modified order, and the Commission having determined to accept the proposal, and having the authority to modify its order by virtue of the fact that the record in the proceeding has not been filed with the Court of Appeals (*see* 15 U.S.C. 21(b) and Commission Rule 3.72(a)); accordingly,

It is ordered, That the cease and desist order entered in this matter be modified to read as follows:

I.

The following definitions shall apply in this order:

*Complaint, Final Order, etc. previously published at 107 FTC 76 (1986).

A. "*Boise Cascade*" shall mean Boise Cascade Corporation, its divisions and subsidiaries, its officers, directors, agents and employees, and its successors and assigns.

B. "*Office Products*" shall mean furniture and supplies commonly used in offices such as those which are sold or distributed by Boise Cascade Corporation's Office Products Division.

C. "*Wholesaler*" is a firm that regularly purchases Office Products for resale to another firm that sells such products to end-users.

D. "*Wholesale Discount*" is any discount, rebate, allowance or deduction or term or condition of sale (however characterized) provided by sellers of Office Products to wholesalers by reason of their status as wholesalers.

II.

It is further ordered, That Boise Cascade shall, in connection with the offering to purchase or purchasing in commerce, as "commerce" is defined in the Clayton Act, of Office Products for resale, cease and desist from knowingly inducing, receiving or accepting, directly or indirectly, from any seller a wholesale discount if the product on which such discount is received is resold by Boise Cascade to an end-user.

III.

It is further ordered, That Boise Cascade shall, within sixty (60) days of the effective date of this order, distribute a copy of this order to each of its suppliers of Office Products.

IV.

It is further ordered, That Boise Cascade shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure of Boise Cascade, such as the creation or dissolution of subsidiaries or divisions, or any other change in the corporation, which may affect compliance obligations arising out of the order.

V.

It is further ordered, That Boise Cascade 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 in which it has complied with this order and shall file such other reports as the Commission may from time to time require to assure compliance with the terms and conditions of this order.

Commissioner Azcuenaga dissenting and Commissioner Owen not participating.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today decides to accept an order proposed by Boise Cascade Corporation in settlement of this matter. The order proposed by Boise is at once more narrow and more broad than the order entered by the Commission following adjudication on the merits.¹ Neither change is in the public interest.

The compromise order is considerably more narrow than the adjudicated order, because it prohibits Boise only from accepting wholesale prices, not discriminatory prices, on goods resold to end users. Boise will remain free to use its buying power to negotiate any discriminatorily lower price that does not fit the definition of wholesale contained in the order. In view of the Commission's unanimous finding of liability for "endemic" practices and the theory of injury in the case (Boise's receipt of discriminatory prices, of which wholesale discounts were an example, *see* Complaint ¶ 4, 107 FTC at 77), I see no compelling reason to concede that the adjudicated order is overbroad. I see even less reason to abandon the gravamen of the relief that was anticipated at the outset of the case and that was imposed after a full adjudication and full consideration by the Commission of the terms of the order. 107 FTC at 223.²

The compromise order also is more broad than the adjudicated order and, indeed, the Robinson-Patman Act, because it omits any reference to two elements essential to a violation: a discriminatory price and competition with disfavored purchasers. As I understand it, Boise's receipt of a wholesale price on goods resold to end users would violate the compromise order even if Boise's only competitors are others of the "Big 5" wholesalers that paid the same price. This is a perverse result.

¹ The adjudicated order of the Commission prohibits Boise from receiving a net price lower than that paid by distributors with which Boise competes for sales to end users. The order proposed by Boise ("compromise order") prohibits the receipt of wholesale discounts on products that Boise resells to end users.

² The Commission, describing the order as "unremarkable," nevertheless modified the order to "eliminate the suggestion of overbreadth" by making explicit that it applied only to office products resold by Boise to end users.

Accepting the compromise order at this stage of the proceeding, when Boise's appeal from the Commission's adjudicated order and opinion on remand is pending, also fails to serve the public interest by leaving the applicable legal standards in a state of confusion and disarray. This might be acceptable, if the compromise order were consistent with the public interest. Unfortunately, the only interest served here is expediency. I dissent.

IN THE MATTER OF

CHAIN PHARMACY ASSOCIATION OF
NEW YORK STATE, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9227. Complaint, April 19, 1989—Decision, June 20, 1991*

This consent order prohibits, among other things, the pharmaceutical association from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into a third-party payer prescription drug plan; for ten years, from continuing any meeting of representatives of pharmacy firms at which any person makes any statement concerning whether any firm will enter into or refuse to enter into any third-party payer prescription drug plan; and for eight years, from providing comments or advice to any pharmacist or pharmacy firm on the desirability or appropriateness of entering into or refusing to enter into any third-party payer prescription drug plan.

Appearances

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

For the respondent: *Michael E. Rosen, Valatie, N.Y. and Willard K. Tom, Sutherland, Asbill & Brennan, 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 the Chain Pharmacy Association of New York State, Inc.; Melville Corporation; Fay's Drug Company, Inc.; Kinney Drugs, Inc.; Peterson Drug Company of North Chili, New York, Inc.; Rite Aid Corporation; and James E. Krahulec 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 Chain Pharmacy Association of New York State, Inc. ("Chain Association") is a corporation organized, existing and doing business under and by virtue of the laws of the