

IN THE MATTER OF
ALLEGHANY CORPORATION

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

Docket C-3335. Consent Order, July 11, 1991--Modifying Order, Feb. 11, 1999

This order reopens a 1991 consent order -- that required Alleghany Corporation to divest certain rights and interests in title plants and back plants to a Commission-approved acquirer, and, for ten years, to obtain Commission approval before acquiring certain related assets -- and this order modifies the consent order by relieving Alleghany of its compliance obligations, under paragraphs VI, VII, VIII.B., IX and X, since Alleghany restructured itself and is no longer engaged in the title plant/back plant business.

Participants

For the Commission: *Pamela Gill and Roberta Baruch.*

For the respondents: *John C. Christie, Jr., Hale & Dorr,*
Washington, D.C.

ORDER REOPENING AND MODIFYING ORDER

On October 14, 1998, respondent Alleghany Corporation ("Alleghany") filed a Petition to Reopen and Modify Consent Order ("Petition"), 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 and Procedure, 16 CFR 2.51. In its Petition, Alleghany requests that the Commission reopen the order in Docket No. C-3335 ("Order") to relieve Alleghany of its compliance obligations under Paragraphs VI, VII, VIII.B., IX and X, the only remaining operative paragraphs of the Order.¹ The Petition was placed on the public record for thirty days pursuant to Section 2.51(c) of the Commission's Rules of Practice and Procedure. Paragraph VI of the Order prohibits Alleghany from acquiring for ten years without prior notice to the Commission any stock, share capital, or equity

¹ In support of its Petition, Alleghany provided the affidavits of Robert M. Hart, General Counsel of Alleghany and Thomas J. Adams, III, General Corporate Counsel of Chicago Title Corporation ("Chicago Title") and of Chicago Title and Trust Company ("CT&T") ("Hart Affidavit" and "Adams Affidavit").

interest in any concern that in turn has any direct or indirect ownership interest in a title plant or back plant servicing the same area, or acquire from any concern any assets (other than in the ordinary course of business) of, or ownership interest in, any existing title plant or back plant servicing any geographic area for which Alleghany has any ownership interest in a title plant or back plant servicing the same area. Paragraph VII of the Order exempts from the requirements of Paragraph VI certain acquisitions. Paragraph VIII.B. requires Alleghany to file annual reports respecting its compliance with the Order. Paragraph IX provides that the Commission shall have access to specified records and officers and personnel of Alleghany. Paragraph X requires that Alleghany provide prior notice of any changes that may affect compliance obligations arising out of the Order.² These Order provisions expire by their own terms on July 23, 2001, ten years after the Order became final.³ Alleghany asserts that the purpose of the Order is to preserve competition in the provision of title plant/back plant information. Since Alleghany is no longer, directly or indirectly, in the title plant/back plant business, the prohibitions and requirements of the Order as to Alleghany serve no useful purpose. According to Alleghany, the Order now places responsibility upon Alleghany for the actions or inaction of other firms that Alleghany, since the spin-off, no longer controls.⁴

The changes of fact alleged by Alleghany include the fact that Alleghany restructured itself by forming an independent publicly-traded corporation named Chicago Title Corporation ("Chicago Title"). Chicago Title includes Alleghany's title insurance and real estate related services business. On June 17, 1998, Alleghany spun-off Chicago Title ("Spin-Off").⁵ The Spin-Off was accomplished through a pro rata distribution to Alleghany stockholders; specifically, three shares of Chicago Title stock were distributed for each share of

² 114 FTC 385 (1991). By an order issued June 27, 1996, the Commission reopened and modified the Order resulting in, among other things, certain modifications of the prior notice provisions contained in paragraph VI of the original Order. 121 FTC 934 (1996).

³ Order ¶¶ VI, VII, VIII.B., IX, X.

⁴ Petition at 5.

⁵ Prior to the Spin-Off, Alleghany was the sole owner of Chicago Title and Trust Company ("CT&T"). CT&T is the sole owner of Chicago Title Insurance Company ("Chicago Title Insurance"), Tigor Title Insurance Company of California ("Tigor") and Security Union Title Insurance Company ("STI"). Chicago Title Insurance, Tigor and STI are engaged in the title plant/back plant business. Chicago Title is a newly formed holding company for these former Alleghany subsidiaries.

Alleghany common stock outstanding as of the record date of June 10, 1998. On the effective date of the Spin-Off, the largest individual stockholder of Alleghany held no more than 12.5% of the total amount of Alleghany stock outstanding. None of the executive officers of Chicago Title holds any present position with Alleghany. The Board of Directors of Chicago Title consists of fourteen directors. Although certain of these Board members hold positions with Alleghany, the substantial majority of the Board has no connection with Alleghany. Only two directors are executive officers of Alleghany, and one of those directors is also a director of Alleghany. Two other directors are also directors of Alleghany and a third is an executive officer of Alleghany Asset Management, Inc. ("AAM"), an Alleghany subsidiary which has never been in the business of title insurance. The remaining directors are either officers of Chicago Title or outside directors unaffiliated in any way with Alleghany.⁶

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.⁷

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so

⁶ See Petition at 2-5; ¶¶ 3-11 Hart Affidavit; ¶¶ 1-6 Adams Affidavit. Prior to the Spin-Off, AAM was a subsidiary of CT&T which conducted the financial services business of CT&T. CT&T distributed the stock of AAM to Alleghany because Alleghany chose to retain the financial services business, while it spun off the title insurance and real estate services business. While Alleghany and Chicago Title have entered into certain administrative agreements to define their ongoing relationship, and to allocate responsibility for past obligations and certain obligations that might arise in the future, these agreements do not give Alleghany responsibility for management of Chicago Title or its subsidiaries. Petition at 4.

⁷ S. Rep. No. 96-500, 96th Cong., 1st Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter"). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.⁸

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order."⁹ If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.¹⁰ However, if the Commission denies relief, it must provide a sufficient explanation of its reasons for the denial.¹¹

Upon consideration of Alleghany's request and other information, the Commission finds pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, that changed conditions of fact warrant reopening and modification of the Order to set aside the aforementioned provisions as to Alleghany. As a result of the Spin-Off, Alleghany is no longer engaged in the title plant/back plant business which gave rise to the Order and has stated that it has no present intent to re-enter that business in the future. In addition, Alleghany is not in a position to oversee the management of Chicago Title. Therefore, there are no longer competitive concerns that would justify the need for prior notice for any acquisition that Alleghany

⁸ Alleghany has based its request upon changed conditions of fact and not the public interest standard for reopening and modifying orders.

⁹ S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify).

¹⁰ *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹¹ *United States v. Louisiana-Pacific Corp.*, 754 F.2d 1445 (9th Cir. 1985).

may wish to make of a title plant/back plant business. In relieving Alleghany of its compliance obligations under the aforementioned paragraphs, the Commission notes that Chicago Title, as a successor corporation, remains bound by the terms of the Order for its duration and that Chicago Title has submitted an affidavit specifically acknowledging that it is bound by the Order as successor.¹²

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's Order be, and it hereby is, modified to relieve Alleghany of its compliance obligations under Paragraphs VI, VII, VIII.B., IX and X as of the effective date of this order.

¹² Petition at 6; ¶ 6 Adams Affidavit.

IN THE MATTER OF
LAFARGE, S.A., ET AL.

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

Docket C-3852. Complaint, Feb. 12, 1999--Decision, Feb. 12, 1999

This consent order, among other things, prohibits the respondents from entering into any contract or agreement relating to the acquisition by Lafarge of any of the Holnam Acquisition Assets, in which the amount of any payment made after the closing of the acquisition is calculated by reference to or dependent upon the quantity of cement produced or sold by Lafarge in any market in the states of Washington or Oregon.

Participants

For the Commission: *Joseph Lipinsky, John Kirkwood, Patricia Hensley, Shane Woods, Maxine Stansell, Virginia Davidson, Robert Schroeder, Charles Harwood, Kenneth Libby, Daniel Ducore, William Baer, Daniel O'Brien, J. Elizabeth Callison and Roger Boner.*

For the respondents: *Richard Favretto, Mayer, Brown & Platt, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Lafarge, S.A., through an entity it controls, Lafarge Corporation (collectively "respondents"), has entered into an agreement to acquire cement production assets of Holnam, Inc., that the agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. THE RESPONDENTS

1. Respondent Lafarge, S.A., is a corporation organized, existing and doing business under and by virtue of the laws of France with its principal executive offices located at 61 rue des Belles Feuilles, F-