

**ANALYSIS OF AGREEMENT CONTAINING  
CONSENT ORDER TO AID PUBLIC COMMENT**  
*In the Matter of Graco, Inc., File No. 101-0215, Docket No. C-4399*

The Federal Trade Commission (“Commission”) has accepted for public comment an Agreement Containing Consent Order (“Consent Order”) with Graco, Inc. (“Graco”) to remedy the alleged anticompetitive effects resulting from Graco’s acquisition of its most significant competitors, Gusmer Corp. (“Gusmer”) and GlasCraft, Inc. (“GlasCraft”). The Commission Complaint (“Complaint”) alleges that, at the time of the acquisitions, Graco, Gusmer, and GlasCraft each manufactured and sold equipment for the application of fast-set chemicals (“fast-set equipment”). Neither acquisition was reportable under the Hart-Scott-Rodino Act. The Consent Order seeks to restore competition lost through the acquisitions by requiring Graco to license certain technology to a small competitor to facilitate its entry and expansion, and to cease and desist from engaging in certain conduct that may delay or prevent entry and expansion of competing firms. The Complaint and Consent Order in this matter have been issued as final and the Consent Order is now effective.

The Complaint alleges that the acquisitions each violated 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.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the Consent Order. It is not intended to constitute an official interpretation of the Agreement and Consent Order or in any way to modify their terms.

The Consent Order is for settlement purposes only. The Commission has placed the Consent Order on the public record for thirty (30) days for the receipt of comments by interested persons.

**I. The Relevant Market and Market Structure**

The relevant market within which to analyze the competitive effects of these acquisitions is fast-set equipment used by contractors in North America. Fast-set equipment combines and applies various reactive chemicals that form polyurethane foams or polyurea coatings used for the application of insulation and protective coatings. The essential components of a fast-set equipment system are the proportioner, the heated hoses, and the spray gun.

Fast-set equipment manufacturers sell their products almost exclusively through a network of specialized, third-party distributors. These independent distributors sell to end-users. End-users demand a proximate source of expertise, spare parts, and repair services. Therefore, a robust network of third-party fast-set equipment distributors is necessary for any manufacturer to compete effectively in the relevant market.

Prior to its acquisition by Respondent in 2005, Gusmer was the largest and most significant competitor engaged in the manufacture and sale of a full line of fast-set equipment

throughout North America and the world. The acquisition increased Graco's share of the North American fast-set equipment market to over 65%, and left GlasCraft as Graco's only significant North American competitor. Graco's acquisition of GlasCraft in 2008 raised Graco's market share above 90% and removed Graco's last significant North American competitor. Following the acquisitions of each of Gusmer and GlasCraft, Graco closed both firms' fast-set equipment manufacturing facilities and has fully assimilated or terminated all remaining assets, products, intellectual property, and personnel from both firms.

Prior to the acquisitions, fast-set equipment distributors typically carried products from multiple manufacturers. Distributors and end-users were able to mix and match the products from the different manufacturers to assemble a fast-set system that best satisfied end-users' demands. Further, manufacturers did not impose exclusive relationships on distributors – a distributor was free to make some or all of its fast-set equipment purchases from whichever manufacturers it chose. The Complaint alleges, among other effects, that the acquisitions of Gusmer and GlasCraft have removed the ability of distributors and end-users to select the equipment that best serves their, and their customers', interests and needs.

## **II. Conditions of Entry and Expansion**

The Complaint alleges high entry barriers in the relevant market. The principal barrier to entry is the need for specialized third-party distribution. As a result of its acquisitions, Graco obtained substantial control over access to that distribution channel. Subsequent Graco practices have further heightened barriers to competitive entry and expansion, such that restoration of the competition lost as a result of Graco's acquisitions is unlikely to be restored unless Graco's continuation of those practices is enjoined.

Beginning in 2007, former employees of Gusmer began distributing fast-set equipment as Gama Machinery USA, Inc., now doing business as Polyurethane Machinery Corp. ("Gama/PMC"). In March 2008, Graco sued Gama/PMC and others alleging, among other things, breach of contract. The continuation of that litigation has reduced the willingness of distributors to purchase fast-set equipment from Gama/PMC, for fear that their supply of fast-set equipment might later be interrupted as a result of litigation. To reduce that barrier, an impending settlement of that litigation is incorporated in the Commission's Consent Order.

Like Gama/PMC, other prospective competitors—some of which presently offer only some components, rather than a full line of proportioners, hoses, and spray guns—have been unable to gain a meaningful foothold in the North American fast-set equipment market because of barriers to access to the required specialty distribution channel. Following its obtaining of market power through its acquisitions, Graco increased the discount and inventory thresholds it required of distributors, and threatened to cut off any distributor's access to needed Graco fast-set equipment if the distributor purchased fast-set equipment from any Graco rival. The reduction of barriers to entry and expansion by enjoining the continuation of this conduct is necessary to the restoration of competition lost as a result of Graco's acquisitions, and certain provisions of the Commission's cease and desist order are directed to that end.

### **III. Effects of Graco's Acquisitions**

As a result of the acquisitions, Graco has eliminated head-to-head competition with Gusmer and GlasCraft. The Complaint alleges that concentration in the relevant market has increased substantially, and given Graco the ability to exercise market power unilaterally. The Complaint alleges that Graco has exercised that market power by raising prices, reducing product options and alternatives, and reducing innovation. The Complaint further alleges that Graco engaged in certain post-acquisition conduct that has raised barriers to entry and expansion such that the continuation of that conduct must be enjoined if the competition lost as a result of Graco's acquisitions is to be restored.

### **IV. The Consent Agreement**

Since the acquisitions were completed some time ago, it is not practicable to recreate the acquired firms as independent going concerns. Instead, the purpose of the Consent Order is to ensure the restoration of the competitive conditions that existed before the acquisitions, to the extent possible, by facilitating Gama/PMC's entry and expansion and lowering barriers to entry. Therefore, the Consent Order requires Graco to enter into a settlement agreement with Gama/PMC within ten (10) days of the entry of the Order. In addition, Graco must grant to Gama/PMC an irrevocable license to certain Graco patents and other intellectual property in order to ensure that Graco cannot continue or renew its suit. In exchange, PMC will pay to Graco a sum of money for the settlement of the litigation and agree to a deferred license fee for the intellectual property. The settlement documents will be incorporated by reference into the Consent Order, and cannot be modified without the Commission's prior approval. Further, the Consent Order independently prohibits Graco from filing suit against Gama/PMC for infringing the licensed intellectual property.

In order to reduce barriers to competitor entry, the Consent Order directs Graco to cease and desist from imposing any conditions on its distributors that could, directly or indirectly, lead to exclusivity. The Consent Order also prohibits Graco from discriminating against, coercing, threatening, or in any other manner pressuring its distributors not to carry or service any competing fast-set equipment. The Consent Order does not mandate that any distributor carry competitive fast-set equipment; rather, it bars Graco from imposing exclusivity on its distributors.

The Consent Order further obligates Graco to waive or modify any policies or contracts that would violate the Consent Order. Graco will have thirty (30) days after the Consent Order is final to negotiate changes in the contracts with its distributors to comply with the Consent Order. Graco must provide all of its distributors, employees and agents with a copy of the Consent Order and a plain-language explanation of what it says and requires.

The Consent Order further requires Graco to provide the Commission with prior notice: (1) if it intends to make another acquisition of fast-set equipment (after an appropriate waiting period); or (2) if it intends, within thirty (30) days, to institute a lawsuit or similar legal action

against a distributor or end-user with regard to a claimed violation of Graco's trade secrets or other intellectual property covering fast-set equipment. The Consent Order will remain in effect for ten (10) years, and contains standard compliance and reporting requirements.

## **V. Effective Date of the Consent Order and Opportunity for Public Comment**

In this instance, the Commission issued the Complaint and the Consent Order as final, and served them upon Graco at the same time it accepted the Consent Agreement for public comment. As a result of this action, the Consent Order has become effective. The Commission adopted procedures in August 1999 to allow for immediate implementation of an order prior to the public comment period. The Commission announced that it "contemplates doing so only in exceptional cases where, for example, it believes that the allegedly unlawful conduct to be prohibited threatens substantial and imminent public harm." 64 Fed. Reg. 46,267, 46,268 (1999).

This is an appropriate case in which to issue a final order before receiving public comment because the effectiveness of the remedy depends on the timeliness of the private settlement agreement between Graco and Gama/PMC, which only becomes effective when the Consent Order becomes final. Both Graco and Gama/PMC have made initial efforts to address distributor concerns about possible Graco retribution by separately sending letters to distributors assuring them that preliminary discussions of business relations with Gama/PMC would not have any adverse consequences on the distributors' relationship with Graco. However, the protections of the applicable license and covenants, as well as those included in the Consent Order, are needed to provide distributors reasonable assurances that buying from Gama/PMC will not jeopardize the distributors' relationship with Graco. As a result, any delay in the effectiveness of the Consent Order and the associated private settlement will prevent Gama/PMC from finalizing relationships with distributors in time for the current construction season – and this will have a significant and meaningful impact on competition in the fast-set equipment market that the Consent Order is intended to foster.

The Commission anticipates that the competitive problems alleged in the Complaint will be remedied by the Consent Order, as issued. Nonetheless, public comments are encouraged and will be considered by the Commission. The purpose of this analysis is to invite and facilitate such comments concerning the Consent Order and to aid the Commission in determining whether to modify the Consent Order in any respect. Therefore, the Complaint and Consent Order have been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the comments received, and may determine that the Consent Order should be modified in response to the comments.<sup>1</sup>

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<sup>1</sup> If the Respondent does not agree to any such modifications, the Commission may (1) initiate a proceeding to reopen and modify the Consent Order in accordance with Rule 3.72(b), 16 CFR § 3.72(b), or (2) commence a new administrative proceeding by issuing an administrative complaint in accordance with Rule 3.11. See 16 CFR § 2.34(e)(2).