

Opinion

83 F.T.C.

## IN THE MATTER OF

## HELIX MARKETING CORPORATION, ET AL.

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-2076. Complaint Nov. 11, 1971—Modifying Order and Opinion,  
Sept. 25, 1973*

Order reopening proceedings and modifying subparagraphs (c), (d), and (g) of Paragraph 3 of the original order to cease and desist, 79 F.T.C. 711, 36 F.R. 22821, which prohibit the threat of legal action or collection action, by expanding said paragraphs to permit such assertions to be made if respondents can establish certain affirmative defenses.

*Appearances*

For the Commission: *Joan Bernstein*, Deputy Director of Consumer Protection.

For the respondents: *Geist, Netter & Marks*, New York, New York.

## OPINION OF THE COMMISSION

On May 14, 1973, respondent Helix Marketing Corporation filed a petition on behalf of captioned respondents to reopen the proceeding for the purpose of modifying subparagraphs 3(c), 3(d) and 3(g) of the order to cease and desist entered by the Commission on November 3, 1971. The Acting Director, Bureau of Consumer Protection filed an answer dated June 8, 1973, not opposing reopening, but proposing changes different from those advanced by respondents. Thereupon, the Commission issued, on June 19, 1973, an Order Proposing Modification of Order to Cease and Desist, ordering respondents to show cause why the modifications proposed therein should not be adopted. Respondents have replied by memorandum received August 9, 1973, and the Bureau of Consumer Protection has answered by memorandum received September 10, 1973.

Upon consideration of the papers before it, the Commission is of the view that the original order to cease and desist should be modified largely in accordance with the Commission's proposal of June 19, 1973, with one amendment [in subparagraph 3(c)] to reflect arguments raised by respondents in their petitions. (A few stylistic changes have also been made in the June 19, 1973, proposal to clarify the meaning of certain provisions.)

The original order of November 3, 1971, prohibits respondents from representing, directly or by implication, that:

(c) Legal action will be or may be taken against a delinquent debtor unless payment is made on a delinquent account.

(d) Legal action has been taken and suit filed against a delinquent account.

\* \* \* \* \*

(g) Accounts are or may be turned over to collection agencies.

The proposed modification would retain the general prohibitions on threatening legal action or collection action, but permit such assertions to be made if respondents can establish certain affirmative defenses. Thus, Paragraph (d) of the proposed modification would permit a representation that legal action has been taken and a suit filed against a delinquent, provided respondents can demonstrate that "prior to making the representation respondents had in fact taken legal action and filed suit against the delinquent debtor." Respondents make no objection to this modification, and it is included in the appended order.

Similarly, nothing in respondents' papers speaks to the proposed subparagraph (c) (1) which prohibits the representation that "legal action will be taken against a delinquent debtor unless payment is made on a delinquent account" except in the event that respondents can establish that "they do in fact take such legal action when payment is not made in all cases where the representation is made." This paragraph is thus retained in our order.

Respondents do object to Paragraphs (c) (2) and (g) of the proposed modification, which prohibit representing that "legal action may be taken" and that "accounts are or may be turned over to collection agencies" unless respondents can demonstrate by way of affirmative defense that "they do in fact take such legal action against a *majority* of such debtors who do not make payment on such delinquent accounts" and that "they do in fact turn over a majority of such delinquent accounts to independent collection agencies."

Respondents argue that, for a variety of reasons, it often turns out that legal action or referral to a collection agency is deemed advisable in the case of fewer than half of all delinquent customers who fail to pay their debts after creditor contact. Therefore, respondents would have us amend the order to permit as an affirmative defense in Paragraphs (c) (2) and (g) a showing that legal or collection action is taken against only a "substantial number" of delinquent debtors who do not pay after contact.

The Bureau of Consumer Protection objects, arguing that a standard of "substantiality" is difficult to enforce and that if respondents are to be permitted to represent the possibility of something occurring, it should be more likely than not that it will.

With respect to referral of accounts to a collection agency, we believe the bureau is clearly correct. We can perceive, and respondents have pointed out, few if any circumstances that might intervene between the time a threat to refer to a collection agency is made, and the time such referral is actually made so as to justify threatening collection activity if, in fact, such threats prove idle on less than half those occasions in which no payment is made in response to the threat. Clearly respondents should be prepared to turn an account over for collection at the time a threat to do so is made, if payment is not forthcoming. If they are not so prepared, they should not so represent. If they are so prepared, it is hard to see how they will not end up referring well over 50 percent of such delinquent accounts to agencies.

A more difficult question is raised with respect to Paragraph (c) (2), pertaining to representations that "legal action may be taken." As respondents point out, following notice to a debtor that legal action may be taken, and subsequent to referral of the matter to a lawyer, a variety of factors may intervene that result in legal proceedings not being instituted. Respondents contend that the result of this is that legal proceedings are instituted in a "substantial" number of cases in which they might wish to represent that legal proceedings "may be instituted," but not in a majority. To preclude reference to possible legal action under such circumstances, respondents argue, deprives them of a needed weapon in their collection activities.

It is true that any restriction on the capacity of a creditor to threaten his customers, truthfully or otherwise, restricts his capacity to collect debts allegedly due him and renders the collection process more expensive for all concerned. At the same time, the Commission, in issuing its Order to Cease and Desist in this matter, had reason to believe that respondents were making unlawfully false representations with respect to the taking of legal action in debt collection, a practice that imposes costs of its own on consumers and society.<sup>1</sup> While respondents aver that their mode of operation has changed to some extent, it is still necessary that they be held, by order, to a strict standard of truthfulness in the making of such claims, based on our reason to believe in

<sup>1</sup> Respondents consented to the order in this matter. There was thus no trial on the merits, nor do respondents concede the allegations of the complaint, but, by the same token, the Commission's position, that it has reason to believe the allegations of the complaint, is not disturbed.

their past propensity to abuse such claims. For this reason, the test of "substantiality" proposed by respondents must be rejected, for it would render it exceedingly difficult to ensure, via enforcement activity, maintenance of the requisite truthfulness in the use of such statements.

We believe that respondents may reconcile the demands of accuracy with those of inexpensive debt collection by resort to greater precision in their use of threatening language. Respondents allege that they do, in fact, refer many delinquent accounts to attorneys, who subsequently counsel for or against taking legal action. Our order makes explicit [Subparagraph (c) (2)] that respondents will not be in violation if they merely represent that an account may be *referred to an attorney for determination of appropriate action*, if in fact this is done in a majority of cases in which no payment is made in response to this threat. Once the attorney recommends legal action, but before it is taken, respondents may inform their debtors that they (1) will or (2) may take such action if payment is not forthcoming, provided that action is taken in (1) all or (2) a majority of cases.

We believe that the appended order will thus permit respondents to make appropriately threatening statements at each stage of the collection process and prior to institution of costly collection actions, while at the same time adhering to a strict and enforceable standard of truthfulness, necessitated by practices alleged in the complaint.

For the foregoing reasons, the Order to Cease and Desist in this matter is amended as described hereinabove. An appropriate Order is appended.

#### ORDER REOPENING PROCEEDINGS AND MODIFYING ORDER TO CEASE AND DESIST

This matter having been considered by the Commission upon the motion of May 14, 1973, by respondents to open this matter, pursuant to Section 3.72(b) (2) of the Commission's Rules of Practice, and upon subsequent petitions and replies by respondents and the Bureau of Consumer Protection relevant thereto, and the Commission, for the reasons stated in the accompanying Opinion, in its discretion, determined to grant the Petition to Reopen, and to modify the Order as provided hereinafter:

*It is ordered*, That the proceedings in this matter be reopened and that subparagraphs (c), (d), and (g) of Paragraph 3 of the Order to Cease and Desist issued against respondents on November 3, 1971, be modified to read as follows:

Order

83 F.T.C.

(c) (1) Legal action *will* be taken against a delinquent debtor unless payment is made on a delinquent account; *Provided, however*, That it shall be a defense in any enforcement proceeding brought hereunder for respondents to establish that they do, in fact, take such legal action when payment is not made in *all* cases in which the representation is made.

(c) (2) Legal action *may* be taken against a delinquent debtor unless payment is made on a delinquent account; *Provided, however*, That it shall be a defense in any enforcement proceeding brought for respondents to establish that they do in fact take such legal action against a *majority* of debtors to whom the representation is made who do not make payment on such delinquent accounts; and, *Provided further*, That it shall not be a violation of this subsection for respondents to represent that they may refer the account of a delinquent debtor to an attorney to determine what action is appropriate, if, in fact, they can establish that they do in fact refer the accounts of delinquent debtors to an independent attorney for evaluation of what action is appropriate in a majority of cases in which such representation is made and payment is not made on an account.

(d) Legal action has been taken and suit filed against a delinquent debtor; *Provided, however*, That it shall be a defense in any enforcement proceeding brought hereunder for respondents to establish that prior to making the representation respondents had, in fact, taken legal action and filed suit against the delinquent debtor.

(g) Accounts are or may be turned over to collection agencies; *Provided, however*, That it shall be a defense in any enforcement proceeding brought hereunder for respondents to establish that they do, in fact, turn a majority of delinquent accounts over to independent collection agencies in cases in which such representations are made and payment is not made on the account.

---

IN THE MATTER OF

AMERICAN DAIRY ASSOCIATION, ET AL.

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

*Docket C-2495. Complaint, Sept. 25, 1973—Decision, Sept. 25, 1973.*

Consent order requiring a Chicago, Illinois, promoter of milk and milk products, among other things to cease disseminating advertising which represents milk