

Amended Complaint

IN THE MATTER OF

HOLIDAY MAGIC, INC., ET AL.

Docket 8834. Interlocutory Order, Aug. 29, 1974

Order amending complaint to substitute executor of estate of deceased respondent for purpose of effecting restitution of funds in the estate subject to any order of restitution. Executor to file appeal brief from initial decision with answering brief by complaint counsel.

Appearances

For the Commission: *Joseph S. Brownman* and *D. Stuart Cameron*.
For the respondents: *Stein, Mitchell & Mezines*, Wash., D. C.

ORDER AMENDING COMPLAINT BY SUBSTITUTING PARTY

Complaint counsel have filed an "Application to Amend Complaint by Substituting Sam Olivo, Executor of the Estate of William Penn Patrick for Decedent Respondent William Penn Patrick," dated Jan. 14, 1974, and counsel for Sam Olivo has replied in opposition in documents dated Jan. 22 and Feb. 5, 1974.

Patrick died shortly after entry of the initial decision by the administrative law judge, which ordered him, among other things, to pay back substantial sums of money obtained from individuals as a result of numerous violations of law. The basis of restitution under Section 5 of the Federal Trade Commission Act is that it is a continuing violation of that Act, redressable by cease and desist order, for an individual or corporation to retain monies obtained as a result of unfair or deceptive acts or practices or methods of competition. It is equally, we believe, a violation of the Act for the estate of a law violator to retain monies obtained as a result of fraud and overreaching, and disburse such funds in accord with the wishes of the law violator, and the question raised by complaint counsel's motion is whether or not the Commission may, in the exercise of its broad powers to enforce its law [*Jacob Siegel Co. v. F.T.C.*, 327 U.S. 612 (1946)], substitute a respondent's executor for the respondent to effect restitution and remedy a continuing violation.

This is unquestionably a matter of first impression for the Commission.¹ Complaint counsel argue that the proposed substitution is appro-

¹The Rules of Practice of the Commission do not give definitive guidance. Section 3.15 of the Rules of Practice provides for amendments to complaints. Substitution may be regarded as merely a form of amendment. Since the motion to amend arose after an appeal had been taken from the initial decision, its disposition is for the Commission to render in the first instance [§§3.51(d)(2), 3.54(a)].

priate both under the Federal Survival Statute (28 U.S.C. 2404) and the common law. The survival statute applies in terms to a "civil action for damages commenced by or on behalf of the United States." At least one court has construed the term "damages" to mean "compensation or remedial recovery as distinguished from imposition of penal exactions." *Federal Savings and Loan Insurance Corporation v. Fielding*, 316 F. Supp. 82, 85 (D. Nev. 1970). This interpretation would support complaint counsel's view, since restitution is unquestionably a remedial recovery of funds and not a punitive one. Nonetheless, the reading of *Fielding* proposed by respondents, and other authority, suggest that the survival statute may more appropriately be construed to apply only to "actions for damages," that is, actions in which the United States is in the role of an aggrieved and injured party. [Cf. *United States v. Price*, 290 F.2d 525, 526 (6th Cir. 1961)] That is not the Commission's role here; it acts merely to remedy a continuing public injustice. We would thus be reluctant to find the requested substitution appropriate based solely on 28 U.S.C. 2404.

A firmer basis for the action requested by complaint counsel is to be found in the common law, whose principles govern where there is no provision for survivorship either in the statute upon which a federal cause of action is based, or elsewhere.

In general, at common law an action would abate upon the death of either party. An important exception was made, however, for actions in equity, which would not abate where the cause of action survived, and which might be revived merely by the substitution of the appropriate party. ("Abatement and Revival," 1 C.J.S. §160(b), p. 212; "Abatement, Revival, and Survival," 1 Am. Jur. 2d, §51, p. 87.)² Complaint counsel argue that the Commission's function in ordering restitution is most closely analogized to that of a court of equity, and that the equity rule should thus govern in resolving the issue of substitution. We agree.

It is clear that the cause of action with respect to money unlawfully obtained by respondent Patrick does not abate upon his death. To be sure, the Commission's interest in restraining Patrick from engaging in continued fraud and deception ended when his plane struck the moun-

² On the law side, when an action abated but the cause of action did not die, suit could be reinstituted against the appropriate party. One purpose of survival statutes was to eliminate the need for this burdensome and, as it were, inequitable procedure. Obviously, reinstitution of these proceedings is an alternative which the Commission might consider, though we do not think it is required. Respondents argue that the Federal Trade Commission Act does not confer authority to proceed at all against executor Olivo. We believe, however, that if it is a violation of the Act for Patrick to retain unlawfully procured funds, it is no less so for Olivo, in his capacity as Patrick's executor, to retain such funds and disburse them in such manner as respondent Patrick would desire, either pursuant to a will or under presumptions embodied in state estate law. Therefore, we believe the Federal Trade Commission Act does confer authority to pursue the executor in his capacity as successor to the wrongdoer, and the issue is whether this may be done via substitution of the executor in the pending proceeding.

tain. The same is not so, however, as regards action involving money unlawfully obtained by him, unlawfully held by him at the time of his death, and subject to disposition according to his wishes (or legally presumed wishes) under a will or applicable intestate succession law. Under common law, causes of action in which the wrong complained of affected primarily *property* or *property rights* survived, and that is clearly so with respect to an action for restitution. [See *Barnes Coal Corporation v. Retail Coal Merchants Association*, 128 F.2d 645, 649 (4th Cir. 1942); *Moore v. Backus*, 78 F.2d 571 (7th Cir. 1935), *cert. denied*, 296 U.S. 640 (1935); *Geiger v. Merle*, 360 Ill. 497, 196 N.E. 497 (1935), *cert. denied*, 296 U.S. 630 (1935); *U.S. v. Kellert*, 101 F. Supp. 698, 699 (D. Conn. 1951); *Edgerton v. Johnson*, 178 F.2d 106, 110 (7th Cir. 1949).]

We agree further with complaint counsel that the restitutionary action is most properly analogized to equitable action, since it is, in essence, injunctive, intended to prevent a continuing wrong. [*Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946); 42 Am. Jur. 2d §1, p. 727, "Injunctions."] To be sure, the Commission is not itself a court of equity. The question, however, is whether the equitable analogy should govern in the resolution of this matter, absent specific statutory directive prescribing one approach (substitution) or another (a new suit).³

The Supreme Court has recognized that the "authority to mold administrative decrees is indeed like the authority of the court to frame injunctive decrees [*Pan American Airways v. United States*, 371 U.S. 296, 312, n. 17, citing *Labor Board v. Express Publishing Co.*, 312 U.S. 426, 433, 436 (1941)]. And the Court has recently likened the Commission itself to a court of equity in the scope of its authority to attack and remedy unfair trade practices:

Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself, if, in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a court in equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the anti-trust laws. *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1970). See also *In the Matter of Ekco Products Co.*, 65 F.T.C. 1163, 1213 (1964), *aff'd* 347 F.2d 745 (7th Cir. 1965).

On balance, we believe that complaint counsel are correct in urging that the equitable analogy apply, and that Executor Olivo be substituted for respondent Patrick for the purpose of any restitutionary order which may issue in this case.

³ The same process of analogizing is conducted by courts when they determine whether an individual is entitled to a jury trial under the 7th Amendment, which guarantees it in actions in which such right was accorded at "common law." When a case is brought under a statute with no common law counterpart, a determination must then be made as to whether the action is most clearly analogized to an equitable or a legal action, there being a right to a jury trial in the latter case. See *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen v. Wood*, 369 U.S. 469 (1962).

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It may be noted that the alternative would be institution of a new action for restitution against Olivo in his capacity as executor. It is hard for us to see how the public interest, the statutory purpose, or due process would be particularly served by such a result. Respondent Patrick died following lengthy administrative hearings and issuance of the administrative law judge's initial decision ordering restitution on his part. The executor stands in the stead of his decedent, and should of course expect to answer for the obligations of the estate. It is difficult, in fact, to imagine a situation in which a substituted party could less justifiably claim to be surprised or unfairly prejudiced by his substitution.

For the foregoing reasons, we shall grant the motion of complaint counsel that Sam Olivo, executor of the estate of respondent Patrick, be substituted as a party respondent in this matter for the purposes of any restitutionary order which may issue against the decedent's estate. Therefore,

It is ordered, That the complaint in this matter be, and it hereby is, amended to substitute Sam Olivo, Executor of the Estate of William Penn Patrick, for deceased respondent Patrick for the purpose of effecting restitution of such funds as are in the estate of decedent Patrick and are subject to any order of restitution entered in these proceedings.

It is further ordered, That Respondent Olivo shall file, within 30 days from receipt of this order, such appeal brief from the initial decision in this matter as he may wish, and that complaint counsel shall answer within 15 days thereafter. No oral argument shall be held upon these briefs.

Commissioner Nye did not participate.

IN THE MATTER OF

BEACON OIL COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 8948. Complaint, Jan. 2, 1974—Decision, Sept. 3, 1974

Consent order requiring a Hanford, Calif., seller and distributor of petroleum and related products, among other things to cease issuing credit cards without specific request or application.