
IN THE MATTER OF
EXXON CORPORATION, ET AL.

Docket 8934. Order Aug. 29, 1975

Administrative law judge's order denying respondents' motions and related requests relying upon assertions of *res judicata* and collateral estoppel placed on Commission's docket for review, and upon review affirmed.

¹⁰ Market data discussed in this paragraph are in the record and are tabulated in respondent's *in camera* proposed findings, Table V.

Appearances

For the Commission: *Roger J. McClure, Rhett R. Krulla, Anne R. Schenof, Ira S. Nordlicht, James H. Thessin, Patrick J. Quinlan, David I. Haberman and Roger B. Pool.*

For the respondents: *John H. Chiles, Houston, Tex. and Benjamin T. Richards, New York City, for Exxon Corporation. William Weitzel, Ass't General Counsel and Milton Handler, Kaye, Scholer, Fierman, Hays & Handler, New York City, for Texaco, Inc. Jesse P. Luton, Assoc. General Counsel, Houston, Tex. and Frank R. O'Hara, Pittsburgh, Pa., for Gulf Oil Corporation. Thomas R. Trowbridge III, Vincent A. Moccio, and Charles F. Rice, New York City, for Mobil Oil Corporation. David McKean, McKean, Whitehead & Wilson, Wash., D.C. and Turner H. McBaine, Pillsbury, Madison & Sutro, San Francisco, Calif., for Standard Oil of California. M. J. Keating, William R. Jentes, Kirkland & Ellis, Robert C. Smith, Chicago, Ill., for Standard Oil of Indiana. Harold F. McGuire, Wickes, Riddell, Boomer, Jacobi, & McGuire, New York City, for Shell Oil Co. Francis X. McCormack, Edward E. Clark and Donald A. Bright, Los Angeles, Calif., Robert E. Jordan III, Steven H. Brose and F. Michael Kail, Steptoe & Johnson, Wash., D.C., for Atlantic-Richfield Company.*

ORDER AFFIRMING DENIAL OF RESPONDENTS' MOTIONS
BASED ON ASSERTIONS OF RES JUDICATA AND COLLATERAL
ESTOPPEL

By leave of the administrative law judge, respondents have filed four applications for review of his "Order Denying Respondents' Motions and Related Requests Relying Upon Assertions of Res Judicata and Collateral Estoppel" dated Mar. 5, 1975. Essentially, respondents argue that certain issues raised in this proceeding have already been conclusively determined against the Government in previous actions brought against them by the Antitrust Division of the Department of Justice. Although he denied the motions, the law judge determined that they raised issues which met the criteria for interlocutory review set forth in Section 3.23(b) of the Commission's Rules of Practice. The Commission agrees and has determined to place the order of Mar. 5, 1975 on its docket for review.

The law judge's order was based primarily on his conclusion that judicial determinations in actions brought by the Department of Justice under the antitrust laws are not binding in subsequent actions brought by the Federal Trade Commission. His analysis of the relevant statutes convinced him that Congress did not intend that the public interest in vigorous enforcement of the antitrust laws be thwarted by strict

application of the doctrines of *res judicata* and collateral estoppel. Furthermore, he found respondents' contention that privity always exists between officers of the United States Government too simplistic, in that it ignores the plain fact that the Justice Department is not authorized to enforce the Federal Trade Commission Act, which is the basis for the instant proceeding.

For the reasons stated in the law judge's thorough analysis, we are inclined to agree with the above conclusions. However, there is no need to rest our decision in this matter solely on a novel question of statutory interpretation. Even assuming the conclusive effect of the Justice Department's antitrust actions on the Commission, the doctrines of *res judicata* and collateral estoppel are inapplicable since the specific cases upon which respondents rely do not involve the same issues and charges which are raised by the instant matter.

The consent settlements cited by respondents Standard Oil Company of California and Atlantic Richfield Company were, at most, determinations that the acquisitions in question, under the conditions set forth in the agreements with the Justice Department, did not significantly lessen competition within the meaning of Section 7 of the Clayton Act. This is entirely different from the questions raised in the instant matter as to whether these companies and six other respondents have pursued "a common course of action" which inhibited competition.

Similarly inapplicable to the instant matter is the provision contained in the agreement between the Justice Department and respondents Texaco, Inc., Exxon Corporation, and Gulf Oil Corporation,¹ settling the so-called *Cartel Cases*.² The provision purports to bar plaintiff, which respondents vigorously argue includes the entire United States Government, from reasserting "any claim or charge * * * made by plaintiff in the complaint or otherwise in this action." Assuming, *arguendo*, that the Justice Department has the authority to bargain away the statutory duty of the Commission to make a determination as to the public interest in challenging alleged illegal acts and practices, the two matters involve clearly different "claims and charges." The *Cartel Cases* charged the above companies and others with conspiracies to violate Sections 1 and 2 of the Sherman Act and Section 73 of the Wilson Tariff Act, whereas the instant matter, as noted above, charges a different group of companies with "pursuing a common course of action" in violation of Section 5 of the Federal Trade Commission Act.

¹ These respondents are joined in appealing the law judge's decision regarding the *Cartel Cases* by respondent Standard Oil Company (Indiana).

² *United States v. Standard Oil Co. (New Jersey)*, 60 Trade Cases ¶69,849 (S.D.N.Y. 1960), and *United States v. Gulf Oil Corp.*, 1960 Trade Cases ¶69,851 (S.D.N.Y. 1960), as superseded by *United States v. Standard Oil Co. (New Jersey)*, 1969 Trade Cases ¶¶72,742, 72,743 (S.D.N.Y. 1968); *United States v. The Texas Co.*, 1963 Trade Cases ¶70,819 (S.D.N.Y. 1963).

Finally, respondents plead the conclusive effect of two litigated matters. However, *United States v. Arkansas Fuel Company*, 1960 Trade Cases ¶69,619 (N.D. Okla. 1960), charging all respondents except Atlantic Richfield with criminal conspiracy, is clearly inapplicable to the instant civil action. Aside from the different nature of the charges themselves, the standard of proof must be at least as great in the subsequent action as in the former in order for *res judicata* or collateral estoppel to be applicable. *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938). This requirement is not satisfied by the judge's remarks to the effect that the Government had failed to meet its burden by a wide margin, since such remarks are merely *dicta* and do not affect the standard of proof involved.

In the other litigated matter cited by respondents, *United States v. Standard Oil Company (Indiana)*, 1964 Trade Cases ¶71,215 (N.D. Cal. 1964), the court dismissed a challenge to defendant's acquisition of Honolulu Oil Corporation. Respondent/defendant now argues that all of the court's findings of fact are binding upon the Commission, including those to the effect that the petroleum industry is highly competitive at all levels (Findings No. 109-150). However, it is well established that only the "ultimate facts" which are essential to the judgment are conclusive in subsequent actions. *Yates v. United States*, 354 U.S. 298, 337-38 (1957). It is difficult to determine to what extent, if any, the court based its decision on the broad conclusions asserted by respondent, but one fact which is clearly essential, and which could alone be the basis for the decision, is the conclusion in the memorandum accompanying the findings that the acquisition was "*de minimis* by any standard."

For the foregoing reasons,

It is ordered, That the administrative law judge's order of Mar. 5, 1975 be placed on the Commission's docket for review.

It is further ordered, That the aforesaid order be, and it hereby is, affirmed.

Commissioner Nye concurs in the result. He believes all respondents' motions are premature and should therefore be denied.

IN THE MATTER OF

LITTON INDUSTRIES, INC.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT

Docket 8778. Substitute Order, Mar. 4, 1975-Modified Order, Sept. 3, 1975

Order modifying a substitute order dated March 4, 1975, 85 F.T.C. 332, 40 F.R. 18989, by striking the compliance paragraph requiring the filing of reports every sixty (60) days and substituting a new compliance paragraph requiring the filing of compliance reports on an annual basis after finality of the order.

Appearances

For the Commission: *Harold G. Munter, Lois E. Berge, Laurence O. Masson and Joseph J. O'Malley.*

For the respondents: *Theodore F. Craver, Beverly Hills, Calif., Howrey, Simon, Baker & Murchison, Wash., D.C. and Hammond, Schrieber, New York City.*

ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondent, by letter dated July 25, 1975, which will be treated as a petition to reopen this proceeding, has requested that the requirement that it file compliance reports at 60-day intervals, contained in the order to cease and desist issued Mar. 4, 1975, be modified so as to require only annual reports. The Bureau of Competition has filed an answer wherein it advises that it does not oppose respondent's request.

The Commission has duly considered respondent's request and has determined that it should be granted.

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by striking the compliance paragraph and substituting therefor the following:

It is further ordered, That respondent shall, within 60 days after the date of service of this order, and on the anniversary of the date of finality of the order thereafter, until respondent shall have fully complied with the provisions of this order, submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, or has complied with this order.