

Order

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IN THE MATTER OF
CONTROL DATA CORPORATION, ET AL.

Docket 8940. Order, Nov. 11, 1975

Affirmation of administrative law judge's order denying motion by Control Data Corporation to strike Paragraph Eleven of the complaint.

Appearances

For the Commission: *Sharon S. Feather, Peter E. Greene and Edward D. Steinman.*

For the respondents: *Oppenheimer, Wolff, Foster, Shepard & Donnelly, St. Paul, Minn. and James F. Hogg, Bloomington, Minn.*

INTERLOCUTORY ORDER

These matters are before us upon two applications for review and a certification by an administrative law judge. In *Electronic Computer Programming Institute, Inc.*, the administrative law judge denied complaint counsel's application for a subpoena duces tecum seeking, in part, evidence needed to support restitutionary relief and granted complaint counsel the right to appeal pursuant to Section 3.23(b) of the rules of practice. Respondents had argued that the subpoena sought information which was irrelevant in view of *Heater v. F.T.C.*, 503 F.2d 321 (9th Cir. 1974), which held that the Commission lacks authority under Section 5 to order restitution for deceptive practices that occurred prior to the issuance of a final cease and desist order ("retroactive restitution."). The law judge, without deciding the relevancy of the subpoena's specifications, suggested that the Commission might consider whether further proceedings in this matter should be deferred pending final review of *Heater* in the Supreme Court.¹

In *Lafayette United Corporation*, the administrative law judge issued an order denying respondents' motion to strike the notice order provision providing that consumer redress might be sought, granted in part and denied in part respondents' motion to quash a subpoena duces tecum, and granted respondents' motion for a protective order. The law judge certified to the Commission the limited question whether further proceedings should be stayed, in whole or in part, pending the Commission's decision whether it would be in the public interest to allow complaint counsel to continue to seek restitutionary relief.

Finally, in *Control Data Corporation*, respondent Control Data filed a motion to strike Paragraph Eleven of the complaint which alleges in part that Control Data's retention of funds obtained for "virtually

¹ The Commission subsequently decided not to seek review in the Supreme Court.

worthless" courses of instruction was an unfair act or practice in violation of Section 5. Respondent contended that the paragraph was included in the complaint solely to lay the groundwork for an award of retroactive restitution, barred by the *Heater* decision. The law judge denied the motion but granted respondent permission to appeal under Section 3.23(b).

On July 15, 1975 [p. 180; herein], the Commission placed the above-captioned matters on its docket for review pursuant to Section 3.23(b) of the rules of practice and invited the parties to brief the following issues:

(1) To what extent, if any, should evidence be presented and findings be made in the administrative proceedings regarding the nature and extent of the injuries sustained by consumers as a result of the challenged acts or practices?

(2) To what extent, if any, should evidence be presented and findings be made on the issue whether the challenged acts or practices are such that "a reasonable man would have known under the circumstances [that they are] dishonest or fraudulent"? [Federal Trade Commission Act, 9(a)(2), as amended by Federal Trade Commission Improvement Act, Pub. Law 93-637, §206 (Jan. 4, 1975)].

Although the Commission adheres to its view that *Heater* was wrongly decided, we have determined that restitution under Section 5 will not be ordered in these cases. In the event, however, that cease and desist orders issue in these matters, and should the circumstances warrant, the Commission reserves the right to bring consumer redress actions under these cases is whether inquiry into issues relating solely to redress under Section 19 should be permitted before the administrative law judges.

Section 19(a)(2) authorizes the Commission, after it has issued a final cease and desist order, to seek consumer redress in a court of competent jurisdiction. "If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b)."²

Section 19(c)(1) provides that in a consumer redress action, "the findings of the Commission as to the material facts in the proceeding under Section 5(b)* * * shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of Section 5(g)(1) [providing that a cease and desist order becomes final if a timely appeal is not taken], in which case such finding shall be conclusive if supported by evidence."

Section 19 clearly contemplates that the Commission will make all

² Subsection (b) authorizes the court to grant such relief as may be necessary to redress injury, including, but not limited to "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting * * * the unfair or deceptive act or practice * * *."

findings pertinent to the Section 5(b) proceeding and the court will make those additional determinations relevant to the redress action. Thus, the court will decide whether redress is warranted under the "reasonable man" standard, applicable to actions brought under Section 19(a)(2), the nature of the relief necessary to redress any injury to consumers, and which consumers, if any, are entitled to relief.

However, as complaint counsel argue, the roles of the Commission and the court will frequently overlap. Subject to the exceptions set forth in Section 19(c)(1), "the findings of the Commission as to the material facts in the proceeding under Section 5(b) * * * shall be conclusive * * *." Frequently, findings material to the Section 5 proceeding will also have a bearing on whether the "reasonable man" standard has been satisfied and on consumer injury issues.

For instance, while an advertiser's knowledge of the falsity of a representation is not an element of a Section 5 violation, see, e.g., *D.D.D. Corp. v. F.T.C.*, 125 F.2d 679 (7th Cir. 1942), it may be relevant to issues relating to the scope of relief and the degree to which a respondent must be "fenced in" to prevent recurrences of the illegal conduct in the future. See, e.g., *F.T.C. v. National Lead Co.*, 352 U.S. 419, 429 (1957); *William H. Rorer, Inc. v. F.T.C.*, 374 F.2d 622, 626 (2d Cir. 1967); *Joseph A. Kaplan & Sons, Inc. v. F.T.C.*, 347 F.2d 785, 789 (D.C. Cir. 1965); *Taylor-Friedsam Co., Inc.*, 69 F.T.C. 483, 497 (1966).

Moreover, while a showing of actual injury to consumers is not necessary to a finding that Section 5(b) has been violated, see, e.g., *Northern Feather Works, Inc. v. F.T.C.*, 234 F.2d 335 (3d Cir. 1956), evidence relevant to injury may, under some circumstances, also be pertinent to whether the challenged representations were false and, hence, in violation of Section 5. The complaints in the instant cases allege that respondents falsely represented the availability of jobs for which their students were trained. A finding that graduates were not placed in such jobs would be relevant both to whether the representations were false and to whether consumers were injured.

Nevertheless, it is clear that findings pertinent to Section 19 issues, but not material to Section 5 issues, would not be conclusive in a consumer redress action. This does not mean that inquiry into Section 19 consumer redress issues³ should await the issuance of a cease and desist order. If consumers are to be afforded the relief to which they are entitled, redress actions must be commenced as soon as possible and the actions must be prosecuted expeditiously. Delay in such cases would often reduce the chances of granting fully effective relief to

³ Issues relevant to the Section 19 action but not to the determination of Section 5 liability will henceforth be referred to as "Section 19 issues." Evidence relevant to whether a Section 19 action should be brought and to the determination of Section 19 liability, but not to liability under Section 5, will be referred to as "Section 19 evidence."

consumers since, with the passage of time, evidence inevitably becomes more difficult to obtain, assets are dissipated or hidden, and some of the consumers to be granted redress become impossible to locate.

There can be little doubt that during the pre-complaint stage of an investigation, the Commission can collect Section 19 evidence since the prospect of obtaining consumer redress will often be a factor in deciding whether the issuance of a complaint would be in the public interest. Information collected during the pre-complaint investigation will, of course, also be available at the close of the administrative proceedings to assist the Commission in deciding, assuming law violations have been found, whether to commence a redress action. It is likely that information collected during the pre-complaint investigation and the record of the Section 5 proceeding will provide the Commission with most of the information it will need to decide whether to commence a redress action.

Therefore, we can see little reason why proceedings before the law judges should be delayed by the discovery and reception of evidence relevant only to Section 19 issues. We have, thus, determined that the law judges should not permit the discovery or introduction of evidence relevant only to Section 19. On the other hand, efforts to obtain or introduce evidence material to the Section 5(b) proceeding shall not be objectionable merely because the evidence might also be relevant to a Section 19 redress action.⁴

With these guidelines in mind, we shall consider the motions now before us:

1. Control Data Corporation, et al.

We agree with complaint counsel that Paragraph Eleven should not be stricken from the complaint. Since a seller's retention of its customer's money can be an unfair trade practice in and of itself, *e.g.*, *Curtis Publishing Co.*, 78 F.T.C. 1472, 1516 (1971), the paragraph states a cause of action, and, if proved, might warrant the ordering of other than restitutionary relief.

2. Electronic Computer Programming, Inc., et al.

Now that we have ruled how the redress issues in these cases should be treated, there is obviously no need to defer further proceedings. Since the law judge has not ruled on the propriety of complaint counsel's discovery requests, he should now consider their application in accordance with the guidelines set forth in this opinion.

3. Lafayette United Corporation, et al.

As in *Electronic Computer Programming Institute, Inc.*, there is

⁴ Because of our decision not to permit inquiry into Section 19 issues during the proceedings below, we find it unnecessary at this time to decide claims made in Docket Nos. 8940 and 8963 that discovery of Section 19 evidence would be inappropriate because Section 19 does not reach acts that occurred prior to Jan. 4, 1975, the date of enactment of the Improvement Act, or prior to the issuance of the complaints in these matters.

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now no need to stay further proceedings. Respondents' claim that restitution is inappropriate in this matter because their services were not "worthless" has largely been mooted, in view of our decision not to order retroactive restitution under Section 5 in this matter. To the extent that it might be relevant to other kinds of relief under Section 5, a determination of respondents' claim will have to await a fuller record. Accordingly,

It is ordered, That the administrative law judge's order in Docket No. 8940 denying the motion by respondent Control Data Corporation to strike Paragraph Eleven of the complaint is affirmed; the order of the administrative law judge in Docket No. 8952 denying complaint counsel's application for a subpoena duces tecum is remanded for reconsideration in accordance with the guidelines set forth at p. 5 of this interlocutory order; and the motion in Docket No. 8963 that further proceedings in this matter be stayed is denied.⁵
