

IN THE MATTERS OF

BRISTOL-MYERS COMPANY, ET AL. - D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL. -
D. 8918

STERLING DRUG INC., ET AL. - D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Oct. 7, 1977

Denial of complaint counsel's motion for reconsideration of August 23, 1977, order denying on procedural grounds their application for review of a discovery ruling.

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR
RECONSIDERATION

Complaint counsel seek reconsideration of our order of August 23, 1977, which denied on procedural grounds their application for review of a discovery ruling requiring production of two memoranda of interviews with potential witnesses. The Commission's ruling is characterized as excessively rigid and formalistic, and the underlying issue as a "controlling question" within the meaning of Section 3.23(b) of our Rules.

That our August 23 ruling represented a strict application of the terms of Section 3.23 is conceded. Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay. In the absence of close and decisive supervision by the administrative law judge, the discovery process in any but the simplest case can be productive of endless dispute, sincere or contrived, to the point that any eventual remedial order relates only to history. Further, any perception on the part of our administrative law judges that the Commission will exercise broadly its undisputed authority to review interlocutory rulings will tend toward the atrophy of their sense of responsibility for the impact of their rulings on the proceedings before them.

These considerations, as noted, apply to interlocutory review generally and to review of discovery rulings particularly. Concededly, however, the Commission has by its Rule Section 3.23(a) afforded a special status to appeals from rulings which, as here, require the disclosure of Commission records. This provision must nonetheless not be understood as a signal that such appeals are favored, but as a

recognition of the Commission's duties under its organic Act to maintain a special oversight capacity, exercisable when circumstances warrant, with regard to release of its records. See 15 U.S.C. 46(f), 50.

We find here no showing that the special concerns which Section 3.23(a) reflects are imperiled. Nor is any sufficient basis demonstrated for the invocation of Section 3.23(b) to supersede the informed discretion of the administrative law judge. If, as complaint counsel urge, the necessity for such rulings is likely to recur with some frequency as the trial progresses, we deem it all the more advisable that they be made by the officer charged with its day-to-day conduct, absent a clear showing of substantial prejudice to one of the parties.

It is therefore ordered, That the motion be, and hereby is, denied.

IN THE MATTER OF
HERBERT R. GIBSON, SR., ET AL.

Docket 9016. Interlocutory Order, Oct. 12, 1977

Denial of respondents' motion to dismiss for lack of public interest.

ORDER GRANTING RESPONDENTS' APPEAL OF ADMINISTRATIVE
LAW JUDGE'S REFUSAL TO CERTIFY MOTION TO DISMISS FOR
LACK OF PUBLIC INTEREST, AND DENYING AFORESAID MOTION

On June 10, 1977 respondents moved (1) for summary decision on Counts I and III of the complaint, (2) for removal of Count II from adjudication because they agreed to accept complaint counsel's suggested consent order as to that count, and (3) in the alternative, for certification to the Commission of their request for dismissal for lack of public interest. On the 19th and 20th of July 1977, the law judge denied all three motions.

On July 26, 1977 respondents filed an application for an interlocutory appeal from the order denying their motions for summary decision and for certification of the public interest question. On August 10, 1977, the law judge entered an order denying authorization to file an interlocutory appeal of the denial of their motion for summary decision and granting authorization to file an interlocutory appeal of the denial of their request for certification of the motion to dismiss.

The threshold question, then, is whether the motion to dismiss for asserted lack of public interest is properly before the Commission. We conclude it is because the law judge lacks authority to rule on it.¹ It is well established that an administrative law judge lacks authority to rule on and must certify motions to dismiss for lack of public interest and other motions containing questions pertaining to the Commission's exercise of administrative discretion. See *Exxon Corp.*, Dkt. 8934, CCH Trade Reg. Rep. ¶21,299 (April 19, 1977); *Amrep Corporation*, 87 F.T.C. 283 (1976); *Crush International Ltd.*, 80 F.T.C. 1023 (1972); *Philip Morris, Inc.*, 79 F.T.C. 1023 (1971); *First Buckingham Community, Inc.*, 73 F.T.C. 938 (1968); and *Suburban Propane Gas Corporation*, 71 F.T.C. 1695 (1967).²

The asserted facts as to the lack of public interest on which the motion rests are essentially the same as those that formed the basis for respondents' June 10, 1977 motion for summary decision. The

¹ Commission Rules, Section 3.22(a), provide that "[a]ny motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation."

² Respondents were not prejudiced by the law judge's July refusal to certify their June motion to dismiss. The matter is now before the Commission for *de novo* consideration and determination. *Suburban Propane*, *supra* at 1697.