

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

KROGER COMPANY

Docket 9102. Interlocutory Order, June 14, 1978

Order denying respondent's application for review of ALJ's orders of October 18 and November 15, 1977.

ORDER DENYING APPLICATION FOR INTERLOCUTORY REVIEW

Respondent the Kroger Company has applied for review, under Rule Section 3.23(b), of the administrative law judge's orders of October 18 and November 15, 1977, which resulted in the striking of Kroger's Second Affirmative Defense from its Answer and denial of leave to amend that defense. Authorization to apply for review was granted by the administrative law judge's order of January 9, 1978.¹

The defense at issue is the version of Kroger's Second Affirmative Defense set forth in its Motion for Leave to Amend Answer:

Second Affirmative Defense

The Complaint is an arbitrary and capricious exercise of the Commission's enforcement discretion and an abuse of that discretion. Respondent's Price Patrol advertising constituted responsible and good faith comparative price advertising. That advertising was based upon surveys of Respondent's and its competitors' prices. This followed the procedure directed by the Commission for supporting comparative price advertising. Other advertisers, including other retail food outlets, have made and are making more sweeping pricing claims with a less adequate or no basis therefor. The Commission is aware of the advertising of Respondent's competitors, having complained in public documents of the widespread use by retail food outlets of claims such as "lowest prices" and "discount prices." In these circumstances, the Commission's decision to proceed solely against Respondent, and not to proceed against other retail food outlets, will unlawfully preclude Respondent from forms of price advertising permitted to others and will place Respondent at a substantial disadvantage against its competitors. Furthermore, to proceed solely against Respondent violates the Commission's policy which requires that it take corrective action on an industry-wide basis where it perceives that several members of an industry are engaged in the same type of practice. Based upon the foregoing, the Complaint also deprives Respondent of equal protection of the laws in that the Commission is engaging in intentional and purposeful discrimination against Respondent in its enforcement of the Federal Trade Commission Act.

Commission review of interlocutory orders, including those applica-

¹ This is a vastly simplified history of the pleadings and rulings relating to the substantive issue of the striking of Kroger's Second Affirmative Defense, but it seems adequate to the task at hand. Had complaint counsel raised the question whether application for review was timely filed under Rule Section 3.23 (b), it would have been necessary to determine with more precision from which of the administrative law judge's several orders, including his ruling on the motion for reconsideration, appeal was sought. Under the circumstances, however, the Commission's decision to proceed solely against Respondent, and not to proceed against other retail food outlets, will unlawfully preclude Respondent from forms of price advertising permitted to others and will place Respondent at a substantial disadvantage against its competitors.

tions for review authorized by the administrative law judge pursuant to Section 3.23(b) of the Commission's rules, is discretionary.² In exercising our discretion to entertain applications for interlocutory review, we have been guided largely by the criteria set forth in the rule for the law judge's determination. Because we disagree with the law judge that these criteria are satisfied here, we deny the application.

First, we find little if any ground for difference of opinion on the proposition that a respondent is not entitled to avoid litigation or liability by a showing that it has been "singled out" from among a number of possible wrongdoers. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Indus., Inc. v. FTC*, 355 U.S. 411 (1958). Respondent contends that it has not violated Section 5 as alleged, but that, if it has, the Commission should not have sued only it at this time and should instead have proceeded on an "industry-wide basis," presumably either by suing respondent and all its competitors simultaneously, or by engaging in rulemaking. The decision whether to proceed against allegedly illegal practices by individual enforcement proceedings or by action of more general application is one within the broad discretion of the Commission. *Moog Indus., supra*, 355 U.S. at 413. See also, *e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); *Central Ark. Auction Sale, Inc. v. Bergland*, 570 F.2d 724, 727 (8th Cir. 1978).³

No court has held that the Commission has abused its discretion under the *Moog* standard, and we do not think it is likely that such a showing will be made with any frequency. It is not necessary here to try to define the specific circumstances in which we believe that a respondent might be entitled to relief under a theory of selective enforcement, as it is sufficient to observe that those set forth in respondent's second affirmative defense plainly are not.

Nor does the striking of the defense as respondent suggests, deny it

² Section 3.23(b) provides that:

application for review of a ruling by the Administrative Law Judge may be allowed only upon request made to the Administrative Law Judge and a determination by the Administrative Law Judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for differences of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. The Commission may thereupon, in its discretion, permit an appeal.

³ The law judge's ruling is not in conflict with anything we said in denying a motion for reconsideration in *Ger-Ro-Mar, Inc.*, 84 F.T.C. 543 (1974), *aff'd as modified on other grounds*, 518 F.2d 33 (2d Cir. 1975), where we observed in passing that "a claim that the Commission has abused its discretion is at best an affirmative defense . . ." *Id.* at 546 (emphasis added). No question was there presented as to the proper procedure for raising such an issue, and the Commission held only that on the evidence proffered the respondent had failed to carry its burden of showing that the use of similar practices by its competitors meant that an order should not issue against it. In *J.J. Newberry Co.*, 80 F.T.C. 1016 (1972), the Commission reversed the law judge's grant of a respondent's request for discovery in aid of a selective enforcement defense, but specifically noted that the propriety or sufficiency of such defense was not presented or decided on the appeal. *Id.* at 1019 n.5.

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any opportunity to proffer evidence on the subject of remedy at an appropriate time,⁴ or to make arguments in this vein based on such evidence on the subject as the record may contain. Cf., e.g., *Universal-Rundle Corp.*, 66 F.T.C. 1538 (1964) (evidence of competitive impact of order proffered and considered on motion to stay, withdraw and stay reentry of order); *C.E. Niehoff & Co.*, 51 F.T.C. 1114 1153 (1955) (assertion that order recommended by examiner would destroy respondent's business if competitors were not similarly restrained considered on appeal to Commission). Rather, deferral of the issues suggested by the second defense will tend to assure that, if necessary to address at all, they can be considered in a more relevant, focussed, and concrete context.⁵

The other criteria of Rule 3.23(b) likewise appear not to be satisfied. It is difficult to see how review of the law judge's decision at this stage of the proceeding will materially advance the ultimate termination of the litigation. Since the allegations of respondent's second affirmative defense, even if proved, are clearly not grounds for dismissal of the complaint, and since they may, in any event, be considered by the law judge or the Commission in determining the appropriate relief when and if a violation is found, holding the proceedings in abeyance to consider a question of pleading could accomplish only delay.

For similar reasons we are unable to conclude that respondent's appeal raises a "controlling question of law or policy" or that "subsequent review will be an inadequate remedy." Confined as they properly are to the question of remedy, the questions respondent raises in its second affirmative defense can hardly be said to be "controlling." Moreover, the adequacy and appropriateness of an order in light of the violations found is a proper question for appellate review under the applicable standard, even if the issue was not raised as an "affirmative defense." Thus, not only will subsequent review provide an adequate remedy, but it is the only appropriate context in which to consider respondent's contentions. Only after a full administrative hearing, and the actual delineation of an order, can any order be adequately assessed in the light of not only the record developed before the law

⁴ In striking the defense, the law judge seems to have assumed that only such evidence and arguments as tended to show that respondent's business would be "destroyed" by the proposed relief would be appropriate for the Commission's consideration. While that standard reflects the very limited scope of a court's authority to set aside a Commission order as an abuse of discretion, other matters might well be considered, both by the law judge and the Commission, in the exercise of that discretion.

⁵ Should the Commission find a violation and issue an order, the relevant inquiry under the general heading of selective enforcement would presumably focus on the scope and competitive impact of such an order. That inquiry might in turn require consideration of such questions as whether, where and to what extent the respondent or its significant competitors were then engaging in the practices found unlawful or proscribed by the order; whether the Commission had taken or was proposing to take action concerning such activities of the competitors; and whether by virtue of Section 5(m) of the FTC Act, 15 U.S.C. 5(m), the competitors would be facing sanctions comparable to those facing respondent for engaging in the activities in issue.

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judge, but also the probable impact of the order gauged in the context of competitive conditions, not as they exist at the time of the complaint, but as they exist or are likely to exist at the time of the order or thereafter.

Accordingly, *it is ordered*, That respondent's application for review of the administrative law judge's orders of October 18 and November 15, 1977, is denied, for the reasons stated herein.

Commissioner Clanton voted in the negative, stating that he would have reached the same result but would have granted the application for review.

Modifying Order

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IN THE MATTER OF

G C SERVICES CORP., ET AL.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2511. Decision, April 16, 1974 — Modifying Order, June 21, 1978.*

This order reopens the proceeding and modifies the cease and desist order issued April 16, 1974, 39 FR 17100, 83 F.T.C. 1521, by substituting for Paragraph 6 of the original order, one that extends the time period postdated checks may be held from 15 days to 60 days, if specified requirements are satisfied before checks are deposited.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO
CEASE AND DESIST

By petition filed December 20, 1977, pursuant to Rule 3.72(b)(2), petitioner G C Services Corporation has requested the Commission to modify its order of April 16, 1974, to permit respondents to hold postdated checks for an unlimited period of time as long as certain requirements are met. The Director, Bureau of Consumer Protection, has filed an answer wherein he advises that he opposes the relief originally sought by petitioner but does not oppose alternate relief which would permit respondents to hold postdated checks for a maximum of sixty days as long as certain additional requirements are satisfied. The Director, Bureau of Consumer Protection, further advises in his answer that this alternative relief has been discussed with respondents and they do not object.

In support of their proposed modification respondents rely on the recent passage of Pub. Law 95-109, the "Fair Debt Collection Practices Act," 15 U.S.C. 1601, *et seq.* Section 808 of the Act (15 U.S.C. 1692f) prohibits a debt collector from using any "unfair or unconscionable" means to collect or attempt to collect any debt. Without limiting the general application of this, the Act continues to specify certain specific violations of the section. With regard to the use of postdated checks, the Act prohibits debt collectors from (1) accepting a check postdated by more than five days unless the alleged debtor is notified in writing of the debt collector's intent to deposit such check three to ten business days prior to deposit; (2) soliciting any postdated check for the purposes of threatening or instituting criminal prosecution; and (3) depositing or threatening to deposit any postdated instrument prior to the date on the instrument.

Respondents request that the Commission modify the order to