

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

BANKERS LIFE AND CASUALTY COMPANY, ET AL.

Docket 9075. Interlocutory Order, Jan. 3, 1979

ORDER AFFIRMING ORDER OF ADMINISTRATIVE LAW JUDGE AMENDING COMPLAINT TO SUBSTITUTE EXECUTRIX

Administrative Law Judge Lewis F. Parker (the "ALJ") has certified for review by the Commission an order he entered on October 11, 1978, substituting as a party in this proceeding the executrix of the estate of a deceased respondent. The executrix has appealed from the ALJ's order, contending that the action against her decedent abated as a matter of law with his death and that, in any event, substitution is improper where the only relief presently sought by complaint counsel is injunctive in nature and where no determination of liability had been made by the ALJ prior to respondent's death. For the reasons set forth below, we affirm the ALJ.

Albert R. Linnick, who was named in the complaint individually and as an officer of three corporations, died in January 1978. Complaint counsel thereafter moved to amend the complaint by substituting Alice Holguin, executrix of Mr. Linnick's estate, for Mr. Linnick. Notwithstanding that the complaint itself seeks only a cease-and-desist order against Mr. Linnick, complaint counsel desire the amendment because, if they prevail herein, the complaint (Par. 25) indicates their intention to ask the Commission to file suit against respondents in U.S. District Court to obtain restitution on behalf of consumers under Section 19 of the F.T.C. Act. Accordingly, complaint counsel assert that the executrix of Mr. Linnick's estate, who is now custodian of his assets, must be substituted as a party in order to facilitate making accurate findings with respect to Mr. Linnick's conduct and in order to preserve access to his assets. To lay the foundation for such a Section 19 action, complaint counsel, on behalf of the Commission, have also filed a contingent claim against Mr. Linnick's estate in probate court.¹

We believe, as did the ALJ, that proper disposition of this case is largely controlled by the Commission's decision in *Holiday Magic*.

¹ The executrix's arguments regarding the propriety of that claim are not properly addressed to the Commission. Hence, we do not reach them here.

Inc., 84 F.T.C. 347 (1974). In that case, following the death of a respondent, the Commission ordered substitution of his executor into the litigation, specifically holding that the Section 5 cause of action had not abated because there remained a prospect of recovery of funds from his estate for the purpose of providing redress to injured consumers. The Commission assessed the Federal Survival Statute, 28 U.S.C. 2404, and the Federal common law in *Holiday Magic*, and concluded that an equitable action seeking, in part, redress to consumers did not abate. We see no reason to disturb that holding here, and we specifically find that in the instant case, amendment of the complaint will effectuate one of the Commission's initial purposes in issuing that complaint, *viz.* to reach assets with which redress may be made to consumers, assuming liability is first established. Hence, we hold that the pending action did not abate with Mr. Linnick's death.

The executrix protests, however, that two features distinguish *Holiday Magic* from this case. First, she notes that the Section 5 complaint in *Holiday Magic*, unlike the complaint in the instant case, expressly included redress to consumers as a part of the relief sought therein. Second, she notes that the ALJ in *Holiday Magic* had already entered his initial decision finding violations on the part of respondents, whereas in the instant case the trial has not yet begun. We find these distinctions to be without significance.

With respect to the first asserted distinction, the difference between the complaints is wholly a product of an amendment to the Commission's statutory scheme and does not imply a distinction with respect to complaint counsel's ultimate objectives in the two cases. The decision in *Heater v. F.T.C.*, 503 F.2d 321 (9th Cir. 1974), and the 1975 amendment of the F.T.C. Act in response thereto, led to a change in Commission procedure with respect to seeking restitution for injured consumers. *Heater* held, contrary to the Commission's argument, that Section 5 of the F.T.C. Act did not include authority for complaint counsel to seek or for the Commission to order restitution to consumers. Rather, the court said, that section limited the Commission primarily to issuance of injunctive, cease-and-desist orders.² Thereafter, the F.T.C. Act was amended by the Congress in 1975 to add Section 19, which authorizes the Commission, *inter alia*, to file suit in U.S. District Court to seek restitution, once there is outstanding against a respondent a final Commission cease-and-desist order. In light of both the amended statutory scheme and the doubts raised by *Heater*, customary Commission practice was modi-

² Certain exceptions to this principle were set out by the court at 323, n.7.

fied so that redress is now ordinarily sought only in Section 19 proceedings. Current Commission practice is thus necessarily at variance with that which was extant at the time of *Holiday Magic*, the complaint in which antedated *Heater, supra*.

We therefore reject the executrix's argument. By giving notice in the complaint that restitution may be sought under Section 19, the Commission has adequately indicated that redress is an objective. It is of no moment that the Section 5 complaint itself seeks no more than a cease-and-desist order. To be sure, the Commission's interest in restraining Mr. Linnick from engaging in continued unfair or deceptive practices ended with his death, but the same cannot be said with respect to the Commission's continued interest in assets which may have been unlawfully acquired by him as a consequence of violations of the Federal Trade Commission Act. As the ALJ noted, respondent's death does not preclude findings with respect to his activities, which findings may be the predicate for a subsequent Section 19 action, notwithstanding the absence of a cease-and-desist order specifically directed against the decedent. Accordingly, the post-1975 form of actions such as this cannot be a ground for excusing Mr. Linnick's successor in interest, his estate.

With respect to the second distinction advanced by the executrix, we find the timing of issuance of the initial decision to be without importance. Concededly, the ALJ in *Holiday Magic* had already issued an initial decision finding the decedent to have violated the law, but the absence of that factor in this case cannot be controlling. Substitution of estates as parties cannot be limited solely to those estates whose decedents have already been adjudged to have violated the law, but must encompass as well the estates of those decedents who may have violated the law, and if so, whose assets may be available to provide redress to injured consumers. Thus, the amendment to the complaint merely serves to ensure that the potential Section 19 action will not be frustrated by the death of Mr. Linnick.

The executrix raises other jurisdictional, due process and collateral objections, but we find these to be without merit and to have been adequately answered by the administrative law judge. Accordingly,

It is ordered, That Order of October 11, 1978 by Administrative Law Judge Lewis F. Parker amending the complaint by substituting Alice Holguin, executrix of the estate of Albert R. Linnick, for decedent respondent Albert R. Linnick be, and it hereby is, affirmed.

Complaint

93 F.T.C.

IN THE MATTER OF

THE ADVERTISING CHECKING BUREAU, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2947. Complaint, January 4, 1979 — Decision, January 4, 1979*

This consent order, among other things, requires a New York City administrator and auditor of cooperative advertising programs to cease designing or implementing cooperative advertising programs for their clients which limit or restrict the rights of dealers to obtain cooperative advertising allowances for merchandise they have advertised or sold at other than regular or suggested retail prices.

Appearances

For the Commission: *Jeffrey Klurfeld.*

For the respondent: *Michael W. Palmer, Baker & McKenzie, San Francisco, Calif. and Abner J. Golieb, Golieb & Golieb, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Advertising Checking Bureau, Inc. has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent The Advertising Checking Bureau, Inc. ("ACB") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at 353 Park Ave. South, New York, New York. ACB is the parent corporation of four corporate subsidiaries which respectively maintain offices in Chicago, Illinois; San Francisco, California; Memphis, Tennessee; and Columbus, Ohio.

For purposes of this complaint, the following definitions shall apply:

"Client" is defined as any person, partnership, corporation or firm which has retained The Advertising Checking Bureau, Inc. to conduct, administer or audit, or to assist in the design or implementation of, any cooperative advertising program or portion thereof.