

IN THE MATTER OF
INDIANA FEDERATION OF DENTISTS

Docket 9118. Interlocutory Order, Feb. 5, 1979

ORDER DENYING PETITION OF STATE OF INDIANA TO
INTERVENE

The State of Indiana, by its Attorney General, has appealed from a decision of Administrative Law Judge Paul R. Teetor (the "ALJ") denying its application to intervene in this proceeding. Because we do not believe that there has been a sufficient showing of the necessity for intervention, we cannot grant the petition.¹ The State of Indiana, however, is granted leave to appear in the proceeding as *amicus curiae* and to submit such briefs as it deems necessary to adequately represent the interests of the State on its own behalf and as *parens patriae* for its citizens.

The complaint in this matter was issued in October, 1978, and charges the respondent Indiana Federation of Dentists with, *inter alia*, illegally conspiring to frustrate cost control programs administered by a number of insurance companies. In essence, the respondent and its members, a small group of Indiana dentists, are alleged to have agreed among themselves to refuse to submit X-rays and other diagnostic tests to insurers, who seek such information in order to assure that a dentist's proposed treatment is the least expensive treatment adequate to remedy a patient's dental ills.

Respondent has raised as an affirmative defense the assertion that its members are proscribed by Indiana law from submitting diagnostic materials, such as X-rays, to third party insurance payers, because such companies may employ non-dentists to review the X-rays. Respondent notes that Indiana law forbids the practice of dentistry by non-dentists, and contends that review of X-rays constitutes the practice of dentistry. Under this so-called "state action" defense, respondent in effect asserts that it is acting as a private attorney general to enforce Indiana law.

The State of Indiana apparently agrees with respondent about what constitutes the "practice of dentistry,"² and seeks permission

¹ Unlike the ALJ, we do not believe that the proposed intervenor's status as a state bars its application here. Section 5(b) of the Federal Trade Commission Act provides: "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person." The term "person" as used in the antitrust laws may encompass a state, *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). A consistent interpretation should be given to the implementing provision of the Commission's Rules of Practice, Section 3.14, albeit slightly different phraseology is used there. Indeed, the Commission has previously permitted intervention by sovereign states, see e.g., *Florida Citrus Mutual*, Dkt. 6074 (February 12, 1953).

² See Unofficial Advisory Letter, dated March 14, 1974, from Curtis Plopper, Deputy Attorney General of the

(Continued)

to intervene both to press this point and, as *parens patriae*, to protect its citizens from the unauthorized practice of dentistry in Indiana. While we appreciate the State's concerns, we are not convinced that Indiana must be made a party to this proceeding in order for that State to present effectively its views on the proper interpretation of Indiana law. No witnesses need be examined, nor any documentary evidence introduced, to establish Indiana's point of statutory construction, and as the State itself recognizes in its Memorandum in Support of Application for Review (p. 4), "*amicus curiae* . . . is the traditional role accorded to those concerned with the precedential impact of adjudicative decisions." Where, as here, Indiana's arguments are wholly legal in nature and will relate more to such concerns as legislative history than to respondent's challenged practices, *amicus curiae* status should satisfactorily protect the State's interest.

Even assuming *arguendo* that some evidentiary inquiry or undertaking is necessary to properly present the "state action" defense, the State of Indiana has advanced no reason why that defense cannot adequately be presented by counsel for respondent. Were the State intending to raise different or even supplemental concerns, our response might be otherwise, but the Deputy Attorney General candidly concedes that "[t]he State does not contemplate raising issues distinct from those raised in the Complaint and the Answer." Memorandum in Support of Application for Review, p. 8. As we said in *Firestone Tire and Rubber Co.*, 77 F.T.C. 1666, 1668 (1970), persons seeking intervention must raise substantial issues "which would not otherwise be properly raised or argued." Given the apparent identity of interest between respondent and the State, and given that the State has not even contended that respondent will not adequately present the "state action" defense, we cannot say that the *Firestone* test has been met.

We are sympathetic to the concerns raised by the State and appreciate its interest in assisting the Commission in reaching a just result in this adjudicative proceeding. We hope that the State will avail itself of the opportunity to file *amicus* briefs as the need arises, so that both the ALJ and the Commission can have the benefit of its views on the proper application of Indiana law to the facts at bar.

It is ordered, That the application for intervention filed by the State of Indiana be, and it hereby is, denied.

State of Indiana, to Dr. Raymond Rothaar, President, Indiana Board of Dental Examiners, in which the author apparently concludes that review of dental X-rays constitutes the "practice of dentistry" under Indiana law. The letter concludes by stating that "[t]he views expressed herein are those of the writer and are not to be considered to be the opinion of the Attorney General of Indiana, nor a precedent of the Attorney General's office."

IN THE MATTER OF
RHINECHEM CORPORATION, ET AL.

Docket 9116. Interlocutory Order, Feb. 12, 1979

ORDER DENYING RESPONDENTS' MOTION FOR DISMISSAL OF
COMPLAINT

Administrative Law Judge Ernest G. Barnes has certified to the Commission, without recommendation, a motion by two respondents, Allegheny Ludlum Industries, Inc. ("ALI"), and Chemetron Corporation, to dismiss the complaint. We deny the motion, believing that the public interest would be better served by allowing this case to proceed.

Respondents' ground for dismissal is that the proposed acquisition by Rhinechem Corporation of the Pigments Division of Chemetron, a subsidiary of ALI, has been terminated. This acquisition, however, was not abandoned until after a United States District Court, upon motion of the Commission, issued an injunction against respondents barring the acquisition during the pendency of a Commission administrative proceeding and any subsequent judicial review. In granting the injunction, the court found that the Commission, which had contended that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, had demonstrated a sufficient likelihood of ultimate success on the merits.

It is conceded, and the Commission has so held, *see, e.g., British Oxygen Co., Ltd.*, 86 F.T.C. 1241, 1334-35 (1975), *rev'd on other grounds*, 557 F.2d 24 (2d Cir.1977), that the prohibitions of Section 7 of the Clayton Act are directed against the acquiring company, rather than the company to be acquired. Nevertheless, it is also clear that the moving respondents may be properly charged with a violation of Section 5 of the Federal Trade Commission Act for entering into a merger agreement which, complaint counsel contend, violates Section 7 of the Clayton Act. *Dean Foods Co.*, 70 F.T.C. 1146, 1288-92 (1966); *British Oxygen Co., Ltd.*, *supra* at 1334. *Cf. Grand Union v. FTC*, 300 F.2d 92 (2d Cir. 1962). Thus, even though the Commission has withdrawn this matter from adjudication with respect to Rhinechem Corporation in order to consider a proffered consent agreement, the complaint nonetheless states a cause of action under Section 5 of the Federal Trade Commission Act against the moving respondents. In Section 5 cases, it is well established that the discontinuance or abandonment of a practice, especially where not entirely voluntary, does not preclude the issuance of an