

IN THE MATTER OF
TRANS WORLD ACCOUNTS, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9059. Final Order, Oct. 25, 1977 — Modifying Order, Oct. 25, 1979

This order further modifies the Commission's July 25, 1979 "Modified Order to Cease and Desist," 44 FR 49650, 94 F.T.C. 141, by inserting paragraph 3 which had been omitted pending its reformulation in accordance with the March 29, 1979 mandate of the Court of Appeals for the 9th Circuit.

ORDER ON REMAND

This matter is before the Commission upon remand from the Ninth Circuit Court of Appeals, which affirmed the Commission's findings of violation and enforced the order entered by the Commission save for paragraph 3 thereof. As to that paragraph, the Court remanded to the Commission for reformulation.

The Commission found, *inter alia*, that Trans World Accounts has misrepresented the imminency of legal action in its form collection letters, implying therein that legal action would be taken within very short periods of time following refusal by the alleged debtor to pay a debt, when, in fact, the only response to nonpayment by Trans World would be to send another letter in its form series.

Paragraph 3 of the Commission's order prohibited both misrepresentations of the imminency of legal action, *and* of its likelihood. This was intended to eliminate misrepresentations of the imminency of legal action, and to "fence-in" related misrepresentations of the *likelihood* of legal action. In remanding this order provision, the Court of Appeals applied the terms "vagueness and overbreadth" to that portion of the order fencing-in misrepresentations of the likelihood of legal action. Respondents argue that the Court held that a showing of misrepresentations of the imminency of legal action was insufficient to justify any fencing-in order as to the likelihood of legal action. Complaint counsel argue that the Court made clear that the Commission was not powerless to fence-in misrepresentations of the likelihood of legal action, but merely objected to the manner in which the Commission had done so.

From the Court's opinion, we are not entirely sure what is the source of its objection to the breadth of the Commission's order. Both sides have offered plausible interpretations. For the reasons noted

below, we believe that it will be sufficient for the purposes of this proceeding if we adopt the order proposed by respondents.¹

The Fair Debt Collection Practices Act, 15 U.S.C. 1692, prohibits on pain of \$10,000 civil penalties per violation, any "false, deceptive, or misleading representation or means in connection with the collection of any debt", 15 U.S.C. 1692e. Among the deceptive practices specifically enumerated are "The threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. 1692e(5).

Respondents suggest that their messages are merely "educational" rather than "threatening." The two attributes are not mutually exclusive, however, and coalesce perfectly in the typical debt collection missive. In our experience, debt collectors are not in business to give free correspondence courses in Creditors' Remedies. When a letter is sent to a debtor for the purpose of collecting a debt, and the writer makes the observation that the debtor "will" or "may" be sued if he or she does not pay, that observation is very likely to be perceived by the debtor as a threat. Why else, after all, would the debt collector have spent money to include that information in its letter?

This commonsense proposition finds support in the decision of the Ninth Circuit, as complaint counsel observe. The Court recognized that statements to the effect that legal action "may" be taken if the debtor did not pay within five days were threats of imminent legal action, not merely abstract statements of creditors' legal rights.

In this case, of course, as the Court and respondents observe, there was no proof that respondents misrepresented the *likelihood* of legal action, and no order against such misrepresentations will enter. But respondents would err grievously to assume that they, therefore, are entitled in the future to misrepresent the likelihood of legal action, particularly given the provisions of the Fair Debt Collection Practices Act cited above.

A valid function is performed by advising debtors of the possibility of legal action if legal action *as to the debtor being informed* is, indeed, a realistic possibility. Where form letters are used to communicate the possibility of legal action, however, some care is necessary to avoid deception. If, for example, debtors allegedly owing small amounts are rarely or never sued in the event that they fail to pay, it is plainly deceitful to threaten such debtors with the reasonable possibility of legal action. The deceit as to those debtors

¹ We have, however, retained the term "legal action" rather than "lawsuit". There is no reason why respondents should be allowed to misrepresent the imminency of any form of "legal action" (e.g., referral to an attorney, levying on a judgment). This is clearly permissible fencing-in, and the Court of Appeals expressed no objection to this formulation in the order that was before it.

not likely to be sued is not obviated merely because the same form letters are sent to other debtors, owing much larger amounts, who are likely to be sued.

A debt collector must, therefore, take care that when threatening legal action, the threat be accompanied by an intention to take such legal action as to the debtor being threatened in the event that payment is not made or a defense not raised by the debtor. In the case of form-letter threats, particular care is needed to assure that such threats are not directed at recipients against whom the collector or creditor would be unprepared to take legal action in the event that payment or a defense were not forthcoming. If particular creditors do not take legal action against debtors owing small amounts, then it is simply dishonest to send form letters on behalf of those creditors to those debtors that in any way suggest that legal action may be taken.

With these observations we shall enter the order proposed by respondents, after substitution of the words "legal action" for "lawsuit".

Therefore, *it is ordered*, That the Commission's "Modified Order to Cease and Desist" dated July 25, 1979, be further modified by the insertion of paragraph 3 to read:

3. Misrepresenting directly or by implication, that legal action with respect to an alleged delinquent debt has been or will be initiated, or misrepresenting in any manner the imminency of legal action.

Complaint

94 F.T.C.

IN THE MATTER OF
ATLANTIC RICHFIELD COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket 9089. Complaint, Oct. 13, 1976 — Decision, Oct. 29, 1979

This consent order, among other things, requires a Los Angeles, Calif. integrated energy company, engaged in various other activities including those related to copper, to timely divest its interest in the Heddleston copper and molybdenum mineral property and Bear copper mineral property located in Lyon County, Nevada; its entire voting stock interest in the Inspiration Consolidated Copper Company; and its joint venture interest in the Anamax Mining Company, a Pima County, Arizona integrated copper company. Each of the divestitures would have to be to an "Eligible Person," and upon company's failure to divest these interests within specified time periods, divestiture authority must be transferred to a trustee who will be charged to attempt diligently to effect divestiture at fair value within three years from the date of his appointment. Should the trustee not have divested the property within such three-year period, he would be required to divest it within one year at the best price he is reasonably able to obtain. The order additionally provides for arbitration should any dispute regarding the terms of the order arise between respondent and the Commission or trustee.

Appearances

For the Commission: *Ernest A. Nagata, Risa D. Sandler, Paul Breitstein and Wallace A. Witkowski.*

For the respondents: *Frances X. McCormack and Donald A. Bright, Los Angeles, Calif. and Jerome Shapiro, Hughes, Hubbard & Reed, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the Atlantic Richfield Company, a corporation subject to the jurisdiction of the Commission, has acquired a part and has entered into an agreement to acquire the whole of the stock of The Anaconda Company, a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the