

IN THE MATTER OF
AMERICAN GENERAL INSURANCE COMPANY, ET AL.

DISMISSAL ORDER AND OPINION IN REGARD TO ALLEGED
VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8847. Complaint, June 17, 1971—Dismissal Order, April 21, 1981*

On remand from the Ninth Circuit Court of Appeals, 589 F.2d 462, the Commission has determined to dismiss the June 17, 1971 complaint which alleged that the effect of American General Insurance Co.'s 1969 acquisition of Fidelity & Deposit Co. of Maryland would be to decrease competition in the fidelity and surety bond markets. The Commission, in dismissing the complaint, held that it would not be in the public interest to impose an order, at this late date, on a respondent no longer doing business in the relevant market.

FINAL ORDER

This matter has been heard by the Commission on remand from the Court of Appeals upon the appeals of complaint counsel and respondent from the initial decision and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain respondent's appeal. Complaint counsel's appeal is denied. The motion to supplement the record filed by complaint counsel is granted. The motion to dismiss filed by respondent is granted. Accordingly,

It is ordered, That the complaint is dismissed.

OPINION OF THE COMMISSION

BY PITOFKY, *Commissioner*:

This case is before us on remand from the Ninth Circuit after an appeal of a cease and desist order issued by the Commission on June 28, 1977. For the reasons set forth in this opinion, the Commission has determined to dismiss the complaint.

The history of this proceeding is long and tortuous. The complaint was issued on June 17, 1971, challenging the July 1, 1969 acquisition by American General Insurance Company of Fidelity & Deposit Company of Maryland (F&D). Various interlocutory proceedings followed, including an unsuccessful district court action filed by respondent to enjoin the Commission from proceeding with the case. *American General Insurance Co. v. FTC*, 359 F. Supp. 887 (S.D. Tex.

* Complaint, Initial Decision, Opinion and Final Order previously published at 89 F.T.C. 557.

1973), *aff'd*, 496 F.2d 197 (5th Cir. 1974). The initial decision was issued in August of 1975, and respondent was ordered by the Administrative Law Judge to divest F&D.

Both sides appealed from the findings of the ALJ, and the Commission affirmed the initial decision in 1977. Because of the participation of Commissioner Collier in both the earlier interlocutory action (as General Counsel) and the Commission decision, the Ninth Circuit reversed and remanded the case to the Commission. *American General Insurance Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979). After the remand, the Commission reopened the proceeding and invited briefs from the parties on how to proceed. We now have before us, in addition to the original briefs filed with the Commission in connection with the appeal from the initial decision, a supplemental appeal brief from complaint counsel, an opposition thereto, a motion to dismiss from respondent and complaint counsel's opposition to that motion.

The Commission's 1977 decision found American General's acquisition of F&D to be an unlawful horizontal acquisition that substantially lessened competition in the fidelity and surety bond markets. *American General Insurance Co.*, 89 F.T.C. 545 (1977). After the close of the record in the Commission proceeding, respondent significantly altered the nature of its presence in the relevant products markets. In 1976, respondent terminated most of its own bonding business, other than that conducted by F&D.¹ Subsequently, in 1979, American General ended the rest of its business in the bond markets, except for the bonds written by F&D.² Finally, in December of 1980, American General sold F&D to two Swiss companies, and thereby withdrew entirely from the relevant product markets.³

Respondent has now moved to dismiss the complaint on the ground that the case has become moot because divestiture of F&D, as ordered by the Commission in 1977, has been accomplished. Alternatively, respondent contends that it would not be in the public interest for the Commission to enter an order against it. Complaint counsel oppose dismissal of the case, arguing that it is not moot because they believe that further relief, beyond the divestiture of F&D, is warranted.

We agree with complaint counsel that the case is not moot. Under the case law cited by both parties, a case is not moot if a controversy

¹ Affidavit of H.J. Bremermann, Jr., May 2, 1980 at 1. This affidavit was entered into the record by order of October 6, 1980.

² *Id.* at 2.

³ Affidavit of J.F. Flack, January 30, 1981. We hereby reopen the record and receive this affidavit into evidence.

remains to be resolved, even if the controversy involves only the question of appropriate relief.⁴ Here, there obviously remains such a controversy. Further, as reiterated by the Supreme Court in the case relied upon by respondent, the mere voluntary cessation of illegal conduct (*i.e.* divestiture of an unlawfully acquired company) “does not deprive the tribunal of power to hear and determine the case”⁵ Indeed, there may be a public interest in having the legality of the abandoned practices settled.⁶ We do not believe that a company should be permitted to escape the imposition of a Commission cease and desist order, once it has reaped the fruits of an illegal acquisition, by selling off the acquired company.

We are much more sympathetic to respondent’s argument that it is not in the public interest to enter an order against American General. Complaint counsel would have us impose further relief, arguing that such relief is necessary to restore the market to the competitive conditions prevailing before the acquisition of F&D. To this end, they argue that the Commission should impose a ten-year ban on acquisitions by respondent of any fidelity or surety underwriter without prior Commission approval (Supplemental Appeal Brief at 7). Such a ban was contained in the Commission’s previous order, and they argue it is necessary because it is likely that American General will make future anticompetitive acquisitions.⁷

Complaint counsel’s second request is more complicated. They have asked the Commission to require American General to divest to F&D the earnings and capital it took from it after the acquisition (Supplemental Appeal Brief at 8). According to complaint counsel, American General has taken approximately \$41 million from F&D in the form of a special dividend from capital and surplus (\$20 million), and quarterly dividends equal to F&D’s earnings (\$21 million). Complaint counsel assert that since a bond company needs liquid assets, it is necessary to return this money so that F&D can be an effective competitor. The same relief was requested by complaint counsel when this case was before the Commission in 1977, and it was denied.

We do not believe that it is in the public interest to enter an order against American General. We are not convinced that there is a reasonable likelihood that American General will reenter the

⁴ *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944).

⁵ *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

⁶ *Id.* at 632.

⁷ Complaint counsel have moved to supplement the record with an SEC filing submitted by American General, indicating its intention to purchase some shares of The St. Paul Companies, Inc., a competitor of American General in the relevant product markets. We hereby grant the motion to reopen the record, and receive the Schedule 13D into evidence.

relevant market, nor do we have reason to believe that if they do the reentry would be anticompetitive. With regard to the divestiture of the earnings, we do not believe that any relevant circumstances have changed since our first denial of the request for the earnings divestiture. Complaint counsel have not shown that F&D's competitive viability has been impaired because it lacks sufficient liquid assets.

Because we do not believe it is in the public interest to impose an order at this late date on a respondent no longer doing business in the relevant markets, respondent's motion to dismiss is granted.

Complaint

IN THE MATTER OF

ALBERTSON'S, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF
THE CLAYTON ACT*Docket C-3064. Complaint, April 21, 1981—Decision, April 21, 1981*

This consent order requires, among other things, a Boise, Idaho operator of retail grocery stores to refrain from acquiring any unapproved retail grocery store business in specified areas for a period of ten years.

Appearances

For the Commission: *Rafe H. Cloe.*

For the respondent: *Michael F. Reuling*, in-house general counsel, *James O'M Tingle*, *Pillsbury, Madison & Sutro*, San Francisco, Calif., and *David J. McKean*, *McKean, MacIntyre, Wilson & Richardson*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Albertson's, Inc., a corporation subject to the jurisdiction of the Commission, has acquired the California Division of Fisher Foods, Inc., which acquisition violates Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), 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 in that respect as follows.

DEFINITION

1. For purposes of this complaint, *Retail grocery stores* are retail food stores currently classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell a wide variety of canned or frozen foods, such as vegetables, fruits and soups; dry groceries, either packaged or in bulk, such as tea, coffee, cocoa, dried fruits, processed food and nonedible grocery items. In addition, these stores