

Interlocutory Order

98 F.T.C.

IN THE MATTER OF
KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Dec. 18, 1982

Staying the effective date of the Initial Decision until January 15, 1982.

ORDER

On November 20, 1981, the Director of the Bureau of Competition ("Director") filed a Withdrawal of Notice of Intention to Appeal. Complaint counsel had previously filed its Notice of Intention to Appeal the Administrative Law Judge's ("ALJ") initial decision in this matter and had subsequently reaffirmed its contention that the public interest would be served by Commission review of the merits as recently as October 1, 1981. Therefore, the Commission issued an Order on December 3, 1981, that required complaint counsel to provide a "Statement as to why the public interest is no longer served by full Commission review and consideration of the substantive merits of this matter."

On December 11, 1981, the Director of the Bureau of Competition filed a statement with the Commission. The Bureau Director's statement expressly acknowledged that it is "the decision of the Commission which should ultimately govern here. . . ." Director's Statement at 2. The Commission concurs with this view. Section 5 of the Federal Trade Commission Act clearly provides that a determination as to the public interest, for the purpose of invoking this Act, rests solely within the discretion of the Commission.

The Bureau Director has articulated his belief that the theory of Docket 8883 is inconsistent with the public interest because it "unavoidably extends Section 5 to condemn some forms of conduct that rationally flow from an industry's structure, and thus, to condemn the structure itself." Director's Statement, at 3. Moreover, the Director states that the relief sought by complaint counsel would be anticompetitive, potentially resulting in inefficient behavior to the ultimate detriment of the consumer. Director's Statement at 3-4.

After reviewing the record materials, the Commission has determined to permit a brief period for further comment from those complaint attorneys and economists who have conducted this litigation. Chairman Miller opposes the extension of time and would not place this matter on the Commission's docket. He believes that the views of all parties have been clearly articulated in their briefs before the ALJ and the Commission. (See separate statement.) Commissioner Clanton also is not inclined to place this matter on the

Commission's docket. However, in light of the Bureau Director's statement noting the differing views of the complaint attorneys litigating this matter, he would support the Commission's action. Respondents may also wish to provide their views on the Bureau Director's statement or on the issue of whether the Commission should place this matter on its own docket for review. Therefore, in order to afford a complete opportunity for all the parties to express their views,

It is ordered, That the parties file any statements, not to exceed thirty pages, if desired, no later than fifteen days following the date of issuance of this order.

It is further ordered, That the effective date of the Initial Decision of the ALJ in this matter is hereby stayed until January 15, 1982, pending a determination of the issues raised by the pleadings.

It is so ordered.

Chairman Miller dissented.

DISSENTING STATEMENT OF CHAIRMAN JAMES C. MILLER III

On November 3, 1981, I joined my fellow Commissioners in denying respondents' petition to affirm the Administrative Law Judge's (ALJ's) decision without briefs to the Commission. My reasons, as stated at that time, were as follows. First, the granting of such a petition would have been unprecedented and inconsistent with the Commission's own rules of procedure. Second, the Commission had before it, at the time, a notice of intention to file an appeal on the part of complaint counsel. To have granted respondents' petition would have required the Commission simultaneously to anticipate and resolve the merits of the then-pending appeal.

On November 23, 1981, the Director of the Bureau of Competition withdrew, without comment, the Bureau's notice of intent to appeal. In the interest of collegial inquiry, on December 3 I joined my fellow Commissioners in delaying for 15 additional days the effective date of the ALJ's decision in order to give the Commission an opportunity to hear the Bureau Director's reasons why an appeal would not be in the public interest.

On December 11, the Bureau Director submitted his rationale to the Commission, stating, in part, that in his judgment the theory on which the case is based is not sound as a matter of law or public policy and could not prevail in the courts.

The circumstances now facing the Commission are as follows:

- (1) The ALJ, after reviewing over 20,000 pages of evidence and argument, has concluded that, under the theory of the case arg

by complaint counsel, the evidence is not sufficient to support a finding of a law violation.

(2) The Director of the Bureau of Competition has concluded that, even if the evidence were found to be sufficient, the theory does not support a finding of a law violation.

(3) The case has occupied the Commission's attention for nearly a decade (the original complaint having been issued in April of 1972).

(4) The case already has cost the Commission and the taxpayers \$5.9 million, and has cost the respondent private parties and, indirectly, consumers of their products, millions more.

(5) Further delays in resolving the case are draining and will continue to drain resources from the Commission's other important work.

With respect to the question of the Commission's need to hear further arguments before deciding whether to take the case on appeal on its own motion, I would note that the Commission has had ample time to review the Bureau Director's rationale for withdrawing the Bureau's notice of intent to appeal, has had since September 1st to review the ALJ's decision, and has had over eighteen months to review complaint counsel's and respondents' briefs filed with the ALJ.

I think it time the Commission acted to bring a merciful end to this case, whose result, if successfully prosecuted, would more likely harm consumers than help them. I cannot in good conscience vote either to bring the matter before the Commission for formal review or to extend further the period for making that decision.

Enough is enough.

IN THE MATTER OF

WORTHINGTON FORD OF ALASKA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE MAGNUSON-MOSS WARRANTY AND FEDERAL TRADE
COMMISSION ACTS

Docket C-3079. Complaint, Dec. 30, 1981—Decision, Dec. 30, 1981

This consent order requires four motor vehicle dealerships, located in various parts of the country, and their corporate officer, among other things, to make the text of written warranties readily available to prospective buyers, prior to sale; maintain up-to-date binders containing copies of written warranties in an easily accessible location; and conspicuously post signs advising consumers that all warranties are not the same and that written warranties are available for comparison upon request. Respondents are barred from improperly disclaiming, modifying or limiting the duration of implied warranties; and required to notify previous purchasers of motor vehicles whose implied warranty rights were improperly waived that they may have additional warranty protection. Each dealership must appoint an individual to be responsible for customer contacts resulting from the notice. Additionally, respondents are required to maintain specified records for a period of three years; instruct employees as to the requirements of the Magnuson-Moss Warranty Act; and institute a program of continuing surveillance to ensure compliance with the terms of the order.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondent: *Sandra S. Froman, Loeb and Loeb, Los Angeles, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act"), the implementing Rule concerning the Availability of Written Warranty Terms ("Pre-Sale Rule") (16 C.F.R. 702 (1977)) duly promulgated on December 31, 1975 pursuant to Title I, Section 109 of the Warranty Act (15 U.S.C. 2309), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Worthington Ford of Alaska, Inc., Worthington Chrysler-Plymouth, Inc., Worthington Ford, Inc., Cal Worthington Dodge, Inc., corporations, and Calvin Worthington, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have