

IN THE MATTER OF
AMERICAN HOME PRODUCTS CORPORATION, ET AL.

Docket 8918. Interlocutory Order, Jan. 21, 1982

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent American Home Products Corporation ("AHP") has requested Commission reconsideration of its opinion and final order in this matter, pursuant to Rule 3.55 of the Commission's Rules of Practice. Rule 3.55 reads, in relevant part, that any request for reconsideration "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

Respondent argues that reconsideration should be granted because it was not given an opportunity to address the "substantial question" theory which it alleges was the basis for the substantiation and disclosure requirements in the final order. It notes that the Commission decided the so-called "substantial question" allegations of the complaint on deception grounds, and argues that it could not have anticipated such a result given that the Administrative Law Judge relied on a theory of unfairness in resolving these allegations against respondent. AHP also challenges the basis for the Commission's conclusion that consumers were deceived by AHP's failure to disclose the existence of a substantial question in the scientific-medical community. AHP argues that the conclusion rests on assumptions regarding consumer beliefs about the level of proof for its comparative superiority claims for Anacin that were not in issue below and are unsupported by the record of this proceeding. Finally, AHP argues that it is especially important for the Commission to consider anew its decision in this matter not only because of the allegedly "new" question of consumer beliefs, but because the composition of the Commission has changed since the opinion and final order were issued on September 9, 1981.

We believe that granting respondent's request for reconsideration would be inappropriate. The complaint made it clear that the alleged failure to disclose the existence of a substantial question about AHP's comparative superiority claims, if proven, was an unfair or deceptive practice in violation of Section 5 of the FTC Act. (Comp. ¶¶ 12-14, 25, 27). Thus, AHP was placed on notice from the very beginning that there was a "substantial question" issue which might be decided on the basis of a finding of deception. Further, as the record clearly demonstrates and as complaint counsel point out, Answer to Motion at 2-3, Respondent AHP has vigorously litigated

and argued the merits of the "substantial question" allegations of the complaint throughout this proceeding before the Commission. Respondent's assertion that it was denied notice and opportunity to address the "substantial question" theory as such is thus without merit. (See also C.Op. at 36-38).

In addition, AHP's charge that the differing legal theories of the Initial Decision and the Commission's Opinion on the "substantial question" issue constitute grounds for reconsideration—because it could not have anticipated that the Commission would depart from the approach taken by the ALJ—is also unfounded. The allegations of the complaint, and not the theory of the Initial Decision, set the bounds for decision by the Commission. In this case, as we have noted, the complaint alleged that AHP's failure to disclose the existence of a substantial question was deceptive or unfair. Contrary to what respondent's argument seems to imply, the mere fact that the ALJ's decision was based on an unfairness theory obviously could not have operated to erase the pleaded theory of deception from the case, or otherwise limit or foreclose the Commission's ability to decide the case on that ground. In any event, the distinction between the theories adopted by the Commission and the ALJ was not as dramatic as AHP implies. Both the ALJ and the Commission focused on the untrue implication in AHP's advertisements, absent disclosure of the existence of a substantial question, that it had a reasonable basis for the comparative claims made for its products. That the ALJ couched his conclusion in terms of unfairness rather than deception is, in the context of this case, a difference more of form than of substance.

We also reject respondent's contention that the question of consumer belief, which underlies its motion for reconsideration, was not an issue in the trial or could not have been anticipated by respondent to be an element of the Commission's decision. Again, we refer to the complaint. Paragraph 14 of the complaint alleged that in light of the comparative superiority claims allegedly made by AHP, "the existence of such a substantial question is a material fact, which, if known to consumers, would be likely to affect their consideration of whether or not to purchase such products." This count clearly implied an allegation that consumers may reasonably believe that unqualified comparative superiority claims signaled the absence of any substantial question about them in the scientific-medical community. From the outset, therefore, the nature of reasonable consumer beliefs about the level of support for these claims in the scientific-medical community was in issue.

Furthermore, the question of reasonable consumer beliefs re-

mained very much in issue throughout this litigation. Respondent had abundant opportunity both to challenge the legal argument that extrinsic evidence of consumer beliefs was not essential to a finding of deception under complaint counsel's "substantial question" theory, and to offer such evidence of its own to demonstrate that, contrary to the allegations of the complaint and the Commission's conclusion, consumers would not reasonably believe that AHP's comparative superiority claims were established beyond substantial question in the scientific-medical community.¹

Finally, we believe respondent's view that the "new" Commission should have an opportunity to consider this case is improperly raised in the context of a motion for reconsideration under Rule 3.55, which speaks solely in terms of new questions and not new Commissions.

For lack of a majority, *it is ordered*, that respondent AHP's motion for reconsideration and accompanying application for oral argument on its motion,² filed October 30, 1981, are hereby denied.

Chairman Miller and Commissioner Clanton favor reconsideration. See their attached separate statements.

SEPARATE STATEMENT OF CHAIRMAN JAMES C. MILLER III

I agree with the views expressed by Commissioner Clanton in his separate statement. Given the posture of this case, I too think it would be wise for the Commission to stay, or reconsider, its order pending resolution of *Bristol-Myers Company*, No. 8917 and *Sterling Drug, Inc.*, No. 8919, the other two analgesic cases that are before the Commission. Such action would give the Commission the opportunity to modify its order in *AHP*, if necessary, and thereby ensure consistency with respect to the similar issues raised in all three cases.

SEPARATE STATEMENT OF COMMISSIONER DAVID A. CLANTON

Respondent argues that the Commission majority's treatment of

¹ The Commission's ruling was based on the capacity of the unqualified advertising claims in question to deceive reasonable consumers, and therefore rested upon evidence tending to show how the advertising could reasonably have been interpreted by consumers, as well as upon the evidence of actual deception that is in the record. See C.Op at 29-32. While the evidence of actual deception, or countervailing evidence suggesting that consumers, in fact, had not been misled might have been relevant, it was not dispositive of the issue.

² In this application, respondent argues for the first time in connection with its motion for reconsideration that the Commission may want to reconsider its opinion and order in this matter in order to consider and possibly avoid potential conflict between its decision in this case and two other pending analgesics cases, *Bristol-Meyers Co.*, Docket No. 8917 and *Sterling Drug, Inc.*, Docket No. 8919. The Commission was fully aware of the possible interrelationship between those cases and this one when it decided to issue its opinion and order in this matter. AHP's concern that after all these cases are decided it could be the only one of the three companies operating under the kind of order issued in this case rests at present on sheer speculation. Should the situation that AHP fears be the end result of these proceedings, AHP may, of course, pursue whatever relief it believes is warranted through the reopening procedures of 16 C.F.R. 3.72.

the substantial question issue in its opinion of September 9, 1981, raises a new question warranting reconsideration under Rule 3.55. I dissented from the majority position on the substantial question issue, but I do not believe that respondent's motion satisfies the criteria for further briefing on the matter.

I do believe, however, that the Commission should preserve the option of reviewing the case at the time it resolves the appeals of the other analgesics proceedings (*Bristol-Myers Company*, No. 8917, and *Sterling Drug, Inc.*, No. 8919). The three analgesics cases, at least in part, raise similar issues. It is conceivable that the opinion and order in *American Home Products* will require some modification to ensure that the company and its competitors are treated equally.

Consequently, I think that, purely as an exercise of its discretion, the Commission should have either stayed the order against American Home Products or voted to reconsider the case pending resolution of the other analgesics appeals.

IN THE MATTER OF
AMERICAN HONDA MOTOR COMPANY, INC.

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

Docket C-3082. Complaint, Jan. 22, 1982—Decision, Jan. 22, 1982

This consent order requires, among other things, a Gardena, Calif. motor vehicle dealer to cease failing to mail to each owner of a Honda automobile which was purchased as new, or is currently registered in certain states, a "notice package" containing information regarding the company's redress program for premature fender rusting. The company must timely remove and replace, at no cost to the owner, the front fenders of any Honda automobile experiencing premature rusting within 36 months-in-service, and reimburse eligible owners of affected vehicles for monies spent in trying to correct the premature rusting problem. Respondent is also required to inform its dealers of the firm's obligations under the provisions of the order, and provide them with adequate supplies or reimbursements for replacing rusted fenders. Additionally, the order requires respondent to maintain documents demonstrating compliance with the order for a period of not less than three years.

Appearances

For the Commission: *Joel Winston and Jeffrey Karp.*

For the respondent: *Henry P. Sailer, Covington & Burling, Washington, D.C., and James J. Short, Lyon & Lyon, Los Angeles, Calif.*

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 American Honda Motor Co., Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions 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 in that respect as follows:

PARAGRAPH 1. Respondent American Honda Motor Co., Inc. is a California corporation, with its principal office and place of business at 100 West Alondra Boulevard, Gardena, California.

PAR. 2. Respondent is now, and has been, engaged in the advertising, offering for sale, sale and distribution of Honda automobiles to members of the public.

PAR. 3. In the course and conduct of its aforesaid business,