

IN THE MATTER OF
CHAMPION HOME BUILDERS CO.

Docket 9151. Interlocutory Order, March 9, 1982

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR REMAND, OR,
IN THE ALTERNATIVE, MOTION TO AMEND COMPLAINT

This matter is before the Commission on the certification by the Administrative Law Judge (the "ALJ") of complaint counsel's Motion to Amend Complaint, filed December 29, 1981. Complaint Counsel has filed a "Motion to Remand Complaint Counsel's Motion to Amend the Complaint or, in the Alternative, To Amend the Complaint" and respondent has filed a "Response to Complaint Counsel's Motion to Amend Complaint."

The original complaint in this matter charges that respondent violated section 5 by failing to disclose material facts about its Solar Furnace to prospective purchasers. Complaint counsel now move the Commission to amend the complaint to state that respondent failed to disclose safety hazards inherent in the Solar Furnace. Specifically, complaint counsel would add the following underscored language to Paragraph Eleven of the original complaint:

PAR. 11. A significant number of Solar Furnaces are subject to or potentially subject to one or more conditions which are costly to correct or may significantly affect the quality, durability, or performance of the Solar Furnaces. Such conditions include but are not limited to controller malfunctions, foam insulation expansion and air leakage, wood frame outgassing and safety hazards. Respondent knew or should have known and failed to disclose to purchasers of Solar Furnaces facts which relate to the existence, nature, and extent of these conditions. Respondent's failure to disclose these material facts which, if known to prospective purchasers, would have been likely to affect their purchasing decisions, was and is deceptive and unfair.

Under Rule 3.15(a), the ALJ is authorized to permit amendments of complaints when "determination of a controversy on the merits will be facilitated thereby," and under "conditions as are necessary to avoid prejudicing the public interest and the rights of the parties." However, the ALJ may enter such an order only if the amendment "is reasonably within the scope of the original complaint." *Capital Records Distributing Corp.*, 58 F.T.C. 1170 (1961). Thus, the ALJ has authority to order amendments which clarify the allegations of a complaint or which merely add examples of practices already challenged. *Century 21 Commodore Plaza Inc.*, 89 F.T.C. 237 (1977); *Cavanagh Communities*, 87 F.T.C. 143 (1976). Where a proposed amendment alters the "underlying theory" of the original complaint, however, the Commission must make the determination whether to

amend the complaint because only the Commission is authorized to determine whether there is reason to believe that the law has been violated and whether a proceeding on those amended charges would be in the public interest. *Standard Camera Corp.*, 63 F.T.C. 1238 (1963).

Complaint counsel argue that the proposed amendment does not change the underlying theory of the original complaint and that the ALJ is therefore authorized under Rule 3.15(a) to decide the motion to amend the complaint. In support of this argument, they note that the specific conditions enumerated in the complaint were expressly cited only as examples, not an exhaustive list, and that the existence of a safety hazard is just "another condition" like the ones enumerated.

The ALJ, however, disagreed. In certifying the motion to amend the complaint to the Commission, he noted that the complaint failed explicitly to mention safety hazards and that "an unsafe product may be treated differently under Section 5 than one that is just misrepresented." He concluded that the decision whether to amend the complaint was properly the Commission's.

Complaint counsel's argument is not persuasive. For a variety of reasons, an allegation of the existence of an undisclosed safety hazard is significantly different than an allegation of an undisclosed product "defect." One obvious difference is the type of harm likely to follow from each: a safety hazard poses a risk of physical as well as economic injury. In cases involving safety risks, the Commission may impose higher standards of conduct or consider different remedies than in a case involving pure economic harm. *Cf., e.g., Firestone Tire and Rubber Co.*, 81 F.T.C. 398 (1972), *affirmed*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973); *Pfizer, Inc.*, 81 F.T.C. 28 (1972). In addition, in considering whether an action under section 5 would be in the public interest, the Commission must also weigh the fact that other federal agencies have the primary duty to ensure the safety of certain products. For these reasons, we cannot agree with complaint counsel that a failure to disclose "safety hazards" was reasonably within the scope of a complaint alleging the failure to disclose product defects causing solely economic harm. Accordingly, the ALJ properly certified the Motion to Amend Complaint to the Commission. *Century 21 Commodore Plaza, Inc.*, 89 F.T.C. 237 (1977).

Complaint counsel urge the Commission to amend the complaint, contending that the amendment is in the public interest and would not prejudice the respondent. Respondent, on the other hand, argues that granting the amendment would unduly complicate an already complex trial, and prejudice its rights and the public interest.

Respondent further argues that there is no "reason to believe" that the Solar Furnace is a safety hazard or that respondent knew or should have known of the existence of the safety hazard.

At the outset, it is clear that amending the complaint at this relatively early stage of the proceeding, where discovery is still ongoing and trial some months distant, would not prejudice respondent. Respondent would have adequate time to respond fully to the charges in the amended complaint. *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); *James Carpets, Inc.*, 81 F.T.C. 1043, 1046 (1972). In addition, it is well established that the Commission may freely grant leave to amend complaints when the public interest so requires. *Forster Mfg. Co. v. FTC*, 335 F.2d 47, 50 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

Nevertheless, the Commission is not persuaded that the public interest would be served, or the trial of this case facilitated, by amending the complaint as moved by complaint counsel. In the first instance, the Commission is not persuaded by the evidence proffered by complaint counsel that there is a reason to believe that respondent violated section 5 by failing to disclose an inherent safety risk about which it knew or should have known. Complaint counsel cite the opinion of one mechanical engineering expert that some of respondent's products could, under some circumstances, create a fire hazard and that some of respondent's products did not conform with national fire and electrical safety codes. However, complaint counsel have not presented information creating a reason to believe that any of respondent's products did, in fact, cause fires or injuries, or that respondent reasonably should have known of the fire hazard potential at the relevant times. The Commission cannot say, on the basis of the evidence before it, that it would be in the public interest to bring an action on the proposed amendment. Accordingly,

It is ordered That Complaint Counsel's Motion to Remand, or, in the alternative, to Amend the Complaint, be, and it hereby is, denied.

Interlocutory Order

99 F.T.C.

IN THE MATTER OF
JIM WALTER CORPORATION

Docket 8986. Interlocutory Order, March 15, 1982

ORDER DEFINING THE SCOPE OF THE PROCEEDINGS ON REMAND AND
DIRECTING COMPLAINT COUNSEL TO SUBMIT A PROPOSED AMENDED
COMPLAINT

On March 13, 1981, the Commission directed complaint counsel and respondent to file briefs presenting their views as to further disposition of this matter.

Complaint counsel argue that under the standards enunciated by the reviewing court, *Jim Walter Corp. v. FTC*, 625 F.2d 679 (5th Cir. 1980), staff could prove in further hearings the existence of two relevant geographic markets: (a) the 26-state area extending from Texas to and including New York and Massachusetts; and (b) the 41 states east of the Rocky Mountains. Complaint counsel also argue that the Commission's prior product market determinations were correct and continue to be correct in both of the proposed geographic markets and that the acquisition violates Section 7 of the Clayton Act, 15 U.S.C. 18, in either or both geographic markets. Complaint counsel also assert that their case would not be affected even if elastomeric roofing materials were included in the product market,¹ and conclude by asserting that a new hearing would be in the public interest both because the acquisition assertedly violates Section 7 and because complaint counsel think there is a strong likelihood of effective relief.

Respondent, Jim Walter Corporation ("JWC"), on the other hand, argues that principles of fairness and finality, as well as the Commission's rules, require a dismissal of the complaint. Even if a dismissal is not required, JWC argues that new evidentiary hearings are not appropriate inasmuch as they would necessarily entail extended discovery and the consideration of current evidence relating to market definition (product and geographic), market share data and the structure of the market, thereby, in JWC's view, causing considerable waste of resources. JWC further argues that the 26-state area and 41-state area asserted by complaint counsel are not relevant markets within which to assess the effects of the acquisition and that, in any event, complaint counsel have shown neither an ability to prove either actual or potential anticompetitive effects nor the appropriateness of divestiture as a remedy.

¹ "Elastomeric roofing materials" consist of solid-preformed sheets and liquids. The term includes the synthetic rubbers neoprene and Hypalon as well as acrylic, butyl, rubberized asphalt, urethane and silicone.