

## IN THE MATTER OF

## DAIRYMEN, INC., ET AL.

*Docket 9143. Interlocutory Order, Nov. 10, 1982*

ORDER GRANTING RESPONDENT MUNFORD, INC.'S MOTION TO  
DISMISS

On July 31, 1980, the Commission issued a complaint against Dairymen, Inc., and Munford, Inc. The complaint alleged that Dairymen's acquisition in 1978 of Munford's wholly owned subsidiary, Farmbest Foods, Inc., may have substantially lessened competition or tended to create a monopoly in the processing and sale of fluid milk in relevant sections of the country, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. On August 23, 1982, respondent Munford moved for an order dismissing the complaint as to it. In support of its motion, Munford offered a stipulation entered into by it and complaint counsel agreeing, *inter alia*, that Munford "is no longer needed for purposes of fashioning effective relief, if any, in this matter, or for any other purpose, as the course of discovery to date has demonstrated that Munford is not a suitable candidate for imposition of the remedy of rescission or for the re-purchase of the stock of Farmbest Foods, Inc." After hearing argument from Munford's counsel in support of the motion and argument in opposition thereto by counsel for respondent Dairymen, the ALJ on August 24 certified the motion to the Commission without any recommendation as to its disposition.<sup>1</sup> Respondent Dairymen filed an opposition to the motion with the Commission on September 3.

Dairymen argues that the motion should be denied because: (1) "Munford, as the seller of Farmbest, was so closely connected to the acquisition herein complained of that it has become a necessary and indispensable party" (Opposition at p. 7); (2) "neither Munford nor complaint counsel have proffered any evidence or justification to support the conclusory statement that Munford is not a suitable candidate for the remedy of rescission" (Opposition at p. 6); and (3)

<sup>1</sup> At the August 24 hearing, the ALJ did not take a position on the merits of Munford's motion, explaining that it was beyond his authority to grant it. He concluded that he would "sign the stipulation, sign the order and let the Commission decide \* \* \* ." (Transcript of August 24, 1982, hearing, p. 228.) However, he then issued an order prepared by Munford purporting to "grant" the motion and certify it for Commission action. In light of the limited discussion of the motion at the hearing, the lack of briefing before the ALJ, and the absence of any analysis of the issues in his order, we do not take the order to constitute a recommendation.

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complaint counsel's support of Munford's motion is inconsistent with their apparent intent to oppose Munford's failing company defense<sup>2</sup> and with earlier statements concerning rescission as a possible remedy in the case.

Dairymen has made no argument that this case is uniquely suited to consideration of rescission as a remedy, should the Commission find that a violation occurred. Rather, it has relied simply on cases holding that a seller may properly be the subject of a rescission order by a court under Section 15 of the Clayton Act. However, it is one thing to argue from those cases that the Commission may order, in appropriate circumstances, that a transaction in violation of Section 7 and Section 5 be rescinded (a proposition with which we agree); and it is quite another to suggest that the Commission *must* retain as a respondent the seller in such alleged transactions so as to preserve rescission as a possible form of relief.

We cannot accept Dairymen's argument that it would be prejudiced by dismissal of the complaint as to Munford—or its implicit assertion that it has a right to insist that Munford be retained as a respondent. It is well within the discretion of the Commission to forego consideration of rescission as a remedy in this case and grant Munford's motion.

We would prefer to have been informed by Munford and complaint counsel as to the basis for their agreement that Munford is not a "suitable candidate" for rescission. However it is not essential to a decision on Munford's motion. It is clear that complaint counsel do not intend to establish the record necessary to support a rescission order. That being the case, it is not in the public interest to retain Munford as a party; indeed, to do so would unreasonably burden that company.

We do not agree that complaint counsel have taken "inherently inconsistent positions" in supporting Munford's motion and opposing Dairymen's failing company defense. Different legal standards apply to the two issues, and they pertain to Munford's financial condition in different time periods. We also reject Dairymen's contention that complaint counsel's support for Munford's motion confuses the issues in the proceeding and handicaps Dairymen in its defense. Although complaint counsel did state in 1980 that they wanted to preserve "the option of considering rescission as a possible sanction in this matter" (Transcript of October 24, 1980, hearing, p. 18), it is

<sup>2</sup> On September 8, 1982, the ALJ granted Dairymen's motion for permission to amend its answer to assert that Munford was a failing company prior to and at the time of the sale of Farmbest. Complaint counsel had opposed the motion.

understandable that their position could change after two years of discovery.

*It is ordered,* That the complaint is dismissed as to respondent Munford, Inc.

Chairmen Miller did not participate.

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IN THE MATTER OF

## TEXAS DENTAL ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9139. Complaint, June 17, 1980—Decision, Nov. 19, 1982*

This consent order requires a Texas dental association to cease, among other things, inhibiting competition by inducing its members to withhold x-rays and other diagnostic information from third-party payers and independent dental consultants for use in reviewing claims and establishing cost containment programs. The association is barred from coercing independent dental consultants and third-party payers into altering the terms and conditions of any dental health care plan, and from compelling third-party payers to select a particular independent dental consultant. Further, previous agreements entered into by the association and dental insurers which do not conform to the terms of the order are not binding upon the signatories. The association is also required to mail a copy of the order together with a letter explaining its provisions to all its members and to any person who joins the association within the next four years.

*Appearances*

For the Commission: *Julian V. Buenger, Steven L. Page and Edward C. Johnson.*

For the respondent: *Robert A. Hall and Roger A. Wright, Jr., Woodard, Hall & Primm, Houston, Tex.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definition shall apply in this Complaint: *Third-party payer or payer* means any entity that provides a program of reimbursement for dental health care services to employees or members of any business organization, and any person, such as an independent claims adjuster, who provides