

IN THE MATTER OF
FOREMOST-McKESSON, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT

Docket C-2427. Consent Order, July 26, 1973—Modifying Order, April 16, 1987

The Federal Trade Commission has modified a 1973 consent order (38 FR 22468) by setting aside the second paragraph, of the consent order, prohibiting material inducements to customers to attend respondent's trade shows.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

Respondent McKesson Corporation ("McKesson")¹ filed a Petition to Reopen Proceeding and Set Aside Order ("Petition") on November 26, 1986, pursuant to Subsection 5(b) of the FTC Act, 15 U.S.C. 45(b). The Commission's order to cease and desist relates to McKesson's practices surrounding trade shows that it conducts for its retail drug store customers. McKesson is the largest wholesale distributor of drugs and druggists' sundries in the country.

McKesson requests the Commission to reopen the proceeding to set aside the two principal parts of the order on the basis of changed conditions of law and fact and the public interest. The Commission issued its order in this matter on July 26, 1973, with the consent of McKesson. 83 F.T.C. 228. The complaint and order were based upon alleged violations of Section 5 of the FTC Act. 15 U.S.C. 45. The first ordering paragraph prohibits McKesson from inducing promotional allowances and services from its suppliers in connection with trade shows when McKesson knows or has reason to know that such allowances and services are not available to its competitors on proportionally equal terms. The second part prohibits McKesson from providing material inducements to customers to attend McKesson's trade shows when the receipt is dependent on the volume of the customer's purchases.

The commission filed on January 10, 1979, a civil penalty action against respondent for violations of the order in this matter in *FTC v. Foremost-McKesson, Inc.*, No. 79 Civ. 0162 (PNL) (S.D.N.Y.). The civil penalty action focused upon national trade shows held by McKesson in 1976, 1977, and 1978 and attended by McKesson's retail customers. A Final Judgment and Permanent Injunction was entered on

¹ Respondent was formerly Foremost-McKesson, Inc. It changed its name to McKesson Corporation in 1983.

November 23, 1983, with the consent of the parties. Under the judgment, McKesson paid civil penalties and was prohibited for ten years from inducing any promotional allowances that were not available to its competitors on proportionally equal terms. This paragraph in the court's injunction parallels the prohibition in the Commission's order against inducing disproportionate promotional allowances.

A. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Subsection 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. The burden is on the petitioner to make the satisfactory showing of changed conditions required by the statute. This burden is not a light one in view of the public interest in repose and the finality of the Commission's orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality). If the Commission determines that the petitioner has satisfied this requirement, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. Subsection 5(b) does not require that the Commission modify any order. S.Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979). See Order Modifying Consent Order Issued September 28, 1977, in *Union Carbide Corp.*, Docket No. C-2902 on November 14, 1986.

Subsection 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. If respondent satisfies this threshold requirement, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. See Order Modifying Consent Order Issued September 28, 1977, in *Union Carbide Corp.*, Docket No. C-2902 on November 14, 1986.

B. THE PROHIBITION AGAINST THE KNOWING INDUCEMENT OF
DISCRIMINATORY PROMOTIONAL ALLOWANCES AND SERVICES

Respondent first seeks to have the prohibition against the knowing inducement of discriminatory promotional allowances and services set aside because the Commission's recent decision in *General Motors Corp.*, 103 F.T.C. 641 (1984) ("G.M."), is a changed condition of law. In *G.M.*, the Commission restricted use of Section 5 of the FTC Act to expand the "spirit" of *per se* liability of Subsection 2(d) of the Robinson-Patman Act, 15 U.S.C. 13(d), to conduct not otherwise covered by the "letter" of the Robinson-Patman Act. The Commission chose to limit the "spirit" theory to conduct that was actually anticompetitive. According to McKesson, the first paragraph in its order does not prohibit conduct that is either anticompetitive or unlawful under the Robinson-Patman Act.

The Commission has long prohibited, pursuant to Section 5 of the FTC Act, a buyer from inducing promotional allowances and services that it knows or has reason to know are not available to its competitors on proportionally equal terms. See, e.g., *Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962). This prohibition is also embodied in the Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. 240.14. The prohibition arises from Subsections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. 13(d) and 13(e), which prohibit sellers from providing promotional allowances and services to any firm in connection with the resale of that supplier's products unless such allowances or services are available to the firm's competitors on proportionally equal terms. Discriminatory promotional allowances and services are *per se* unlawful, that is, unlawful without a demonstration of an injury to competition. See *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

Although the Robinson-Patman Act does not itself prohibit the inducement of such allowances and services, the Commission has employed Section 5 of the FTC Act to prohibit such buyer inducements. The omission of buyer liability under the Robinson-Patman Act was deemed by the court of appeals in *Grand Union* to be "more 'inadvertent' than 'studious.'" 300 F.2d at 96 (footnote omitted). The court observed that "[s]ince * * * there can be no unlawful preference made by a seller unless it was received by a buyer, it is clear that Congress did not intend to sanction buyers to continue to engage in the unlawful activity." *Id.* at 97 (footnote omitted).

The Commission's decision in *G.M.* did not change this precedent surrounding buyer liability for knowingly inducing discriminatory promotional allowances nor the Commission's underlying enforcement policy. In *G.M.*, the Commission declined to extend the *per se*

liability of Subsections 2(d) and 2(e) of the Robinson-Patman Act to a transaction not otherwise prohibited by those subsections. The concept of buyer liability under Section 5 of the FTC Act, however, as explained in *Grand Union*, only imposes liability upon a party to a transaction that is already unlawful under those subsections of the Robinson-Patman Act. That is, *Grand Union* stands for the proposition that both parties to an unlawful transaction may be held liable. In *G.M.*, the Commission merely declined to broaden the class of unlawful transactions.

The Commission also acknowledged the continued applicability of the *Grand Union* line of cases in *G.M.* 103 F.T.C. at 700-01. In the accompanying footnote, the Commission noted that proof of injury is not required in a Section 5 buyer inducement case. *Id.* at 701 n.3.

In view of the Commission's position respecting buyer inducements in *G.M.*, McKesson has not established a changed condition of law that requires reopening the order.

Apparently as a changed condition of fact, McKesson also asserts that this first prohibition of the order is no longer needed because the prohibition is now embodied in a court decree as a result of the civil penalty action. McKesson contends that the Commission is, thus, well-equipped to proceed against future conduct. However, the fact that a federal court has entered a decree to enforce a portion of the Commission's own order is not the type of changed condition of fact that requires reopening the order. Rather, the previous alleged violations leading to the entry of the decree suggest that continuation of the order is appropriate to ensure that McKesson continues to conform its conduct to the law.

McKesson also urges the Commission in the public interest to set aside the prohibition against inducing discriminatory promotional allowances and services because the prohibition places it at a competitive disadvantage. According to McKesson, none of its competitors are subject to such prohibitions, save one. *See Bergen Brunswig Corp.*, Docket No. C-2463, 83 F.T.C. 687 (1973). However, this order provision only prohibits McKesson from violating the law. The order provision does not prohibit any conduct that is currently lawful and McKesson has not demonstrated any other injury flowing from the prohibition. McKesson has not established that it is placed at a competitive disadvantage by an order that requires it to obey the law. *See Order Modifying Cease and Desist Order Issued July 19, 1951, in Atlas Supply Co.*, Docket No. 5794, 106 F.T.C. 334, 335 (1985).

In view of this, and because of the continued viability of the *Grand Union* line of cases, the Commission does not believe that setting aside this part of the order would be in the public interest.

C. THE PROHIBITION AGAINST PROVIDING CUSTOMERS MATERIAL
INDUCEMENTS TO ATTEND TRADE SHOWS

McKesson also requests the Commission to set aside the prohibition against providing material inducements to customers to attend its trade shows when the amount is dependent upon the customers' volume of purchases. McKesson claims that the paragraph prohibits competitive conduct and, therefore, is contrary to the public interest.

This provision no longer appears to be necessary. Setting aside this paragraph may be warranted because the prohibited conduct has never been *per se* unlawful under Section 5 and is a competitively reasonable method for a wholesale distributor to employ in attracting retailers to attend a trade show. Additionally, there is evidence that the prohibition against material inducements may place McKesson at a competitive disadvantage because its competitors are not bound by a similar prohibition. Of course, Subsection 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), prohibits any price discrimination that injures competition among wholesale distributors.

The Commission has denied that part of McKesson's petition that seeks to reopen on the basis of changed conditions. McKesson has failed to make any showing of changed conditions of law or fact of the type to require such reopening. Likewise, the public interest does not warrant any modification to the prohibition of the knowing inducement of promotional allowances because the paragraph only requires compliance with established case law. However, in the public interest, the Commission has determined to reopen the order and set aside the second paragraph prohibiting material inducements to customers to attend respondent's trade shows.

Accordingly, it is hereby ordered that the proceeding be, and it hereby is, reopened and the following paragraph be set aside as of the date of this order:

It is further ordered, That respondent shall cease and desist from offering or providing to its customers, directly or indirectly, any material inducement, monetary or otherwise, to attend its trade shows whenever such customers' receipt of the inducement depends upon their purchases or volume of purchases of merchandise from respondent.

By direction of the Commission. Chairman Oliver concurred in part and dissented in part. Commissioner Azcuenaga was recused.

SEPARATE STATEMENT OF CHAIRMAN DANIEL OLIVER

Foremost-McKesson (McKesson), a drug and sundries wholesaler, has petitioned the Commission to vacate a 1973 order that regulates McKesson's conduct in administering druggists' sundries trade shows. The order regulates both McKesson's acceptance of promotional fees, services, and facilities from suppliers who set up booths at the shows, and McKesson's reimbursement of travel and other expenses to retailers who attend the shows.

The Commission concludes, and I agree, that the order should be vacated to the extent it regulates McKesson's reimbursement of retailer travel and other expenses, because continued regulation is not in the public interest. However, the Commission has chosen not to vacate the order's provisions regulating McKesson's acceptance of promotional fees, services, and facilities from suppliers of druggists' sundries. I strongly dissent from this portion of the Commission's decision.

The order's provisions that the Commission refuses to vacate prohibit McKesson from receiving promotional services or facilities from suppliers, or from receiving compensation from suppliers for providing promotional services or facilities, if McKesson knows or has reason to know that similar allowances and services are not available to its competitors on proportionally equal terms. These restrictions are the "buyer side" analogs of Robinson-Patman Act subsections 2(d) and 2(e), which prohibit sellers from offering nonproportional promotional allowances and services to buyers.

As is well known, there is little economic justification for regulating either the offers of services and allowances by sellers (as in subsections 2(d) and 2(e)), or the inducements for services and allowances by buyers (as in the present matter), when neither sellers nor buyers possess substantial market power. Under competitive conditions, sellers face incentives sufficient to ensure that no buyer will face systematic discrimination, or "proportionally unequal" treatment, in any meaningful sense.

Subsections 2(d) and 2(e) of the Robinson-Patman Act would not be quite as troublesome if they incorporated a competitive injury standard requirement.¹ Unfortunately, they do not. As a result, the subsections often increase the costs of doing business, and ultimately force consumers to pay higher prices for goods and services, by making illegal *per se* practices that, in most instances, pose no threat to competition. Even more unfortunately, the Commission has in the

¹ Notably, the American Bar Association has recently suggested that subsections 2(d) and 2(e) be subjected to the competitive injury standard embodied in subsection 2(a). *ABA Favors Competitive Injury Test for Advertising and Promotional Allowances*, 52 Antitrust and Trade Reg. Rep. 357 (Feb. 26, 1987).

past (in the *Grand Union* line of cases) compounded the anti-consumer effects of subsections 2(d) and 2(e) (which regulate conduct of sellers) by using Section 5 to reach an even broader class of cases (conduct of buyers), making it *per se* unlawful for a buyer to induce, or receive allowances and services with knowledge that competing buyers were treated nonproportionally.²

The Commission recently provided a persuasive basis for overturning the use of Section 5 to extend the scope of subsections 2(d) and 2(e). In its decision in *General Motors Corp.* ("GM"), the Commission determined that activities not prohibited by the Sherman and Clayton acts should be prohibited under Section 5 only if (1) they have anticompetitive effects very similar to the effects of conduct barred by the pro-competitive portions of those Acts; and (2) if their prohibition is not inconsistent with any other legislative goal reflected in the pro-competitive portions of those Acts.³

Thus, the Commission should no longer use Section 5 to extend the Robinson-Patman Act, if the Commission does not consider the Act itself to be pro-competitive. And the Commission clearly does not view the Robinson-Patman Act as pro-competitive; it has characterized the Act as a "protectionist non-efficiency oriented" statute whose objectives conflict rather than coincide with the protection of competition.⁴ This condemnation applies most strongly to subsections 2(d) and 2(e) because they do not require any demonstration of competitive injury.

Moreover, in the present matter, there is no evidence or analysis to indicate an exercise of market power, and hence no evidence of an ability to discriminate. Therefore the prohibitions imposed by the order on McKesson are likely only to inhibit McKesson's ability to compete. Clearly, this is inconsistent with the pro-competitive purposes of the Sherman and Clayton Acts.

The Commission was created as an expert body capable of determining when a practice injures competition and when it does not. The Commission did not exercise that expertise in the *Grand Union* line of cases. Instead, it simply extended an inappropriate standard of illegality to an additional class of businesses. The Commission has clear authority to overturn the *Grand Union* line of reasoning. I am unaware of any court decision ordering the Commission to hold as illegal *per se* an inducement by a buyer of what we cast as nonproportional services and allowances. The courts merely have indicated that the Commission may, in its discretion, take that step. But, as a gener-

² See, e.g., *Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962); *Giant Food Inc. v. FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).

³ *General Motors Corp.*, 103 F.T.C. 641, 700-701 (1984); accord, *Ethyl Corp.*, 101 F.T.C. 425, 597 (1983), rev'd on other grounds sub nom. *DuPont v. FTC*, 729 F.2d 1288 (2d Cir. 1984).

⁴ *General Motors Corp.*, 103 F.T.C. 641, 695-696 (1984), citing *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 171 n. 39 (1983).

al matter, the Commission has both the primary responsibility and wide discretion to interpret Section 5. Moreover, the Supreme Court has concluded that "as a general rule the Robinson-Patman Act should be construed so as to insure its coherence with ' the broader antitrust policies that have been laid down by Congress.' "5

The Commission has elected not to modify the order's buyer inducement provisions. The Commission has thus, to the detriment of American consumers, foregone an opportunity to alter a precedent in an instance where it has the authority to do so. How can the Commission take this action and at the same time claim to serve the interest of American consumers?6

Accordingly, although I concur with so much of the Commission's decision as vacates the "seller side" provision, I dissent from the Commission's decision not to vacate the order in its entirety.

⁵ *United States v. United States Gypsum Co.* 438 U.S. 458-459 (1978), quoting *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953).

⁶ Hint: How can you square a circle?

IN THE MATTER OF

AMERCO, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9193. Complaint, June 24, 1985—Decision, May 18, 1987*

This consent order requires, among other things, a Phoenix, Ariz.-based respondent, U-Haul International, Inc., the nation's largest renter of trucks and trailers, and its Las Vegas, Nev.-based parent company, AMERCO, from initiating or participating in any judicial or administrative proceeding in which their main purpose is to harass or injure any competitor or potential competitor. Additionally, respondents are required for ten years: (1) to give the FTC prior notice before participating in any bankruptcy proceeding of a competitor; (2) to obtain FTC approval before filing a plan of reorganization to acquire a competitor in bankruptcy; (3) to provide the FTC with a copy of any lawsuit filed against a competitor; and (4) to obtain FTC approval before acquiring any competitor worth \$5 million or more.

Appearances

For the Commission: *Gerald T. Gregory.*

For the respondents: *Allen Ward, Baker & Hostetler, 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 AMERCO, a corporation, and U-Haul International, Inc., a corporation, hereinafter sometimes referred to as respondents, have 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:

DEFINITION

1. For the purpose of this complaint, the term "*moving equipment*" shall include trucks, trailers, and/or equipment such as tow bars, hand trucks, hitches, and furniture pads.