

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION AND CLAYTON ACTS

Docket C-2929. Consent Order, Sept. 26, 1978—Modifying Order, Feb. 23, 1988

The Federal Trade Commission has modified a 1978 consent order (92 F.T.C. 405) with respondent and its subsidiaries by removing the ban on "preticketing", the listing of suggested retail prices on tags, with respect to the raincoats and outerwear sold by Londontown. The Commission also ordered the respondents to show cause why the provision should not be set aside in its entirety.

ORDER REOPENING AND MODIFYING ORDER ISSUED SEPTEMBER 26, 1978,
AND ORDER TO SHOW CAUSE

October 26, 1987, respondents Interco Incorporated ("Interco"), Londontown Corporation ("Londontown") and Queen Casuals, Inc. ("Queen Casuals") filed a "Request As Supplemented To Reopen And Set Aside A Portion Of Order" ("request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. Londontown is a division and Queen Casuals is a wholly owned subsidiary of Interco. The request asked the Commission to reopen the consent order issued on September 26, 1978 ("the order") and set aside a portion of paragraph 4 of Part I of the order. Respondents' request was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. No comments were received.

Paragraph 4 of Part I of the order, the provision at issue here, prohibited respondents for a three year period ending October 10, 1981, from communicating in writing any resale price or sale period to any reseller or prospective reseller of its products. After October 10, 1981, respondents are permitted by the order to suggest resale prices on the pages of any list, book, advertising, promotional material or other document if they include the following statement on such material:

"THE (RESALE PRICES OR SALE PERIODS) QUOTED HERE-
IN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE
YOUR OWN (RESALE PRICE OR SALE PERIODS)."

Paragraph 4 of Part I of the order also provides:

"A respondent shall not, however, suggest resale prices on any

tag, ticket or other marking affixed or to be affixed to any product shipped to a reseller."

It is this latter provision, which prohibits a practice known as "pre-ticketing," that respondents request the Commission to set aside insofar as it is applicable to raincoats and outerwear sold by Londontown.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), 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" require such modification. 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. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4; *Hospital Corporation of America*, Docket No. 9161, Letter to Peter J. Nickles, Esquire (November 27, 1987), at 3.

The Commission may also modify an order pursuant to section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, section 2.51 of the Commission's Rules, 16 CFR 2.51, invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500,

96th Cong., 1st Sess. 9-10 (1979). If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether the modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders. See *Federated Department Stores v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

After reviewing respondents' request, the Commission has concluded that the respondents have not made a satisfactory showing that changed circumstances require that the ban on preticketing in the order should be set aside. Respondents have submitted market share and concentration data for the years 1983-1986 that tend to indicate that Londontown does not have market power in the manufacture, distribution and sale of raincoats and outerwear. However, the complaint in this matter made no allegation as to market power or market shares, and there is no reason to believe that the order or the ban on preticketing was imposed because of considerations of market share or market power. Changed factual circumstances justify modification of an order only when the changed circumstances are significant and respondent shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Albertson's Inc.*, Docket No. C-3064, (petition to reopen and set aside order granted on July 1, 1987) at 2-3; *Cooper Industries, Inc.*, Docket No. C-2970, Letter to Sean F. Boland, Esquire (September 16, 1987), at 1; *Hospital Corporation of America*, Docket No. 9161, Letter to Peter J. Nickles, Esquire (November 27, 1987), at 3. The changed circumstances alleged by respondents clearly do not meet this standard and are irrelevant to the allegations of the complaint. Accordingly, these changes do not constitute changed circumstances that require modification of the order.

The Commission has concluded, however, that it is in the public interest to reopen and set aside the ban on preticketing in the order. Respondents have shown that the ban on preticketing prohibits them from marketing their products in a manner that is available to their competitors and that would otherwise be lawful. Accordingly, the ban on preticketing places the respondents at a competitive disadvantage with respect to their competitors who are not subject to similar provisions.

The affirmative need to modify the order to eliminate the competitive disadvantage outweighs any continuing need for the prohibition on preticketing. The ban on preticketing is in the nature of a "fencing-

in" provision to prevent respondents from using otherwise lawful preticketing as a device to accomplish vertical price fixing. The Commission believes that the conduct that led to the entry of this order has been interrupted for a sufficient period of time so that the ban on preticketing is no longer necessary either to dissipate the effects of respondents' past conduct or to prevent its recurrence.

Respondents have requested that the ban on preticketing be removed only with respect to raincoats and outerwear sold by Londontown. However, the Commission believes that the provision should be deleted in its entirety inasmuch as it no longer appears to be serving a remedial purpose and is inhibiting lawful competitive behavior.

Accordingly, *It is ordered*, That this matter be and it hereby is reopened and that the last sentence of paragraph 4 of Part I of the Commission's Decision and Order issued on September 26, 1978, shall be modified as of the effective date of this order to read as follows:

A respondent shall not, however, suggest resale prices on any tag, ticket or other marking affixed or to be affixed to any product shipped to a reseller except as to raincoats and outerwear sold by Londontown.

It is further ordered, That respondents show cause why the foregoing provision should not be set aside in its entirety. In accordance with Section 3.72 of the Commission's Rules of Practice, 16 CFR 3.72, respondents have 30 days from the date of service of this order to file an answer hereto or be deemed to have accepted the action proposed herein.

Commissioner Bailey dissenting.

IN THE MATTER OF
PREFERRED PHYSICIANS, INC.

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

Docket C-3222. Complaint, Feb. 26, 1988—Decision, Feb. 26, 1988

This consent order prohibits, among other things, an association of doctors in Tulsa, Okla., from conspiring to restrain competition and from fixing or increasing the prices they charge third-party payers for their services. In addition, the respondent is prohibited, for five years, from advising its members on the desirability or appropriateness of any price to be paid for physicians' services by any third-party payers.

Appearances

For the Commission: *Toby G. Singer.*

For the respondents: *Michael M. Eaton, Arent & Fox, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, Title 15, U.S.C. Section 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Preferred Physicians, Inc., a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, 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 as follows:

PARAGRAPH 1. Respondent Preferred Physicians, Inc. (hereinafter "respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma. Respondent's principal office and place of business is located at 6161 South Yale Avenue, Tulsa, Oklahoma.

PAR. 2. Respondent's shareholders (sometimes referred to as its "members") are physicians licensed to practice in the State of Oklahoma, and are generally engaged in the business of providing medical services to patients for a fee. Except to the extent that competition has been restrained as herein alleged, respondent's members have been and are now in competition among themselves, and with other physi-