

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

TIMOTHY D. PRUITT, individually, and)	
on behalf of all other persons similarly situated,)	
)	
Plaintiff,)	
)	Civil Action No. L-03-CV-21
)	
v.)	
)	
KAUFMAN AND BROAD HOME CORP., et al,)	
)	
Defendants.)	

MEMORANDUM OF LAW OF AMICUS FEDERAL TRADE COMMISSION

Introduction

The Federal Trade Commission (“Commission” or “FTC”) is the federal agency principally responsible for the protection of consumers from unfair and deceptive trade practices. Under the Federal Trade Commission Act, 15 U.S.C. §§ 41, *et seq.* (“FTC Act”), the FTC is empowered to prevent unfair and deceptive acts or practices in or affecting commerce.

The Commission respectfully submits this amicus brief in response to the Court’s request that it address two issues: (1) whether the plaintiff, a purchaser of a home from the defendant, KB Home, has standing as a third-party beneficiary to enforce a 1979 administrative consent order between the FTC and the defendant; and (2) whether the plaintiff has standing to enforce a subsequent 1991 judicial order (reached by consent in an enforcement action brought by the United States) that incorporated and enforced the original consent order. Relevant to this case, both the 1979 administrative order and the 1991 consent decree require the defendant to furnish purchasers with a warranty providing for mandatory arbitration that is binding upon the

defendant but not upon home purchasers, with the defendant responsible to pay all costs associated with arbitration.

There appears to be no dispute that the defendant violated both orders in regard to the arbitration provision. The defendant admitted to this Court on March 19, 2003 that there was a “big difference” between the mandatory binding arbitration provision that it included in its warranties and the non-binding arbitration provision required by the two orders. Transcript of TRO at 16. We also note that the defendant provided this Court with incorrect and potentially misleading information when it stated, during the March 19, 2003 hearing, that the Commission was aware of KB Home’s conduct but chose not to act upon it. TRO at 22, 29. On the contrary, the Commission and KB Home have struggled over this issue for many years; and throughout this period, the Commission has consistently made clear its position that KB Home is precluded under the consent order from including and enforcing an arbitration clause that is binding upon homeowners and from requiring homeowners to pay for arbitration (discussed, *infra*). Indeed, the Commission is presently poised to take further judicial actions to rectify these issues.

Despite the defendant’s misconduct, the Commission concludes that it must answer the two specific questions posed by the Court in the negative. As we show below, controlling decisional law generally denies private parties standing to enforce government consent decrees; and more specifically, private parties may not enforce Commission consent orders, whose exclusive enforcement mechanism is established by Section 5(l) of the FTC Act, 15 U.S.C. § 45(l). Moreover, sound policy and prudential considerations, such as the even and consistent administration of justice, dictate that such parties should not obtain rights under a judicial

consent decree that are denied to them under the administrative action that gave rise to the subsequent judicial enforcement proceeding.

However, before turning to our analysis of the two questions posed by the Court, we stress that this amicus brief does not consider two issues that the Court did not ask us to address: (1) whether private contract provisions that violate a Commission order may, as a matter of contract law, be unenforceable because of such violation; and (2) whether a private party injured by a contract provision that violates a Commission order may proffer that order as evidence in support of a claim seeking either to reform the contract or to have the contract declared a nullity. In this regard, we note that courts have sometimes recognized that private parties may rely on Commission orders to support the elements of independent causes of action. For example, in *Biovail Corp. Int'l v. Hoechst Aktiengesellschaft*, 49 F. Supp. 2d 750 (D.N.J. 1999), a generic pharmaceutical company claimed that the defendant's failure to grant certain rights regarding an existing drug violated an FTC administrative consent decree. Although the court in that case rejected the notion that the plaintiff had standing to sue to enforce the provisions of the consent decree *as such* (49 F. Supp. 2d at 763-64), it went on to clarify that the plaintiff may rely on evidence of the violation of the consent decree in establishing the elements of its own cause of action under the federal antitrust laws. *Id.* at 764-65. Similarly, in *In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618 (E.D. Mich. 2000), *aff'd on other grounds*, 332 F.3d 896 (6th Cir. 2003), the court ruled that the defendants' conduct in connection with an FTC consent decree could be used "as evidence in support of state [antitrust] law claims." *Id.* at 664-65.

Accordingly, our discussion below does not rule out the possibility that a violation of a Commission consent decree may be highly relevant to one or more legal theories that may be

available to the plaintiff, such as unconscionability or unenforceability due to conflict with public policy. Such theories, however, would be governed by state contract law, in which the Commission has no special expertise or experience. With this important caveat, we proceed to discuss the issues on which the Court has requested the Commission's views.

STATEMENT OF THE CASE

In 1979, the FTC issued an administrative consent order prohibiting KB Home – a California-headquartered builder and seller of residential housing – from, *inter alia*, making misrepresentations of fact and using other unfair or deceptive acts or practices in the construction and sale of residential housing. *See Kaufman and Broad, Inc.*, 93 F.T.C. 235, 247-62 (1979). Among other things, the order requires KB Home to make timely warranty repairs and to furnish home purchasers with a warranty “substantially identical” to the Home Owners Warranty Corporation (“HOW”) warranty (then in use), “including the procedures for the settlement of disputes.” *Id.* at 253-54. The HOW warranty covers various new home systems, mechanical components, and structural defects and established standards for repair of covered items. *Id.* at 263-79. Although the HOW warranty mandates that warranty disputes be arbitrated, the arbitration is free to the homeowner and the result is binding only on KB Home. *Id.* at 267.

In 1991, after receiving a referral from the FTC regarding various alleged violations of the 1979 consent order, the U.S. Department of Justice (“DOJ”) instituted a civil penalty action in the United States District Court for the Southern District of California, pursuant to Section 5(l) of the FTC Act. The complaint alleged that KB Home and related corporate entities had violated several provisions of the Order, including the provisions requiring KB Home to make

timely warranty repairs and to make certain affirmative disclosures to consumers. The court entered a consent decree wherein KB Home settled the action by (1) paying a civil penalty in the amount of \$595,000, and (2) stipulating to a permanent injunction against any further violations of the FTC's 1979 consent order. *See United States v. Kaufman & Broad Home Corp.*, Civil Action No. 91-872 (S.D. Cal. July 9, 1991).

In 1995, KB Home sought an FTC staff advisory opinion regarding whether it could furnish KB Home purchasers with a warranty that required arbitration of warranty disputes that would be binding on all parties rather than just KB Home, even though it conceded that such a requirement was prohibited by the consent order. The company argued that being tied to a 1979 HOW warranty seemed inappropriate in 1995, especially considering the trend in the law favoring arbitration and the fact that the KB Home warranty provided 10 years of coverage for major construction defects, whereas HOW coverage was only for four years. The staff opined that Part III.B of the consent order would not permit this practice because a warranty providing for arbitration that was binding on consumers would not be substantially identical to the HOW warranty. The staff further informed KB Home that it was free to seek an advisory opinion from the Commission or to seek modification of the consent order. KB Home never sought either.

The FTC staff subsequently opened an investigation after receiving complaints primarily regarding construction defects and the quality and timeliness of warranty repairs. These consumer complaint allegations raised many complex issues concerning building codes, design and repair practices, local building standards, highly fact-specific questions regarding the appropriateness of repairs in a wide variety of circumstances, and the interpretation of

warranties.¹ During its investigation, staff learned that KB Home was providing new home purchasers with warranties containing mandatory binding arbitration provisions, despite having been advised by the staff that doing so would violate the consent order. In December 1999, FTC staff put KB Home on notice that its practice of furnishing home purchasers with warranties requiring homeowners to submit to mandatory binding arbitration of warranty disputes violated both the 1979 administrative consent order and the 1991 consent decree. Additionally, FTC staff informed KB Home’s counsel that the consent order and consent decree prohibited KB Home from imposing the costs or fees of arbitration on homeowners.

Over the next year, the staff continued to exert pressure upon KB Home regarding its use of mandatory binding arbitration. In February 2001, KB Home advised the staff that it would cease providing warranties that require homeowners to resolve warranty disputes through mandatory binding arbitration and further assured the staff that it would not enforce the “binding” aspect of the arbitration of claims brought pursuant to those warranties that included mandatory binding arbitration clauses. Despite this assurance, however, KB Home continued to provide home purchasers with warranties requiring mandatory binding arbitration. In June 2001, in an apparent effort to come into compliance with the order, KB Home assured the Commission *in writing* that it would no longer enforce the binding arbitration provisions and that it would assume the costs of arbitration. Exh. 1, letter dated June 28, 2001 from Barton Pachino to James Prunty.

¹ Some of these issues have since been resolved and are not the subject of current investigatory efforts.

In December 2002, the staff first learned that KB Home was not abiding by its promises in the June 28, 2001 letter.² The staff thereupon investigated this issue, and received written proof that KB Home was in fact enforcing the binding arbitration provisions. On March 13, 2003, the staff contacted Elroy H. Wolff, KB Home's District of Columbia counsel, and told him that they knew of the present litigation, that KB Home's conduct was inconsistent with the promises it had made in the June 28, 2001 letter, and that if the company did not resolve this issue, the Commission staff would recommend referral of the matter to the DOJ to pursue civil penalties or civil contempt.

On March 19, 2003, KB's counsel in the present case - who was not present during the March 13, 2003 conversation - stated to the Court that the Commission "fail[ed] to act when they (*sic*) have knowledge of what was going on," TRO at 22, and that "[the Commission was] currently choosing not to act," TRO at 29, even though the company was aware at the time that the FTC was in fact investigating the issue and was again taking steps to terminate the practice. Soon after, the staff heard from the plaintiff's counsel about KB Home's misrepresentations to the Court. The staff advised KB Home that it would review the transcript of the March 19, 2003 hearing to determine whether the company had misled the Court and that if it had, the FTC would correct the record itself unless KB Home did so. KB Home responded on April 22, 2003 in a filing with the Court entitled "Advisory to the Court Regarding the Position of and Actions taken by the FTC," as well as a letter addressed to the Court. Exh. 2. These documents did not advise the Court that KB Home had made written commitments to the Commission that it would

² Throughout the period between June 2001 and December 2002, the Commission had been actively investigating other complaints regarding housing defects and failed warranty repairs by KB Home.

(1) inform homeowners requesting arbitration that the results would not be binding, (2) refrain from enforcing binding arbitration in the future, and (3) assume all arbitration costs.

The FTC staff expressed its dissatisfaction with the April 22, 2003 documents filed with the Court. On May 1, 2003, KB Home sent another letter to the Court noting that by letter to the FTC dated June 28, 2001, KB Home had assured the Commission that it would not enforce binding arbitration against homeowners. Exh. 3. KB did not mention its prior commitment to the Commission to pay all costs of arbitration for homeowners; and although KB Home admitted that it had enforced mandatory binding arbitration in a “few instances,” it failed to disclose that it engaged in a pattern and practice of informing homeowners that they would be required to submit their claims to binding arbitration if they were not able to reach informal resolution of their warranty disputes.³ The letter also failed to advise the Court that the staff had written KB Home on several occasions in early 2001 demanding that KB Home “immediately” cease including mandatory binding arbitration clauses in its warranties.

On June 26, 2003, KB Home circulated a letter to the Court, the FTC, and the parties expressing its intention to correct its misconduct. However, although the orders require KB Home to absorb all arbitration costs, KB Home’s ostensible correction calls for a cost-sharing

³ FTC staff recently learned that KB Home has been using terms requiring mandatory binding arbitration specifically targeted at warranty claims in their home purchase agreements to circumvent the requirements of the Order. Staff has also received numerous letters in which KB Home attorneys instruct homeowners that if warranty disputes are not settled informally, homeowners will be required pursuant to the terms of their purchase agreements to submit their claims to binding arbitration. KB Home takes the position that this does not violate the FTC order or its prior commitments not to “enforce” binding arbitration. Finally, KB Home also only recently revealed that it began furnishing home purchasers in Texas and Colorado with warranties providing for mandatory binding arbitration of disputes as early as 1996. *See* Attachment to June 30, 2003 letter from KB Home to the Court.

policy that could effectively dissuade many home purchasers from pursuing their claims. Accordingly, its new proposal does not appear to comply with the orders, or with the commitments the company made to the Commission in its June 28, 2001 letter. Therefore, in an effort to bring KB Home into compliance with the orders, the FTC staff is currently preparing a recommendation for the Commission's consideration regarding appropriate steps to address this matter.

ARGUMENT

The statutory mechanism for enforcing FTC administrative orders provides in pertinent part that civil penalties and injunctive relief “may be recovered in a civil action brought by the Attorney General of the United States.” 15 U.S.C. § 45(l). Courts that have addressed the question of private enforcement of FTC consent decrees have concluded that third parties have no standing. *Biovail*, 49 F. Supp. 2d at 763; *Cardizem*, 105 F. Supp. 2d at 664-65. The Fifth Circuit has not yet addressed whether a private party has standing to enforce an FTC consent decree or any other consent decree resulting from a governmental enforcement action. However, the overwhelming majority of courts that have considered the issue have either rejected the proposition that third parties may enforce a government consent decree or have limited such rights to circumstances that do not apply here.

A. Controlling Authorities Disallow Third Party Enforcement of Government Consent Decrees

The Supreme Court has expressly rejected arguments that private parties have standing to enforce government consent decrees. *See Blue Chip Stamp v. Manor Drug Stores*, 421 U.S. 723 (1975). In *Blue Chip*, the government and Blue Chip Stamp had entered into a consent decree

wherein the company was obligated to offer shares of its stock to the plaintiff at a “bargain” price. *Id.* at 725-727. The plaintiff did not purchase these shares, however, because it was dissuaded by a deceptive prospectus issued by the company. *Id.* at 726-727. Subsequently, the plaintiff attempted to sue the company under the antifraud provisions of the Securities Act, 15 U.S.C. § 78j(b). *Id.* at 726-727. On appeal, the Ninth Circuit determined that although individuals who do not purchase or sell stocks are precluded from pursuing an action under these laws, the plaintiff here nonetheless had standing to sue because the consent decree vested upon the plaintiff contractual rights to buy shares. *Id.* at 749-750.

The Supreme Court opinion focused on whether enforcement of the antifraud provisions is correctly restricted to persons who purchased or sold stocks, as the Second Circuit had concluded in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert denied*, 343 U.S. 956 (1952). *Id.* at 727-749. However, to address the Ninth Circuit’s opinion, the Supreme Court also discussed the issue of third party enforcement of consent decrees and determined that the consent decree did not confer standing upon the plaintiff. *Id.* at 750. In so ruling, the Court reaffirmed the general rule that third parties may not enforce a consent decree:

A well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefitted by it.

Id.

Although the Supreme Court’s pronouncement in *Blue Chip* appears to leave little room for third parties to assert any rights under a consent decree, the lower courts have struggled to apply it, with some courts adhering strictly to a broad reading of *Blue Chip* and others adopting the position that general contract principles determine whether a consent decree is enforceable

by third parties. Among the latter courts, some have shown particular reluctance to permit third parties to enforce a consent decree that resulted from government law enforcement. As shown below, while it is difficult to reconcile the varying approaches adopted by the lower courts, the plaintiff has no standing to enforce the 1979 consent order or the 1991 consent decree under even the most generous theory of third party enforcement.

B. Courts Interpret *Blue Chip* to Prohibit or to Strictly Limit Third Party Enforcement of Consent Decrees.

Although the Supreme Court's discussion of the consent decree issue in *Blue Chip* arose in a particular statutory context, some lower courts have construed it broadly to preclude third parties from enforcing consent decrees, directly or indirectly. The broadest reading of *Blue Chip* arose in the Sixth Circuit, which held: "the plain language of *Blue Chip* indicates that even intended [third-party] beneficiaries to a consent decree lack standing to enforce its terms." *Aiken v. City of Memphis*, 37 F.3d 1155, 1167-68 (6th Cir. 1994). The court of appeals in *Aiken* recognized that its conclusion was contrary to the holdings in other circuits, but added: "we are unable to join them until the Supreme Court revisits the unequivocal language of *Blue Chip*." *Id.* at 1168. *Accord, Vogel v. City of Cincinnati*, 959 F. 2d 594 (6th Cir.), *cert. denied*, 506 U.S. 827 (1992) (disappointed applicant for city police force has no standing to pursue a damages claim against city based on alleged erroneous interpretation of consent decree entered previously in action in which the applicant was not a party); *Golden v. National Finance Adjusters*, 555 F. Supp. 42, 46 (E.D. Mich. 1982) (nonparty may not enforce consent decree or seek a declaratory judgment interpreting the rights under the decree because no case or controversy exists).

While the Sixth Circuit has construed *Blue Chip* broadly to prohibit virtually any third party enforcement of consent decrees, other courts have limited *Blue Chip*'s reach to preclude

only so-called “incidental beneficiaries” from enforcing consent decrees. According to the majority of these circuits, consent decrees are contractual arrangements that are given the status of a judicial decree. For example, in *Hook v. Arizona Dep’t of Corrections*, 972 F.2d 1012, 1014 (9th Cir. 1992), the Ninth Circuit held that prison inmates had standing to enforce a judicial consent decree that had been negotiated by previous inmates. The Court there reasoned that under “established contract principle[s],” intended third party beneficiaries may enforce an agreement. Distinguishing “[t]he holding in *Blue Chip* [as] * * * limited to *incidental* beneficiaries or beneficiaries of consent decrees where the government [is] the plaintiff,” the Court held that the principle articulated in *Blue Chip* “does not apply to intended third party beneficiaries.” *Id.* at 1015 (emphasis added). Accordingly, the Ninth Circuit concluded the subsequent inmates were “*intended* third party beneficiaries that have standing to enforce the rights of the [prior] inmates under the consent decree.” *Id.*

Applying a similar analysis, other circuits have recognized that third parties have standing to enforce the terms of a consent decree where there is an understanding that the third parties are “intended beneficiaries” with enforcement rights. *See, e.g., Floyd v. Ortiz*, 300 F.3d 1223, 1225 (10th Cir. 2002) (another prisoner case in which the parties agreed during the hearing regarding the original consent decree that the agreement would be to the benefit of, and would be enforceable by, all inmates, and not just the named plaintiffs). Still other courts at least in theory recognize standing for an “intended beneficiary,” but require that such beneficiaries demonstrate that the parties to the decree intended to confer enforcement rights on third parties. As the D.C. Circuit explained in *SEC v. Prudential Securities, Inc.*, 136 F.3d 153 (D.C. Cir. 1998):

Third parties to a consent decree, involving the government or not, must demonstrate that they are the intended beneficiaries in order to have enforcement

rights * * *. The test is not * * * only whether the contracting parties intended to confer a benefit directly on the third parties, *but also whether the parties intended the third party to be able to sue to protect that benefit.*

Id. at 159 (emphasis added).⁴ *Accord, Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 958 (8th Cir. 2002); *Rafferty v. Nynex Corp.*, 60 F.3d 844, 849 (D.C. Cir. 1995); *Beckett v. Air Line Pilots Ass’n*, 995 F.2d 280, 288 (D.C. Cir. 1993); *Township of South Fayette v. Allegheny County Housing Authority*, 27 F. Supp. 2d 582 (W.D. Pa. 1998), *aff’d*, 185 F.3d 863 (3d Cir. 1999).

In the case of government consent orders, which are intended for the general benefit of the public, third parties have a particularly heavy burden to carry. In cases where the government is the plaintiff, courts assume that third parties are mere incidental beneficiaries to consent decrees and therefore are precluded from enforcing them absent a clear expression of a different intent on the part of the parties. *See, e.g., Hook*, 972 F.2d at 1015; *Restatement (Second) of Contracts* § 313(2) comment a (1981) (“Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested”). As the D.C. Circuit explained in *Prudential Securities, Inc.*, while “the fact that the government is involved [in a consent decree] is not in itself fatal to third party enforcement,” courts are “loath to allow third parties to enforce consent decrees when the government is involved * * * because the government usually acts in the general public interest.” 36 F.3d at 158.

⁴ The D.C. Circuit, however, “[left] for another day consideration of whether authorization of third party enforcement must invariably be explicit.” *Prudential Securities, Inc.*, 136 F.3d at 159. *But see Biovail*, 49 F. Supp. 2d at 763 (“[T]o have standing as a nonparty to enforce a government consent decree, one must show that the government explicitly authorized third party enforcement”).

C. The Administrative Order and Consent Decree Do Not Provide Third Party Enforcement Rights

These governing principles show that the plaintiff has no standing to enforce either the 1979 administrative consent order or the 1991 court order requiring KB Home to adhere to the terms of the earlier agreement. First, the FTC Act itself expressly provides for enforcement only by the way of “civil actions brought by the Attorney General of the United States.” 15 U.S.C. § 45(l). As in *Blue Chip*, the underlying statutory framework does not allow a private right of action by the plaintiff. 421 U.S. at 730-749. Second, nothing in the language of the 1979 administrative decree confers enforcement rights upon third parties. Instead, the 1979 consent order is silent regarding that issue. *Kaufman and Broad, Inc.*, 93 F.T.C. 235 (1979). In the context of a government consent decree, such silence regarding the enforcement rights of third parties is powerful evidence that the parties did not intend to confer such rights. *See Rafferty*, 60 F.3d at 849 (denying standing to enforce in part because “the decree nowhere authorizes a third party to enforce its obligation”); *Biovail*, 49 F. Supp. 2d at 763 (even though the third party was named specifically as the only beneficiary to an FTC consent decree, it had no standing as a nonparty to enforce the consent decree because the government had not explicitly authorized third party enforcement); *Cicirello v. New York Telephone Co.*, 123 F.R.D. 523, 526 (E.D.Pa.), *aff’d*, 879 F.2d 855 (3d Cir.), *cert. denied* 110 S.Ct. 326 (1989) (no third party enforcement where a government consent decree “does not * * * contemplate enforcement by third parties”); *Dahlberg v. Avis Rent a Car System, Inc.*, 92 F. Supp. 2d 1091, 1107 (D. Colo. 2000) (same).⁵

⁵ Plaintiff does not appear to contend that the 1979 consent order or the 1991 consent decree explicitly confer enforcement rights upon third parties, but instead asserts that these documents *implicitly* grant him standing to enforce their obligations. *See* Plaintiff’s Supplemental Briefing in Support of his Response to Defendant’s Motion to Dismiss and Reply to Defendant’s

Indeed, the Commission is not aware of any case in which a court has allowed third party enforcement of a consent order that resulted from a government enforcement action to proceed where the parties have not conferred enforcement rights on third parties. Inasmuch as there are no private causes of action under the FTC Act (*e.g.*, *Fulton v. Hecht*, 580 F.2d 1243, 1248 n.2 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Alfred Dunhill, Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973)), it would seem anomalous to allow such private enforcement of an FTC consent decree.

As for the 1991 order, it is crucial to bear in mind that the order is the product of a civil enforcement action brought by the Attorney General to enforce the 1979 administrative consent order. That civil action sought civil penalties and injunctive relief. It did not seek, nor could it have sought, to create any new rights or obligations unrelated to the original consent order.

Moreover, the language used by the parties to describe the enforcement scheme is notable for its failure to confer enforcement rights on third parties. Specifically, that court retained jurisdiction:

for the purpose of enabling any of *the parties* to this Consent Decree to apply to the Court at any time for such further orders or directives as may be necessary or appropriate for the interpretation or modification of this Consent Decree, *for the enforcement or compliance therewith*, or for the punishment of the violations thereof.

Exh. 3 at ¶ 5 (emphasis added). Given this language, it is reasonable to conclude that third party enforcement was not contemplated or intended by the parties to the decree. *Cf. Dahlberg*, 92 F. Supp. 2d at 1107 (parties to settlement agreement did not intend to confer enforcement rights to

third parties where settlement agreement reserved to DOJ the right to review compliance with settlement agreement and institute civil action).⁶

D. Enforcement of Government Consent Orders by Third Parties Creates a Potential for Inconsistent and Conflicting Determinations

There is good reason to use particular caution in allowing a private party to assert third-party beneficiary status as to a government consent decree. As the Second Circuit has explained,

Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time affords those parties affected by the decree sufficient protection of their rights.

United States v. American Soc'y of Composers, Authors and Publishers, 341 F. 2d 1003, 1008 (2d Cir. 1965). See also *Prudential*, 136 F.3d at 158; *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 998 (D.C. Cir. 1973). Tracing the history of the FTC Act in detail, the court of appeals in

⁶ The foregoing contract analysis is fully consistent with provisions of the Federal Rules of Civil Procedure relating to enforcement of judicial decrees by nonparties. Under Fed. R. Civ. P. 71, “[w]hen an order is made *in favor of* a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party * * *” (emphasis added). Rule 71 thus authorizes “a non-party who establishes standing to pursue enforcement of that agreement or decree as a third-party beneficiary.” *Hook*, 972 F. 2d at 1012; *Washington Hosp. v. White*, 889 F. 2d 1294, 1299 (3d Cir. 1989); *Gautreaux v. Pierce*, 743 F.2d 526, 533 (7th Cir. 1984). But while Rule 71 allows nonparties to enforce orders made in their favor, it cannot be invoked by third parties to enforce an order in an action in which they have no standing to sue. See *Moore v. Tangipahoa Parish School Bd.*, 625 F.2d 33, 34 (5th Cir. 1980); *Lasky v. Quinlan*, 558 F.2d 1133 (2d Cir. 1977); *Lavapies v. Bowen*, 687 F. Supp. 1193, 1207 (S.D. Ohio 1988), *aff'd*, 883 F.2d 465 (6th Cir. 1989) (“Under Rule 71, a non-party who establishes standing to proceed as a third-party beneficiary of a settlement agreement or consent decree may pursue enforcement of that agreement or decree.”) (citations omitted). It is doubtful, moreover, whether plaintiff could maintain this action in this judicial district even assuming that he could establish that he otherwise is authorized to enforce the terms of the consent order. A trial court retains jurisdiction to enforce its consent decrees. See, e.g., *Beckett*, 995 F.2d at 286; *Hook*, 972 F.2d at 1014. Given the district court’s retained jurisdiction in the Southern District of California, the proper procedure would be to institute an action in that judicial district.

Holloway explained that the original reason Congress restricted enforcement of the FTC Act to the FTC itself included avoiding a burden on the judicial system, including potentially “vexatious litigation,” and development of a “central and coherent body of precedent * * * so as to define the [FTC Act’s] operative reach.” 485 F.2d at 990. The court added that private actions would abrogate the FTC’s ability to control matters in a way to further its priorities and enforcement goals. *Id.* at 999.

Congress has established a comprehensive framework for exclusive enforcement by the FTC of the FTC Act’s prohibition against “unfair or deceptive acts or practices.” It has also established a comprehensive framework for exclusive enforcement of the FTC’s orders by the Attorney General working in conjunction with the FTC. Injecting private rights of action into this statutory mechanism creates a substantial risk of inconsistent and uneven enforcement decisions. The efficient administration of justice requires that parties who enter into consent agreements with the Commission know that they must deal only with the Commission (and the Attorney General) in ordering their business affairs under the terms of the consent agreement. Similarly, the Commission’s efficient allocation of its resources requires that it be free to target its enforcement efforts under the priorities it (and Congress through the appropriation process) sets. Private enforcement of FTC consent orders does not advance the public interest and disrupts the orderly administration of justice.

CONCLUSION

The FTC concludes that the plaintiff does not have standing to enforce the government’s consent orders against KB Home.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Memorandum of Law of Amicus Federal Trade Commission has been served by first class mail, postage prepaid, on counsel for the plaintiff and counsel for the defendant on this 18th day of August, 2003.

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