

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASSADY, FULLER & MARSH;
DOWLING & CARMICHAEL;
PITTMAN, WHITTAKER & HOOKS;
ROWE, ROWE & SAWYER; and
S. MARK JORDAN,

Defendants

Civil Action No. 80-110-S

Filed:

Entered:

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h) (the "Act"), the United States of America submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDINGS

The complaint in this action, filed December 9, 1980, alleges that beginning at least as early as May 1980 and continuing to the present, the defendants and their co-conspirators engaged in a combination and conspiracy to raise and fix legal fees for residential real estate closings in and near Enterprise, Alabama, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

In its complaint, the government asked the court to find that the defendants and their co-conspirators engaged in the conspiracy alleged, and it requested the court to enjoin the defendants and their co-conspirators from continuing or renewing the conspiracy or engaging in any other actions having a similar purpose or effect.

Entry of the proposed Final Judgment would terminate the action, except that the court would retain jurisdiction over the matter for further proceedings that may be required to interpret, enforce, or modify the Judgment, or to punish violations of it.

II

DESCRIPTION OF PRACTICES INVOLVED IN THE ALLEGED VIOLATION

The defendants Cassady, Fuller & Marsh; Pittman, Whittaker & Hooks; and Rowe, Rowe & Sawyer are partnerships with offices in Enterprise, Alabama, and whose members are attorneys admitted to the Alabama State Bar. The defendant Dowling & Carmichael was formerly such a partnership. Its former members, John C. Dowling and Daniel F. Carmichael, Jr., now practice law individually in Enterprise, as does the defendant S. Mark Jordan. Dowling, Carmichael, and Jordan are all members of the Alabama State Bar.

The government was prepared to prove that the defendants and co-conspirators met in the state courthouse in Enterprise at or about 5:00 p.m., May 6, 1980, and there reached an understanding or agreement to raise the level of legal fees for residential real estate closings. The government was further prepared to prove that the defendants actually did raise such fees beginning the morning after the meeting.

The complaint alleges that the combination has had the following effects, among others:

- (a) fees charged by the defendants for residential real estate closings have been raised, fixed, maintained, and stabilized at artificial and non-competitive levels;
- (b) price competition among members of the defendants for their services has been restrained; and
- (c) persons using the defendants' real estate closing services have been unable to purchase such services at competitively determined prices.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the court may enter the proposed Final Judgment after compliance with the Act. The proposed Final Judgment provides that its entry does not constitute any evidence against or admission by either party with respect to any issue of fact or law. Under the provisions of

Section 2(e) of the Act, the proposed Final Judgment may not be entered until the court finds that entry is in the public interest.

A. Prohibited Conduct

The proposed Final Judgment would prohibit each defendant, in concert with others, from continuing the conspiracy or participating in any activities whose purpose or effect is to fix, establish, raise, or maintain legal fees. In addition, any form of communication between any defendant and any other attorney about past, present, or future legal fees would be prohibited with certain exceptions, namely, (1) where the fees were court ordered, (2) where an attorney-client relationship existed between a member of the defendant and the other attorney and the communication involved the fee to be charged as a result of that relationship, (3) where there was joint representation of a client and the communication involved the fee to be charged that client, and (4) where the legal fee was part of a settlement between a client of a defendant and a client of another attorney or law firm and the communication concerned the amount of legal fees that one client would pay the attorney of the other.

The Final Judgment would not prohibit communications within a law firm or attendance at state bar seminars.

B. Scope of the Proposed Judgment

The proposed Final Judgment would remain in effect ten years from the date of its entry and would apply to each of the defendants and to each of their partners, associates, members, agents, employees, successors, and assigns, and to all other persons in active concert or participation with any of them who receive actual notice of the Judgment.

C. Effect of the Judgment on Competition

The relief in the proposed Final Judgment is designed to ensure that consumers have the opportunity to purchase legal services in and near Enterprise, Alabama, at competitive rates.

Two methods for determining compliance with the terms of the Final Judgment are provided. First, upon reasonable notice, the Department of Justice would be given access to the defendants' records relating to matters contained in the Final Judgment and

would be permitted to interview each of the defendants' partners, members, employees, agents, or associates. Second, upon written request, the Department of Justice could require each defendant to submit written reports under oath about any matters relating to the Final Judgment.

The Department of Justice believes that the proposed Final Judgment contains adequate provisions to prevent further violations of the type upon which the complaint is based.

IV

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, plus costs and reasonable attorney's fees. Entry of the proposed Final Judgment would neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. §16(a), the Judgment would have no automatic effect in any subsequent lawsuits that may be brought against the defendants.

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED JUDGMENT

As provided by the Act, any person who believes that the proposed Final Judgment should be modified may submit written comments to John W. Poole, Jr., Chief, Special Litigation Section, Antitrust Division, United States Department of Justice, Washington, D.C. 20530, within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to its entry. The Judgment provides that the court retains jurisdiction over this action, and the parties may apply to the court for an order to modify, interpret, or enforce it, if necessary.

VI

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment considered by the Department of Justice was a full trial of the issues on the merits and on relief. At such a trial the government could have asked the court to "roll back" the defendants' legal fees for residential loan closings to their pre-conspiracy levels. The complaint did not specifically ask for such relief, however, and it was unclear whether the court would have granted it even if the government had prevailed on the merits. In addition, private parties damaged by the conspiracy have federal legal remedies available to them, including an action under the antitrust laws for three times the amount of their actual damages. The uncertainty of obtaining relief beyond what is actually embodied in the proposed Final Judgment, the substantial expense of further litigation, and the availability of legal remedies to third parties led the government to conclude that further litigation would not be in the public interest.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b), were considered in formulating the proposed Final Judgment. Consequently, none are filed herewith.

Respectfully submitted,



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Dated: