

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	
Plaintiff,	:	80 Civ. 6129 (LBS)
v.	:	PROPOSED FINAL JUDGMENT:
NEW YORK COUNTY LAWYERS'	:	COMPETITIVE IMPACT
ASSOCIATION,	:	STATEMENT
Defendant.	:	

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

I

NATURE AND PURPOSE OF THE PROCEEDING

On October 28, 1980, the Government filed a civil antitrust Complaint under Section 4 of the Sherman Act, 15 U.S.C. § 4, alleging that the defendant and unnamed co-conspirators had, beginning as early as 1966 and continuing at least until August 1980, engaged in a continuing combination and conspiracy, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to restrict and to define the trust and estate services which corporate fiduciaries may provide to the public in competition with attorneys-at-law. A corporate fiduciary is a corporation, typically a bank or trust company, authorized by law to serve as executor of a decedent's estate or as the trustee of a trust. The Complaint alleged further that, as a result of the

combination and conspiracy, competition in the trusts and estates business had been restrained; corporate fiduciaries had been limited, restricted, and impaired in their ability to advertise the availability of and to provide trust and estate services; corporate fiduciaries had been denied the opportunity freely to compete with attorneys-at-law in offering and providing services incident to appointment as executor or trustee; and the public had been deprived of the benefits of free and open competition in the trusts and estates business.

The Complaint sought an adjudication that the alleged combination and conspiracy was illegal, an injunction enjoining the defendant from continuing or renewing the alleged combination and conspiracy, and an injunction prohibiting the defendant from unilaterally adopting, or seeking adherence to any standards relating to the trust and estate activities of banks or trust companies or to the advertising of such services.

The Court's entry of the proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction over the matter for possible further proceedings to construe or carry out the Judgment, to modify any of its provisions, to enforce compliance with the Judgment, or to punish violations of any of its provisions.

II

DESCRIPTION OF THE PRACTICES GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

The trusts and estates business involves the providing of services incident to appointment as executor of a decedent's estate or trustee of a trust, including the planning for the disposition, investment, and management of the assets of an

estate or a trust. In New York County, the primary providers of trust and estate services incident to appointment as an executor or a trustee are attorneys-at-law and corporate fiduciaries. Attorneys-at-law and corporate fiduciaries compete in the providing of these services.

The defendant is a Bar Association organized under the provisions of the New York Not-For-Profit Corporation Law whose membership consists of licensed attorneys practicing, among other places, in New York County. The Corporate Fiduciaries Association of New York City is an unincorporated professional organization of member banks and trust companies doing business, among other places, in New York County.

In June 1966, the defendant entered into a written agreement with the Corporate Fiduciaries Association of New York City which delineated the spheres of activities of corporate fiduciaries and attorneys-at-law with respect to the providing of trust and estate services. This agreement included prohibitions on the activities of corporate fiduciaries which do not constitute the practice of law under the law of the State of New York or which have not been adjudicated by the courts of New York State as constituting the practice of law.

The agreement, styled as a "Statement of Principles", prohibited corporate fiduciaries from, among other things, advertising that they offer services to the public in the planning of trusts, wills, inter vivos or testamentary dispositions; offering forms of wills or trust instruments to the public; and advising a prospective customer about any details of the individual's estate, except through or in the presence of the individual's legal counsel. Attorneys-at-

law, under the Statement of Principles, were prohibited from seeking to displace a client's choice of a corporate fiduciary, except under compelling circumstances.

The agreement between the defendant and the Corporate Fiduciaries Association was enforced on various occasions either by resort to a Joint-Conference Committee which, according to the Statement of Principles, was established "in order to insure implementation of the principles," or by actions of the defendant's Unlawful Practice of the Law Committee.

In late July, 1980, several months after the Government's investigation of the defendant's activities in this field commenced, the defendant abrogated the Statement of Principles and confirmed this abrogation to the corporate fiduciaries in letters it sent to them in August and October, 1980.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Government and the defendant have stipulated that the proposed Final Judgment, in the form negotiated by the parties, may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The proposed Final Judgment states that it constitutes no admission by any party with respect to any issue of fact or law.

The proposed Final Judgment enjoins any direct or indirect continuation or renewal of the type of conspiracy alleged in the Complaint. Specifically, Section IV enjoins and restrains the defendant from proposing, entering into, adhering to, implementing, or enforcing any contract,

combination, conspiracy, agreement, understanding, plan, or concert of action with any corporate fiduciary or any representative thereof which, directly or indirectly, relates to the activities of a corporate fiduciary or any other person in (1) being or seeking to be appointed, providing services or acting as an executor of a decedent's estate or a trustee of a trust, or (2) advertising, or furnishing materials about its availability to be appointed, provide services or act as an executor of a decedent's estate or a trustee of a trust.

Section IV also enjoins the defendant from adopting, promulgating, publishing, or seeking adherence to any statement of principles, code of ethics, or other guide, rule or standard which restricts or governs or delineates as proper or improper, practices or activities of corporate fiduciaries with respect to (1) being or seeking to be appointed, providing services or acting as executor of a decedent's estate or trustee of a trust or (2) advertising, or furnishing materials about, their availability to be appointed, provide services or act as an executor of a decedent's estate or trustee of a trust.

Section V of the proposed Final Judgment states that a lawyer or firm, acting alone, is not prevented by the Judgment from giving legal advice to a client, or from otherwise expressing an opinion, concerning unlawful practice of the law, and allows five limited exceptions to the injunctive provisions of the Judgment. First, the defendant is permitted to exercise any of its powers under the statutes of the State of New York and the Rules of Practice of the Appellate Division, First Department, of the Supreme Court of the State of New York. These powers relate to the defendant's

right to initiate legal proceedings in cases involving alleged unlawful practice of the law. Second, the defendant is permitted to enter into any settlement or otherwise compromise any lawsuit brought by or against it relating to the unlawful practice of the law. Third, the defendant is permitted to state in response to a specific inquiry from a person engaged in particular activities that the defendant does not intend to make a complaint or file an action alleging that such activities constitute the unlawful practice of law, or to state that it is unable to state that it does not intend to make such a complaint or bring such an action. Fourth, the defendant is permitted to express its views on any matter to the legislature, executive branch, administrative agencies, courts and other governmental bodies of the State of New York or any other jurisdiction. Fifth, the defendant is permitted to state or express its opposition to any actions by corporate fiduciaries or any other persons which are expressly prohibited by the law of the State of New York or which are held by the Supreme Court or any appellate court of the State of New York to constitute the unlawful practice of law.

Section VI of the proposed Final Judgment requires the defendant to publish the text of the Final Judgment in its newsletter, to send copies of the Final Judgment to each current member of the Corporate Fiduciaries Association of New York City and to deliver a copy of the Final Judgment to each of its officers, directors and committee chairpersons, and for a period of ten years, to each successor to any one of these officers and directors and to each successor to the chairpersons of its Committee on Unlawful Practice of the Law and Committee on the Surrogate's Court.

In addition, the proposed Final Judgment provides methods for determining the defendant's compliance with its terms. Section VII provides that, upon request of the Department of Justice, the defendant shall submit written reports, under oath, with respect to any of the matters contained in the Final Judgment. Additionally, the Department of Justice is permitted to inspect and copy all books and records, to interview officers, directors, employees and agents of the defendant.

Section VIII makes the Final Judgment effective for ten years from the date of its entry.

Section IX of the proposed Final Judgment states that entry of the Judgment is in the public interest. Under the provisions of the Antitrust Procedures and Penalties Act, entry of the proposed Final Judgment is conditional upon a determination by the Court that the proposed Judgment is in the public interest.

The Government believes that the proposed Final Judgment is fully adequate to prevent the continuation or recurrence of the violation of Section 1 of the Sherman Act alleged in the Complaint, and that disposition of this proceeding without further litigation is appropriate and in the public interest.

IV

REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

After entry of the proposed Final Judgment, any potential private plaintiff that might have been damaged by the alleged violation will retain the same right to sue for monetary damages and any other legal or equitable relief that it may have had if the Final Judgment had not been entered. The

Final Judgment may not be used, however, as prima facie evidence in private litigation, pursuant to Section 5(a) of the Clayton Act, as amended, 15 U.S.C. § 16(a).

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments within the 60-day period provided by the Act to Ralph T. Giordano, Chief, New York Office, Antitrust Division, United States Department of Justice, Room 3630, 26 Federal Plaza, New York, New York 10278. These comments and the Department's responses to them will be filed with the Court and published in the Federal Register.

All comments will be given due consideration by the Department of Justice. The Department remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry if it should determine that some modification is necessary. Additionally, the proposed Final Judgment provides that the Court retains jurisdiction over this action, and that the parties may apply to the Court at any time during the life of the Final Judgment for interpretation, modification, or enforcement of its provisions.

VI

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment considered by the Government was a full trial on the merits and on relief. The Government considers the proposed Judgment to be

of sufficient scope and effectiveness to make a trial unnecessary, since it provides appropriate relief against the violations alleged in the Complaint.

VII

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials or documents were considered determinative by the Government in formulating the proposed Final Judgment. Consequently, none is being filed pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b).

Dated: New York, New York
July , 1981

Respectfully submitted,

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