

The Complaint alleges that defendant, in coordination with certain of its members--nearly all private-practice orthopedic surgeons located in Delaware--organized and became the hub of a conspiracy to oppose and prevent proposed reductions in payments for orthopedic services by Blue Cross and Blue Shield of Delaware (“Blue Cross”). The defendant allegedly orchestrated a price-fixing boycott by which its members reached an understanding that they would negotiate with Blue Cross only through the Federation in order to extract higher fees than Blue Cross had offered and thus to prevent other health care insurers in Delaware from seeking to reduce their fees paid to orthopedic surgeons.

On October 22, 2001, the parties submitted a proposed Final Judgment and a Stipulation signed by the parties consenting to entry of the proposed Final Judgment, and the United States also submitted a Competitive Impact Statement. The proposed Final Judgment prohibits the Federation’s alleged illegal practices and prevents their renewal, enjoining the Federation from engaging in practices that would limit competition among Delaware orthopedic surgeons in the sale of orthopedic services and among physicians throughout the nation in the sale of their services. The Competitive Impact Statement explains the basis for the Complaint and the reasons why entry of the proposed Final Judgment will be in the public interest. The Stipulation provides that the proposed Final Judgment may be entered by the Court after completion of the procedures required by the APPA.

II. Compliance with the APPA

The APPA requires a sixty-day period for the submission of public comments on the proposed Final Judgment. 15 U.S.C. § 16(b). In this case, the sixty-day comment period commenced on November 20, 2001, and ended on January 22, 2002. During this period, the

United States received one comment on the proposed Final Judgment. After carefully considering this comment, the United States concluded, as explained in its Response to Public Comments (D.I. 232), that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint.

As the Certificate of Compliance filed by the United States simultaneously with this Memorandum demonstrates, the procedures required by the APPA for entry of the proposed Final Judgment have been completed. It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Final Judgment. The Court will retain jurisdiction to construe, modify or enforce the Final Judgment.

III. Standard of Judicial Review

Before entering the proposed Final Judgment, the Court is to determine that the Judgment "is in the public interest." In making that determination, the Court may consider:

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment; and

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint, including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e).

The APPA permits a Court in making this determination to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the Complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v.

Microsoft Corp., 56 F.3d 1448, 1461-62 (D.C. Cir. 1995). In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."¹ Rather,

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508 at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a Court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) (citing United States v. Bechtel Corp., 648 F.2d 660, 665 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1457. Precedent requires that

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the

¹ 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and, where public comments have been filed, the Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A Court need not invoke any of them unless it believes that the proposed Final Judgment raises significant issues and that further proceedings would aid the Court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.²

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"³

Plaintiff incorporates here by reference those portions of its previously filed Competitive Impact Statement (pages 6-11) in which the United States explained how the proposed Final Judgment effectively remedies the violation alleged in the Complaint and prevents its recurrence. The public, including affected competitors and customers, has had an opportunity to comment on the proposed Final Judgment as required by law, and one comment was received. There has been no showing that the proposed settlement constitutes an abuse of the Department of Justice's discretion or that it is not consistent with the public interest.

² Bechtel, 648 F.2d at 665 (citations omitted)(emphasis added); see BNS, 858 F.2d at 462; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ") (citations omitted).

³ United States v. American Tel. and Tel Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (quoting Gillette Co., 406 F. Supp. at 716 (citations omitted)); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

IV. Conclusion

For the reasons set forth in this Memorandum and in the Competitive Impact Statement, the Court should find that the proposed Final Judgment is in the public interest and should enter that Judgment without further hearings.

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Respectfully submitted,

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