

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ARMCO DRAINAGE & METAL)
 PRODUCTS, INC.,)
)
 Defendant.)

Case No. 3804

**MEMORANDUM IN SUPPORT OF
THE UNITED STATES' MOTION
TO TERMINATE LEGACY
ANTITRUST JUDGMENT**

The United States of America (United States) respectfully submits this memorandum in support of its motion to terminate the above-captioned legacy antitrust judgment. The Court entered this judgment in 1961 in a case brought by the United States; thus, the judgment is fifty-eight years old. After examining the judgment—and after soliciting public comments on the proposed termination—the United States has concluded that termination of this judgment is appropriate. Termination will permit the Court to clear its docket, the Department to clear its records, and businesses to clear their books, allowing each to utilize its resources more effectively.

I. BACKGROUND

From 1890, when the antitrust laws were first enacted, until the late 1970s, the United States frequently sought entry of antitrust judgments whose terms never expired.¹ Such perpetual judgments were the norm until 1979, when the Antitrust Division of the United States Department of Justice (Antitrust Division) adopted the practice of including

¹The primary antitrust laws are the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, 15 U.S.C. §§ 12-27. The judgment the United States seeks to terminate with the accompanying motion concerns violations of these laws.

a term limit of ten years in nearly all of its antitrust judgments. Perpetual judgments entered before the policy change, however, remain in effect indefinitely unless a court terminates them. Although a defendant may move a court to terminate a perpetual judgment, few defendants have done so. There are many possible reasons for this, including that defendants may not have been willing to bear the costs and time resources to seek termination, defendants may have lost track of decades-old judgments, individual defendants may have passed away, or firm defendants may have gone out of business. As a result, hundreds of these legacy judgments remain open on the dockets of courts around the country. Originally intended to protect the loss of competition arising from violations of the antitrust laws, nearly all of these judgments likely are no longer necessary to protect competition.

The Antitrust Division recently implemented a program to review and, when appropriate, seek termination of legacy judgments. The Antitrust Division's Judgment Termination Initiative encompasses review of all of its outstanding perpetual antitrust judgments. The Antitrust Division described the initiative in a statement published in the Federal Register.² In addition, the Antitrust Division established a website to keep the public apprised of its efforts to terminate perpetual judgments that no longer serve to protect competition.³ The United States believes that its outstanding perpetual antitrust judgments presumptively should be terminated; nevertheless, the Antitrust Division is

²Department of Justice's Initiative to Seek Termination of Legacy Antitrust Judgments, 83 Fed. Reg. 19,837 (May 4, 2018), <https://www.gpo.gov/fdsys/granule/FR-2018-05-04/2018-09461>.

³*Judgment Termination Initiative*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/JudgmentTermination>.

examining each judgment to ensure that it is suitable for termination. The Antitrust Division is giving the public notice of—and the opportunity to comment on—its intention to seek termination of its perpetual judgments.

In brief, the process the United States is following to determine whether to move to terminate a perpetual antitrust judgment is as follows:

- The Antitrust Division reviews each perpetual judgment to determine whether it no longer serves to protect competition such that termination would be appropriate.
- If the Antitrust Division determines a judgment is suitable for termination, it posts the name of the case and the judgment on its public Judgment Termination Initiative website, <https://www.justice.gov/atr/JudgmentTermination>.
- The public has the opportunity to comment on each proposed termination within thirty days of the date the case name and judgment are posted to the public website.
- Following review of public comments, the Antitrust Division determines whether the judgment still warrants termination; if so, the United States moves to terminate it.

The United States followed this process for the judgment it seeks to terminate by this motion.⁴

The remainder of this memorandum is organized as follows: Section II describes the Court’s jurisdiction to terminate the judgment in the above-captioned case. Section III explains that perpetual judgments rarely serve to protect competition and those that

⁴The United States followed this process to move several other district courts to terminate legacy antitrust judgments. See United States v. Am. Amusement Ticket Mfrs. Ass’n, Case 1:18-mc-00091 (D.D.C. Aug. 15, 2018) (terminating nineteen judgments); In re: Termination of Legacy Antitrust Judgments, No. 2:18-mc-00033 (E.D. Va. Nov. 21, 2018) (terminating five judgments); United States v. The Wachovia Corp. and Am. Credit Corp., Case No. 3:75CV2656-FDW-DSC (W.D.N.C. Dec. 17, 2018) (terminating one judgment); United States v. Capital Glass & Trim Co., et al., Case No. 3679N (M.D. Ala. Jan. 2, 2019) (terminating one judgment); United States v. Standard Sanitary Mfg. Co., et al., Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments).

are more than ten years old presumptively should be terminated. This section also describes the additional reasons why the United States believes this judgment should be terminated. Section IV concludes. Appendix A attaches a copy of the final judgment that the United States seeks to terminate.

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENT

This Court has jurisdiction to terminate the judgment in the above-captioned case. The judgment, a copy of which is included in Appendix A, provides that the Court retains jurisdiction. In addition, the Federal Rules of Civil Procedure grant the Court authority to terminate the judgment. Rule 60(b)(5) and (b)(6) provides that, “[o]n motion and just terms, the court may relieve a party . . . from a final judgment . . . (5) [when] applying it prospectively is no longer equitable; or (6) for any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(5)-(6); see McDonald v. Armontrout, 908 F.2d 388, 390 (8th Cir. 1990) (“The district court retains authority over a consent decree, including the power to modify the decree in light of changed circumstances, and is subject to only a limited check by the reviewing court”); see also Smith v. Bd. of Educ. of Palestine-Wheatley Sch. Dist., 769 F.3d 566, 572 (8th Cir. 2014) (“federal courts of equity [have] substantial flexibility to adapt their decrees to changes in the facts or law”).

Given its jurisdiction and its authority, the Court may terminate this judgment for any reason that justifies relief, including that the judgment no longer serves its original purpose of protecting competition.⁵ Termination of this judgment is warranted.

III. ARGUMENT

Under the provisions of the 1961 judgment in the above-captioned case, a manufacturer of corrugated culvert⁶ was prohibited from engaging in practices related to price fixing, allocation of customers, and attempting to eliminate competitors and potential competitors in the corrugated culvert market through coercion. The manufacturer was also prohibited from being a member, or participating in the activities, of any trade association or other similar group of corrugated culvert manufacturers that engaged in price fixing or customer allocation.

It is appropriate to terminate the perpetual judgment in this case because it no longer continues to serve its original purpose of protecting competition. The United States believes that the judgment presumptively should be terminated because its age alone suggests it no longer protects competition. Other reasons, however, also weigh in favor of terminating this judgment, including that the defendant no longer exists, and terms of the judgment merely prohibit that which the antitrust laws already prohibit.

⁵In light of the circumstances surrounding the judgment for which it seeks termination, the United States does not believe it is necessary for the Court to make an extensive inquiry into the facts of the judgment to terminate it under Fed. R. Civ. P. 60(b)(5) or (b)(6). This judgment would have terminated long ago if the Antitrust Division had the foresight to limit it to ten years in duration as under its policy adopted in 1979. Moreover, the passage of decades and changed circumstance since their entry, as described in this memorandum, means that it is likely that the judgment no longer serves its original purpose of protecting competition.

⁶As described in the judgment (see Appendix A, section II(B)), “‘corrugated culvert’ means any tube or channel commonly used for drainage purposes, constructed from corrugated culvert sheets, whether plain, dipped, galvanized or paved, including full circle culvert, part circle culvert, nestable culvert and arches.”

Under such circumstances, the Court may terminate this judgment pursuant to Rule 60(b)(5) or (b)(6) of the Federal Rules of Civil Procedure.

A. The Judgment Presumptively Should be Terminated Because of its Age

Permanent antitrust injunctions rarely serve to protect competition. The experience of the United States in enforcing the antitrust laws has shown that markets almost always evolve over time in response to competitive changes. These changes may make the prohibitions of decades-old judgments either irrelevant to, or inconsistent with, competition. These considerations, among others, led the Antitrust Division in 1979 to establish its policy of generally limiting judgments to a term of ten years.⁷ The judgment in the above-captioned matter—which is decades old—presumptively should be terminated for the reason that led the Antitrust Division to adopt its 1979 policy of generally limiting judgments to a term of ten years.

B. The Judgment Should be Terminated Because it is Unnecessary

In addition to age, other reasons weigh heavily in favor of termination of this judgment. These reasons include: (1) the defendant no longer exists in its original form, and (2) the judgment largely prohibits that which the antitrust laws already prohibit. Each of these reasons suggests the judgment no longer serves to protect competition. In this section, we describe these additional reasons.

⁷U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL at III-147 (5th ed. 2008), <https://www.justice.gov/atr/division-manual>.

1. The Defendant No Longer Exists In Its Original Form

The Antitrust Division believes that Armco Drainage & Metal Products, Inc. no longer exists. The Antitrust Division believes that Contech Engineered Solutions is Armco's successor, but there is no reason to believe that Contech has engaged in anti-competitive behavior. In the event that the Division discovers evidence of Contech engaging in price-fixing or customer allocation activities, the Division would open a new enforcement action rather than pursuing those antitrust violations as a contempt action in violation of the 1961 judgment.

2. Terms of Judgment Prohibit Acts Already Prohibited by Law

The Antitrust Division has determined that the core provisions of the judgment in this case prohibit acts that are already illegal under the antitrust laws. As noted earlier, the judgment in this case prohibited the defendant from engaging in practices related to price fixing, allocation of customers, and attempting to eliminate competitors and potential competitors in the corrugated culvert market through coercion, or from participating in a trade association or similar group that engaged in the aforementioned unlawful activities.

The unexpired terms amount to little more than an admonition that defendants shall not violate the law. Absent such terms, defendants who engage in the type of behavior prohibited by this judgment still face the possibility of imprisonment, significant criminal fines, and treble damages in private follow-on litigation, thereby making such violations of the antitrust laws unlikely to occur. To the extent this judgment includes

terms that do little to deter anticompetitive acts, it serves no purpose, and there is reason to terminate it.

C. There Has Been No Public Opposition to Termination

The United States has provided adequate notice to the public regarding its intent to seek termination of the judgment. On April 25, 2018, the Antitrust Division issued a press release announcing its efforts to review and terminate legacy antitrust judgments, and noting that it would begin its efforts by proposing to terminate judgments entered by the federal district courts in Washington, D.C., and Alexandria, Virginia.⁸ On July 13, 2018, the Antitrust Division listed the judgment in the above-captioned case for the District of North Dakota on its public website, describing its intent to move to terminate this judgment.⁹ The notice identified the case, linked to the judgment, and invited public comment. No comments were received.

IV. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgment in the above-captioned case is appropriate, and respectfully requests that the Court enter an order terminating it.

⁸Press Release, *Department of Justice, Department of Justice Announces Initiative to Terminate “Legacy” Antitrust Judgments*, U.S. DEP’T OF JUSTICE (April 25, 2018), <https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

⁹*Judgment Termination Initiative*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atr/JudgmentTermination>; *Judgment Termination Initiative: North Dakota*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atr/judgment-termination-initiative-north-dakota-district> (last updated Oct. 2, 2018).

Respectfully submitted this 5th day of April, 2019.

By: /s/ Don P. Amlin
DON P. AMLIN
Trial Attorney, Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 8010
Washington, DC 20530
(202) 598-8180
DC Bar Board ID No. 978349
Don.amlin@usdoj.gov
Attorney for United States

CHRISTOPHER C. MYERS
United States Attorney

By: /s/ Kent Rockstad
KENT ROCKSTAD
Assistant United States Attorney
Quentin N. Burdick United States Courthouse
655 First Avenue North - Suite 250
Fargo, ND 58102-4932
(701) 297-7431
ND Bar Board ID No. 05434
Kent.Rockstad@usdoj.gov
Attorney for United States