

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

IN RE: TERMINATION OF LEGACY
ANTITRUST JUDGMENTS IN THE
DISTRICT OF SOUTH CAROLINA

Civil Action No. _____

Consolidating:

UNITED STATES OF AMERICA,

Plaintiff,

v.

SONOCO PRODUCTS COMPANY,

Defendant.

Civil No. 67-520

UNITED STATES OF AMERICA,

Plaintiff,

v.

BANKERS TRUST OF SOUTH
CAROLINA, ET AL.,

Defendants.

Case No. 72-830

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE
UNITED STATES TO TERMINATE LEGACY ANTITRUST JUDGMENTS**

The United States respectfully submits this memorandum in support of its motion to terminate two legacy antitrust judgments. The Court entered the judgment in *Sonoco Products* in 1970, forty-nine years ago; it entered the judgment in *Bankers Trust of South Carolina* in 1973, forty-five years ago. After examining each judgment—and after soliciting public comment on each proposed termination, and receiving no comments—the United States has concluded that termination of these judgments is appropriate. Termination will permit the Court to clear its docket, and the Department to clear its records, 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 a term limit of ten years in nearly all of its antitrust judgments. Perpetual judgments entered before the policy change, like the two at issue here, 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

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

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, none of these judgments likely continues to do so because of changed circumstances.

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 examined each judgment in the two actions covered by this motion to ensure that it is suitable for termination. The Antitrust Division also gave the public notice of—and the opportunity to comment on—its intention to seek termination of these 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.

² Department 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>.

- 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 judgments 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 judgments in the above-captioned cases and the applicable legal standards. Section III explains that perpetual judgments rarely serve to protect competition and those that are more than ten years old presumptively should be terminated. This section also presents factual support for termination of each judgment. Section IV concludes. Appendix A attaches a copy of each final judgment that the United States seeks to terminate. Appendix B summarizes the terms of each judgment and the United States' reasons for seeking termination. Appendix C is a Proposed Order Terminating Final Judgments.

⁴ The United States followed this process to move several other district courts to terminate legacy antitrust judgments. *See, e.g., 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); and *United States v. Standard Sanitary Mfg. Co., et al.*, Case 1:19-mc-00069-RDB (D. Md. Feb. 7, 2019) (terminating nine judgments).

II. APPLICABLE LEGAL STANDARDS FOR TERMINATING THE JUDGMENTS

This Court has jurisdiction and authority to terminate the judgments in the above-captioned cases. Each 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 each 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 also Thompson v. U.S. Dep’t. of Housing & Urban Dev.*, 404 F.3d 821, 826 (4th Cir. 2005) (noting that the court’s inherent authority to modify a consent decree is encompassed in Rule 60(b)(5) and that the standard for modification is a flexible one)

Given its jurisdiction and its authority, the Court may terminate each judgment for any reason that justifies relief, including that the judgments no longer serve their original purpose of protecting competition.⁵ Termination of these two judgments is warranted.

III. ARGUMENT

It is appropriate to terminate the perpetual judgments in each of the two above-captioned cases because they no longer continue to serve their original purpose of protecting competition. The United States believes that the judgments presumptively should be terminated because their age alone suggests they no longer protect competition. Other reasons, however, also weigh in

⁴ In light of the circumstances surrounding the two judgments 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 each judgment to terminate them under Fed. R. Civ. P. 60(b)(5) or (b)(6). These two judgments would have terminated long ago if the Antitrust Division had the foresight to limit them to ten years in duration as under its policy adopted in 1979. Moreover, the passage of many decades and changed circumstance since their entry, as described in this memorandum, means that it is likely that the judgments no longer serve their original purpose of protecting competition.

favor of terminating these judgments, including that the terms of the judgment have been satisfied, and the terms of the judgment enjoin acts already prohibited by law. Under such circumstances, the Court may terminate the judgments pursuant to Rule 60(b)(5) or (b)(6) of the Federal Rules of Civil Procedure.

A. The Judgments Presumptively Should Be Terminated Because of Their 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 and technological changes. These changes may make the prohibitions of decades-old judgments either irrelevant to, or inconsistent with, competition. The development of new products that compete with existing products, for example, may render a market more competitive than it was at the time of entry of the judgment or may even eliminate a market altogether, making the judgment irrelevant. In some circumstances, a judgment may be an impediment to the kind of adaptation to change that is the hallmark of competition, undermining the purposes of the antitrust laws. These considerations, among others, led the Antitrust Division in 1979 to establish its policy of generally including in each judgment a term automatically terminating the judgment after no more than ten years.⁶ The two judgments in the above-captioned matters—both of which are decades old—presumptively should be terminated for the reasons that led the Antitrust Division to adopt its 1979 policy of generally limiting judgments to a term of ten years.

B. The Judgments Should Be Terminated Because They Are Unnecessary

⁶ U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL at III-147 (5th ed. 2008), <https://www.justice.gov/atr/division-manual>.

In addition to age, other reasons weigh heavily in favor of termination of each judgment.

1. Terms of the Judgment Have Lapsed or Have Been Satisfied

With respect to the *Bankers Trust of South Carolina* case, the judgment enjoined defendants for ten years from acquiring assets of any commercial bank situated in thirty-one counties in South Carolina (the specific counties are set forth in Section IV of the judgment). The ten-year period expired over thirty-five years ago, in 1983. Consequently, because *all* the substantive terms of the *Bankers Trust of South Carolina* judgment have lapsed or have been satisfied, the judgment should be terminated.

With respect to the *Sonoco Products* case, the judgment, among other things, required the defendant to sell cone board to any person on reasonable terms for five years (Section VI). The five-year period in Section VI of the judgment expired in 1975. In addition, the judgment required the defendant to divest certain cone-making equipment (Section VIII). This Court deleted Section VIII in an Order dated May 21, 1973 (see Appendix A for judgment modifications). This judgment should be terminated because its core terms have been satisfied.

2. Terms of the Judgment Enjoin Acts Already Prohibited by Law

The *Sonoco Products* judgment also enjoins defendant from agreeing not to compete in the manufacture or sale of cone board, cones, or cone making equipment (Section IV). This provision amounts to little more than an admonition that defendant must not violate the law. Absent such a term, defendant still is deterred from violating the law by the possibility of imprisonment, significant criminal fines, and treble damages in private follow-on litigation; a mere admonition to not violate the law adds little additional deterrence. To the extent a judgment includes terms that do little to deter anticompetitive acts, it should be terminated.

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 these two judgments. On April 25, 2018, the Antitrust Division issued a press release announcing its efforts to review and terminate legacy antitrust judgments.⁷ On August 15, 2018, the Antitrust Division listed the judgments in the above-captioned cases on its public website, describing its intent to move to terminate the judgments.⁸ The notice identified each case, linked to the judgment, and invited public comment. No public comments were received with respect to these two judgments.

IV. CONCLUSION

For the foregoing reasons, the United States believes termination of the judgments in each of the two above-captioned cases is appropriate, and respectfully requests that the Court enter an order terminating them. A proposed order terminating the judgments is attached as Appendix C.

⁷ Press Release, *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/departments-justice-announces-initiative-terminate-legacy-antitrust-judgments>.

⁸ *Judgment Termination Initiative*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atr/judgment-termination-initiative-south-carolina-district> (last updated October 2, 2018).

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Respectfully submitted,

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