

UNITED STATES OF AMERICA,
Plaintiff,
v.
THE PHILADELPHIA PRODUCE
CREDIT AND COLLECTION BUREAU,
Defendant.

Filed: June 27, 1983

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), the United States files this Competitive Impact Statement, relating to the proposed Final Judgment submitted for entry in this case.

On June 27, 1983, the United States filed a civil antitrust suit alleging that The Philadelphia Produce Credit and Collection Bureau (the "Bureau") participated in a conspiracy to fix credit terms in the sale of produce from 1896 until the date of filing of the complaint. The Bureau is a Pennsylvania corporation doing business in Philadelphia, Pennsylvania. It is an organization with 48 members, each of which is an independent wholesale produce firm doing business in the terminal market on Galloway Street in South Philadelphia.

The complaint alleges that the Bureau and co-conspirators agreed to fix credit terms employed in the sale of produce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The complaint asks the Court to: (1) find that the defendant violated the Sherman Act; (2) enjoin the defendant from continuing or renewing the conspiracy; and (3) require that notices be sent to Bureau members and their customers informing them of entry of the judgment.

On the same day the complaint was filed, the parties filed a proposed Final Judgment, Stipulation, and this Competitive Impact Statement. Under the Stipulation, the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act. Entry of the proposed Final Judgment will terminate the action. The Court will retain jurisdiction to interpret, modify or enforce compliance with the provisions of the proposed Final Judgment.

II.

Practices and Events Giving Rise to the Alleged Violation

Bureau members are independent produce distributors. The Bureau serves as the billing office of its members. It receives payment for goods sold on credit and collects debts not paid on time. The Bureau also distributes credit information and lists of delinquent customers to its members. The

complaint alleges that the Bureau and co-conspirators restrained trade by entering an agreement to fix and maintain credit terms employed in the sale of produce.

The Bureau was formed in 1896. Until late in 1982, the Bureau's by-laws provided that all credit extended by members in the sale of produce was due on the Saturday following the sale. Bureau members complied with this agreement. The by-laws also provided that the names of customers who did not pay bills by the Wednesday following the week of sale would be circulated to all Bureau members. Members of the Bureau agreed not to sell on credit to any person reported as delinquent, and until 1972 this agreement was reflected in the Bureau's by-laws. As recently as November 1981, the Bureau fined a member \$250 for making a credit sale to a person on the Bureau's delinquent list. In addition, members of the Bureau agreed not to grant credit to customers who had not obtained credit approval from the Bureau. These two agreements are alleged to have been entered for the purpose of forming and effectuating the conspiracy to fix credit terms.

Throughout recent years the Bureau regularly informed members and their customers of these agreements. For example, in collecting payments for amounts due its members the Bureau weekly sent each customer its bills incurred in dealings with all Bureau members that week. Along with the bills the Bureau

sent a form stating that all bills were due pursuant to the terms of the agreement challenged in this action. Similarly, the Bureau regularly reminded members not to sell to persons identified on a list circulated to members or to unapproved accounts. It also informed members when those who broke the rules were disciplined.

In December 1981 the Bureau obtained a copy of an Antitrust Division business review letter in another matter which stated that agreements among competitors on credit terms are unlawful. The Bureau then wrote the Antitrust Division concerning certain Bureau practices. In March 1982 the Division replied, stating that the practices described in the Bureau's letter appeared to violate the Sherman Act, and asking that specific steps be taken to remedy this situation. The Bureau did not respond to this letter in a satisfactory manner, but instead denied that it was engaged in the type of activity which would violate the Sherman Act.

In May 1982 the Antitrust Division opened an investigation to determine whether or not the Bureau was violating or had violated the Sherman Act. The investigation revealed, as the complaint alleges, that the defendant and co-conspirators had agreed to fix and maintain credit terms employed in the sale of produce.

III.

Explanation of the Proposed Final Judgment

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The proposed Final Judgment does not constitute an admission by any party as to any issue of law or fact. Under the provisions of the Antitrust Procedures and Penalties Act, entry of the proposed Final Judgment is conditioned upon a determination by the Court that the proposed Judgment is in the public interest.

The proposed Final Judgment contains two principal forms of relief. First, the defendant is enjoined from repeating the behavior that constituted the conspiracy. Second, the proposed Judgment places an affirmative obligation on the defendant to provide notice of this action to persons affected by the Bureau's rules as they relate to credit.

A. Prohibited Conduct

Section V of the proposed Judgment enjoins certain agreements with members or other distributors. Section V(a) enjoins all agreements on the time for which distributors extend credit. This was the heart of the alleged violation. Section V(b) bans agreements to withhold credit from any person. This prohibits the alleged ancillary agreements to withhold credit

from delinquents and unapproved accounts. Section V(c) preserves the right of members to collect credit without using the Bureau. This prevents the Bureau from policing credit restrictions by requiring members to allow the Bureau to collect all credit that members extend. Finally, Section V(d) enjoins agreements regarding the amount or any other term of credit that distributors grant. This covers agreements on dollar limits, interest charges, or any other term of credit.

Section VII enjoins use of forms and form letters that contain any reference to bills being due within a specified number of days, or on any day of the week. As indicated above, the Bureau has employed several forms of this nature. This prohibition is meant to bring the impropriety of Bureau use of such forms to the attention of Bureau officials and to ensure that such forms will not be used in the future.

Section VI indicates that the proposed Judgment does not interfere with the legitimate functions of the Bureau. It states that the Bureau can collect and circulate credit information, that it can collect bills, and that it can conduct its business in any other reasonable, lawful, commercial fashion.

B. Affirmative Obligations of the Defendant

Section IV requires the defendant, as a condition of the sale of all or substantially all of its assets used by it in collecting and distributing credit information and payments, to

require the purchaser to agree to be bound by the Final Judgment and to file the agreement with the Court.

Section VIII requires that notices be sent to persons affected by the Bureau's credit rules. Section VIII A requires notices to members. Section VIII B requires notices to customers of members who receive bills through the Bureau. Both groups were recipients of Bureau information regarding credit restrictions in the past. The notices, attached as exhibits to the proposed Judgment, spell out the rights and obligations of members, their customers, and the Bureau so that all know what is allowable behavior.

The notices refer to the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499(a)-(s). That Act requires, inter alia, that dealers must pay promptly for fresh fruits and vegetables. 7 U.S.C. § 499(b)(4). United States Department of Agriculture rules provide that prompt payment within the meaning of the Act is payment within any agreed-upon time period or, in the absence of agreement, payment within ten days. 7 C.F.R. Part 46.2(aa). The proposed Judgment does not interfere with this scheme.

Section VIII C requires that the Bureau, within 30 days of entry of the Judgment and annually for five years, notify its officers, managers, and certain employees of the obligations imposed on each of them by the proposed Judgment. Section

VIII D requires the Bureau to provide a copy of the proposed Judgment to anyone who requests one and pays a reasonable copying fee. Section VIII E requires the Bureau for five years to report to the United States actions taken to ensure compliance with the proposed Judgment and to provide a copy of any new rule or by-law. Thus, the United States will receive reports which will allow it to police compliance with the notice provisions.

Finally, under Section IX of the proposed Final Judgment, the Justice Department will have access, upon reasonable notice, to the defendant's records and personnel to determine its compliance with the Final Judgment and may require the defendant to submit written reports with respect to any of the matters contained in the Final Judgment.

IV.

Competitive Effect of the Proposed Final Judgment

The relief encompassed in the Final Judgment is aimed at preventing any recurrence of the activities described in the complaint, and at educating Bureau members and their customers concerning their right to negotiate terms of sale. Agreements on credit terms interfere with the normal operation of competitive forces in the marketplace and, accordingly, result in artificially determined price levels.

Entry of the Final Judgment will ensure that each member of defendant independently determines its terms and conditions of credit in the sale of produce. This assurance is primarily provided by Sections V and VII, which forbid all agreements relating to credit and prohibit the Bureau from using forms which suggest the existence of common credit terms among members. In addition, the notice requirements of Section VIII will ensure that both members and their customers will receive notices informing them that any Bureau member is free to offer whatever credit terms it chooses. This should stimulate bargaining over credit terms and allow the level of credit in the market to reach its competitive equilibrium. Indeed, the fact that the Bureau will no longer have the power to enforce the agreements on credit will immediately result in a more competitive marketplace, since in the past the Bureau regularly found it necessary to take steps aimed at ensuring compliance with those agreements. After entry of the proposed Judgment, members who independently determine their terms and conditions of sale will have no reason to fear retribution by the Bureau.

V.

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 such person has suffered, as well as costs and reasonable attorneys fees. Entry of the proposed Final Judgment in this proceeding will neither impair nor assist the bringing of any such private antitrust action. Under Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed judgment has no prima facie effect in any private lawsuit that may be brought against the defendant.

VI.

Procedures Available for Modification of the Proposed Final Judgment

The proposed Final Judgment is subject to a stipulation between the United States and the defendant providing that the United States may withdraw its consent to the proposed Judgment at any time before it is entered by the Court. The Antitrust Procedures and Penalties Act conditions entry upon the Court's determination that the proposed Judgment is in the public interest. Under Section X of the proposed Final Judgment, the Court would retain jurisdiction over this action in order, among other things, to permit either party to apply for any necessary or appropriate modification of the proposed Judgment or construction of its provisions.

The Antitrust Procedures and Penalties Act provides a period of at least sixty days preceding the entry of the proposed Final Judgment within which any person may submit to the United States comments regarding the proposed Final Judgment. The United States will evaluate the comments and determine whether it should withdraw its consent. The comments and the response of the United States to the comments will be filed with the Court and published in the Federal Register in accordance with the Antitrust Procedures and Penalties Act.

Written comments should be submitted to:

Alan L. Marx, Chief
General Litigation Section
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

VII.

Alternatives to the Proposed Final Judgment

This proceeding does not involve any unusual or novel issues of fact or law which might make litigation a more desirable alternative than entry of the Final Judgment. All relief requested in the Complaint is included in the proposed Final Judgment.

The only alternative to a judgment such as that now proposed that the United States considered was seeking changes in Bureau practices without initiating court action. However, as discussed above in section II, the Bureau did not respond

positively to the initial suggestions of the United States in this regard. The investigation which ensued convinced the United States that effective relief required entry of an enforceable court order such as that now proposed.

VIII.

Determinative Documents

There are no materials or documents that the United States considered determinative in formulating this proposed Final Judgment. Accordingly, none are being filed along with this Competitive Impact Statement.

Dated: June 27, 1983

Respectfully submitted,

/s/ Kenneth L. Jost
KENNETH L. JOST

/s/ Michael P. Lindemann
MICHAEL P. LINDEMANN

United States Department of
Justice
Antitrust Division
Washington, D.C. 20530
(202) 724-6468

Attorneys for the United States