Antitrust Alert

Out with the Old: DOJ Seeks to Terminate Outdated Antitrust Judgments

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The Department of Justice (“DOJ”) announced a new initiative to terminate “legacy” antitrust judgments that “no longer protect competition.” In 1979, the DOJ adopted a general practice to include sunset provisions that automatically terminate judgments, typically 10 years after entry. However, prior to that time, the DOJ often entered into final judgments that did not include express termination dates. There are nearly 1300 such legacy judgments that remain open on the dockets of courts nationwide. According to the DOJ, the vast majority of them no longer protect competition due to changes in industry conditions, economics, or law.

The Antitrust Division of the DOJ indicated that it will review all of the legacy judgments to identify those to be terminated. The Assistant Attorney General for the Antitrust Division said that this initiative is focused on legacy judgments that “do little more than clog court dockets, create unnecessary uncertainty for businesses, or, in some cases, may actually elicit anticompetitive market conditions.” All legacy judgments identified by the Antitrust Division’s review as no longer protecting competition will be posted to a public website and open to a 30 day public comment period. The DOJ lacks the authority to unilaterally terminate the decrees. Hence, following the comment period, if the Antitrust Division still believes termination is appropriate, it will file a motion to terminate in the appropriate court. The court filings and related court orders will also be posted on the public website.

About two dozen legacy judgments originally entered in the federal district courts in Washington, D.C. and Alexandria, Virginia, already have been identified by the Antitrust Division as candidates for termination. For example, DOJ pointed to a 1926 judgment that was modified in 1935 in U.S. v. American Amusement Ticket Manufacturers Association, which involved allegations that a trade association was used by competitors to allocate markets, fix prices, and exchange confidentially competitively sensitive information. The 1926 judgment prohibited the defendants from continuing such behavior. Showing its antiquated age, the 1935 modification clarified that nothing in the judgment prohibited defendants from activity permitted by the then newly enacted National Industrial Recovery Act of 1933. The original judgment and the modification did not include termination dates. The DOJ has not yet posted any information explaining why this legacy judgment is appropriate for termination, but it likely based its decision on changes to the industry since 1926.

Another example of a legacy judgment targeted for termination is U.S. v. Maryland and Virginia Milk Producers Association, Inc. The 1960 judgment arose out of the government’s 1956 complaint against an agricultural co-operative. The complaint alleged that the co-operative (1) attempted to monopolize interstate trade and commerce in fluid milk in violation of Section 2 of the Sherman Act; (2) conspired with a commercial dairy (Embassy Dairy) to eliminate and foreclose competition in the fluid milk market in violation of Section 3 of the Sherman Act; and (3) purchased all of the assets of that same commercial dairy (the largest milk dealer in the region) in violation of Section 7 of the Clayton Act. While the judgment included termination dates for some activities, ranging from 1 year to 10 years, the judgment did not include a termination date for other activities. One such activity with no termination date is perhaps the reason for DOJ termination, as the judgment barred the Maryland and Virginia Milk Producers Association from acquiring stock of specific dairies, including Embassy Dairy, which shuttered in 1998.

It is too soon to see what standard DOJ will suggest the courts apply with continuing jurisdiction over the judgments to determine whether to eliminate them — or whether anyone will come forward to advocate that any of the judgments should be preserved. The likely outcome is that the vast majority of the 1300 legacy judgments will ultimately be terminated.

The legacy judgments thus far identified by the Antitrust Division’s review can be found at https://www.justice.gov/atr/JudgmentTermination. Comments should be sent to JudgmentTerminationComments@usdoj.gov. The DOJ encourages the public to check the public website often for updates or to subscribe for email updates at https://public.govdelivery.com/accounts/USDOJ/subscriber/new.