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[Report No. 93-298]

IN THE SENATE OF THE UNITED STATES

FEBRUARY 6, 1973

Mr. TUNNEY (for himself, Mr. GURNEY, Mr. BAYH, and Mr. HART) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JUNE 30, 1973

Reported by Mr. TUNNEY, with amendments

[Omit the part struck through and insert the part printed in *italic*]

A BILL

To amend the antitrust laws of the United States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Antitrust Procedures and
4 Penalties Act".

5 CONSENT DECREE PROCEDURES

6 SEC. 2. Section 5 of the Act entitled "An Act to supple-
7 ment existing laws against unlawful restraints and monop-
8 lies, and for other purposes", approved October 15, 1914
9 (38 Stat. 730; 15 U.S.C. 16), is amended by redesignating
10 subsection (b) as ~~(b)~~ (i) and by inserting after subsection
11 (a) the following:

1 “(b) Any consent judgment proposed by the United
2 States for entry in any civil or criminal proceeding brought
3 by or on behalf of the United States under the antitrust laws
4 shall be filed with the district court before which that pro-
5 ceeding is pending and published in the Federal Register at
6 least sixty days prior to the effective date of such decree.
7 *Any written comments relating to the proposed consent judg-*
8 *ment and any responses thereto shall also be filed with the*
9 *same district court and published in the Federal Register*
10 *within the aforementioned sixty-day period. Copies of the*
11 *proposed consent judgment [and such other materials and*
12 *documents relating to considerations other than the antitrust laws*
13 *which the United States considered determinative*
14 *in formulating the proposed consent judgment] shall also be*
15 *made available to members of the public at the district court*
16 *before which the proceeding is pending and in such other*
17 *districts as the court may subsequently direct. Simultaneously*
18 *with the filing of the proposed consent judgment, unless*
19 *otherwise instructed by the court, the United States shall*
20 *file with the district court, cause to be published in the*
21 *Federal Register and thereafter furnish to any person upon*
request a public impact statement which shall recite—

22 “(1) the nature and purpose of the proceeding;

23 “(2) a description of the practices or events giving
24 rise to the alleged violation of the antitrust laws;

25 “(3) an explanation of the proposed judgment, relief

1 to be obtained thereby, and the anticipated effects on
2 competition of that relief, including an explanation of any
3 unusual circumstances giving rise to the proposed judg-
4 ment or any provision contained therein;

5 “(4) the remedies available to potential private
6 plaintiffs damaged by the alleged violation in the event
7 that the proposed judgment is entered;

8 “(5) a description of the procedures available for
9 modification of the proposed judgment

10 ~~“(6) a description and evaluation of alternatives~~
11 ~~actually considered to the proposed judgment and the~~
12 ~~anticipated effects on competition of such alternatives.]~~

*Delete
opening up
staff recs*

13 “(c) The United States shall also cause to be published,
14 commencing at least sixty days prior to the effective date of
15 such decree, for seven days over a period of two weeks in
16 newspapers of general circulation of the district in which the
17 case has been filed, in Washington, District of Columbia, and
18 in such other districts as the court may direct (i) a summary
19 of the terms of the proposed consent judgment, (ii) a sum-
20 mary of the public impact statement to be filed under subsec-
21 tion (b), (iii) and a list of the materials and documents
22 under subsection (b) which the United States shall make
23 available for purposes of meaningful public comment, and
24 the places where such material is available for public inspec-
25 tion.

1 “(e)(d) During the sixty-day period provided above,
 2 and such additional time as the United States may request
 3 and the court may grant, the United States shall receive and
 4 consider any written comments relating to the proposed con-
 5 sent judgment. The Attorney General or his designate shall
 6 establish procedures to carry out the provisions of this subsec-
 7 tion; but the sixty-day time period set forth herein shall not
 8 be shortened except by order of the district court upon a
 9 showing that extraordinary circumstances require such
 10 shortening and that such shortening of the time period is not
 11 adverse to the public interest. At the close of the period
 12 during which such comments may be received, the United
 13 States shall file with the district court and cause to be pub-
 14 lished in the Federal Register a response to such comments.

15 “(d)(e) Before entering any consent judgment proposed
 16 by the United States under this section, the court shall
 17 determine that entry of that judgment is in the public
 18 interest *as defined by law*. For the purpose of this determina-
 19 tion, the court shall *may* consider—

20 “(1) the public impact of the judgment, including
 21 termination of alleged violation, provisions for enforce-
 22 ment and modification, duration of relief sought, [^d antici-
 23 ~~pated effects of alternative remedies actually considered.~~] *delete 2*
 24 and any other considerations bearing upon the adequacy
 25 of the judgment;

1 " (2) the public impact of entry of the judgment
 2 upon the public generally and individuals alleging spe-
 3 cific injury from the violations set forth in the complaint¹

4 [including consideration of the public benefit to be de-
 5 rived from a determination of the issues at trial.]

} Delete

6 "~~(e)~~ In making its determination under subsection ~~(d)~~,
 7 *(f)* In making its determination under subsection *(e)*, the
 8 court may—

9 " (1) take testimony of Government officials or ex-
 10 perts or such other expert witnesses, upon motion of
 11 any party or participant or upon its own motion, as
 12 the court may deem appropriate;

13 " (2) appoint a special master, pursuant to rule
 14 53 of the Federal Rules of Civil Procedure, and such
 15 outside consultants or expert witnesses as the court
 16 may deem appropriate; and request and obtain the
 17 views, evaluations, or advice of any individual group
 18 or agency of government with respect to any aspect
 19 of the proposed judgment of the effect thereof in such
 20 manner as the court deems appropriate;

21 " (3) authorize full or limited participation in pro-
 22 ceedings before the court by interested persons or agen-
 23 cies, including appearance amicus curiae, intervention
 24 as a party pursuant to rule 24 of the Federal Rules
 25 of Civil Procedure, examination of witnesses or docu-

← Ambiguous

1 mentary materials, or participation in any other manner
2 and extent which serves the public interest as the court
3 may deem appropriate;

4 “(4) review any comments or objections concern-
5 ing the proposed judgment filed with the United States
6 under subsection ~~(e)~~ (d) and the response of the United
7 States to such comments or objections;

8 “(5) take such other action in the public interest
9 as the court may deem appropriate.

10 “~~(f)~~(g) Not later than ten days following the filing of
11 any proposed consent judgment under subsection (b), each
12 defendant shall file with the district court a description of
13 any and all written or oral communications by or on behalf
14 of such defendant, including any officer, director, employee,
15 or agent thereof, or other person ~~except counsel of record,~~

16 with any officer or employee of the United States concern-
17 ing or relevant to the proposed consent judgment, ^{and} prior
18 to the entry of any consent judgment pursuant to the anti-
19 trust laws, each defendant shall certify to the district court
20 that the requirements of this section have been complied
21 with and that such filing is a true and complete description
22 of such communications *known to the defendant or which the*
23 *defendant reasonably should have known.*

*with the
Attorney Gen-
eral or
his representa-
tives shall
be excluded
from the
requirements
of this subsec-
tion.*

24 “~~(g)~~(h) Proceedings before the district court under sub-
25 sections ~~(i)~~ and ~~(e)~~ (c) and (f), and public impact state-

1 ments filed under subsection (b) hereof, shall not be admis-
 2 sible against any defendant in any action or proceeding
 3 brought by any other party against such defendant under
 4 the antitrust laws or by the United States under section 4A
 5 of this Act nor constitute a basis for the introduction of the
 6 consent judgment as prima facie evidence against such de-
 7 fendant in any such action or proceeding.”

8 PENALTIES

9 SEC. 3. Sections 1, 2, and 3 of the Act entitled “An Act
 10 to protect trade and commerce against unlawful restraints
 11 and monopolies”, approved July 2, 1890 (26 Stat. 209;
 12 15 U.S.C. 1, 2, and 3) are each amended by striking out
 13 “fifty thousand dollars” and inserting “five hundred thousand
 14 dollars if a corporation; or, if any other person, one hundred
 15 thousand dollars”.

16 EXPEDITING ACT REVISIONS

17 SEC. 4. Section 1 of the Act of February 11, 1903 (32
 18 Stat. 823), as amended (15 U.S.C. 28; 49 U.S.C. 44),
 19 commonly known as the Expediting Act, is amended to
 20 read as follows:

21 “SECTION 1. In any civil action brought in any district
 22 court of the United States under the Act entitled ‘An Act
 23 to protect trade and commerce against unlawful restraints
 24 and monopolies’, approved July 2, 1890, or any other Acts
 25 having like purpose that have been or hereafter may be

1 enacted, wherein the United States is plaintiff and equitable
2 relief is sought, the Attorney General may file with the
3 court, prior to the entry of final judgment, a certificate that,
4 in his opinion, the case is of a general public importance.
5 Upon filing of such certificate, it shall be the duty of the
6 judge designated to hear and determine the case, or the chief
7 judge of the district court if no judge has as yet been desig-
8 nated, to assign the case for hearing at the earliest prac-
9 ticable date and to cause the case to be in every way
10 expedited.”

11 SEC. 5. Section 2 of that Act (15 U.S.C. 29; 49 U.S.C.
12 45) is amended to read as follows:

13 “(a) Except as otherwise expressly provided by this
14 section, in every civil action brought in any district court
15 of the United States under the Act entitled ‘An Act to pro-
16 tect trade and commerce against unlawful restraints and
17 monopolies’, approved July 2, 1890, or any other Acts hav-
18 ing like purpose that have been or hereafter may be enacted,
19 in which the United States is the complainant and equitable
20 relief is sought, any appeal from a final judgment entered
21 in any such action shall be taken to the court of appeals
22 pursuant to sections 1291 and 2107 of title 28 of the United
23 States Code. Any appeal from an interlocutory order entered
24 in any such action shall be taken to the court of appeals pur-
25 suant to sections 1292 (a) (1) and 2107 of title 28 of the

1 United States Code but not otherwise. Any judgment entered
 2 by the court of appeals in any such action shall be subject
 3 to review by the Supreme Court upon a writ of certiorari as
 4 provided in section 1254 (1) of title 28 of the United States
 5 Code.

6 “(b) An appeal from a final judgment pursuant to
 7 subsection (a) shall lie directly to the Supreme Court if—
 8 ~~“(1) upon application of a party filed within five~~
 9 days of the filing of a notice of appeal, the district judge
 10 who adjudicated the case enters an order stating that
 11 immediate consideration of the appeal by the Supreme
 12 Court is of general public importance in the Adminis-
 13 tration of justice; or *justice*.

14 ~~“(2) the Attorney General files in the district court~~
 15 a certificate stating that immediate consideration of the
 16 appeal by the Supreme Court is of general public im-
 17 portance in the administration of justice; or

18 ~~“(3) the district judge who adjudicated the case,~~
 19 *sua sponte*, enters an order stating that immediate con-
 20 sideration of the appeal by the Supreme Court is of
 21 general public importance in the administration of justice.

22 ^{Dec.} A court order ~~pursuant to (1) or (3)~~ or a certificate par-
 23 suant, to ~~(2)~~ must be filed within fifteen days after the filing
 24 of a notice of appeal. When such an order or certificate is
 25 filed, the appeal and any cross appeal shall be docketed in

1 the time and manner prescribed by the rules of the
2 Supreme Court. That Court shall thereupon either (1) dis-
3 pose of the appeal and any cross appeal in the same manner
4 as any other direct appeal authorized by law, or (2) in its
5 discretion, deny the direct appeal and remand the case to the
6 court of appeals, which shall then have jurisdiction to hear
7 and determine the same as if the appeal and any cross ap-
8 peal therein had been docketed in the court of appeals
9 in the first instance pursuant to subsection (a).”

10 SEC. 6. (a) Section 401(d) of the Communications
11 Act of 1934 (47 U.S.C. 401(d)), is repealed.

12 (b) The proviso in section 3 of the Act of February
13 19, 1903, as amended (32 Stat. 848, 849; 49 U.S.C. 43),
14 is repealed and the colon preceding it is changed to a
15 period.

16 SEC. 7. The amendment made by section 2 of this Act
17 shall not apply to an action in which a notice of appeal to
18 the Supreme Court has been filed on or before the fifteenth
19 day following the date of enactment of this Act. Appeal in
20 any such action shall be taken pursuant to the provisions
21 of section 2 of the Act of February 11, 1903 (32 Stat. 823),
22 as amended (15 U.S.C. 29; 49 U.S.C. 45) which were in

1 effect on the day preceding the date of enactment of this
2 Act.

Amend the title so as to read: "A bill to reform consent
decree procedures, to increase penalties for violation of the
Sherman Act, and to revise the Expediting Act as it pertains
to Appellate Review."