

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
) Plaintiff,)
))
) v.)
))
WICKES COMPANIES, INC.,)
) Defendant.)
_____)

MAR 23 1988

Civil Action No. **88-0782**

FILED

MOTION FOR ENTRY OF JUDGMENT

Plaintiff, having this date filed its Complaint in the above-captioned case, together with a Stipulation and proposed Final Judgment, hereby moves this Court for entry of Final Judgment. By agreement of the parties, the Final Judgment provides for the payment of a civil penalty of \$300,000 under Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1).

STATEMENT OF POINTS AND AUTHORITIES

The Complaint in this action alleges that defendant, in acquiring voting securities of Owens-Corning Fiberglas Corporation, violated Section (a) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino Act"), 15 U.S.C. § 18a(a), which prohibits certain acquisitions of voting securities or assets until a notification has been filed with the Department of Justice and the Federal Trade Commission and a waiting period has expired. The Complaint alleges that defendants were continuously in violation of the Hart-Scott-

Rodino Act during the period from July 18, 1986 through September 2, 1986. Section (g)(1) of the Hart-Scott-Rodino Act, 15 U.S.C. § 18a(g)(1), provides that any person who fails to comply with the Act shall be liable to the United States for a civil penalty of not more than \$10,000 for each day during which such person is in violation of the Act. Accordingly, the Complaint seeks "an appropriate civil penalty." As the Stipulation and proposed Final Judgment indicate, defendant has agreed to pay a civil penalty of \$300,000 within 10 days of entry of the Final Judgment.

The Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), requires that any proposal for a "consent judgment" submitted by the United States in a civil case filed "under the antitrust laws" be filed with the court at least 60 days in advance of its effective date, published in the Federal Register and newspaper for public comment, and reviewed by the court for the purpose of determining whether it is in the public interest. Key features of the APPA are preparation by the United States of a "competitive impact statement" explaining the proceeding and the proposed judgment, and the consideration by the court of the proposed judgment's competitive impact and impact on the public generally as well as individuals alleging specific injury from the violation set forth in the complaint.

The United States does not believe that the procedures of the APPA are required in this action because the Complaint

seeks, and the Final Judgment provides for, only the payment of civil penalties. In our view, a consent judgment in a case seeking only monetary penalties is not the type of "consent judgment" Congress had in mind when it passed the APPA. Civil penalties are intended to penalize the defendant for violating the law and, unlike injunctive relief, have no "competitive impact," and no effect on other persons or on the public generally. The legislative history of the APPA does not contain any indication that Congress intended to subject settlements of civil penalty actions to its competitive impact review procedures.^{1/}

Thus, courts to date have not required use of APPA procedures in cases involving only the payment of civil penalties. For example, a consent judgment for civil penalties under Section 11(1) of the Clayton Act was entered on November 1, 1983 in United States v. RSR Corp., Civ. No. CA3-83-1828-C (N.D. Tex.), without employing APPA procedures.^{2/} Previously, in United States v. ARA Services, Inc., 1979-2 CCH Trade Cases ¶62,861 (E.D. Mo.), a consent judgment calling for both equitable relief and civil penalties

^{1/} Civil penalties may also be assessed under Section 11(1) of the Clayton Act, 15 U.S.C. § 21(1), for violation of Federal Trade Commission orders.

^{2/} The United States had noted the issue and explained to the court that it believed the APPA inapplicable. A copy of the RSR Corp. consent judgment is attached hereto.


was approved by the court on August 14, 1979, after the United States had taken the position in APPA proceedings that the civil penalties component of that judgment was not open to public objection. See 44 Fed. Reg. 41583 (July 17, 1979).

There may be circumstances, of course, in which the procedures of the APPA, while not required, would serve the public interest. Thus, in one of the two cases involving civil penalties assessed for alleged violations of the Hart-Scott-Rodino Act, United States v. The Coastal Corp., 1985-1 CCH Trade Cases ¶66,425 (D.D.C.), the United States noted its view that the APPA was not applicable in actions where the complaint seeks and the final judgment provides for only the payment of civil penalties, but chose to employ the APPA procedures, believing that those procedures would in that particular case - the first brought under the Hart-Scott-Rodino Act - help describe to the public the circumstances and events that gave rise to the complaint and final judgment. 49 Fed. Reg. 36455 (Sept. 17, 1984).^{3/} There are no circumstances counselling in favor of using APPA procedures in this case.

^{3/} In the other case involving civil penalties under the Hart-Scott-Rodino Act, United States v. Bell Resources Ltd., 1986-2 CCH Trade Cases ¶67,321 (S.D.N.Y.), APPA procedures were followed; the complaint sought injunctive relief in addition to civil penalties.

For the above reasons, the United States asks the Court to enter the Final Judgment in this case.

Respectfully submitted,


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