MERGER ANTITRUST LAW

LAWJ/G-1469-05 Tuesdays and Thursdays, 3:30-5:30 pm
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Class 6 (September 19): Merger Antitrust Settlements (Unit 5)

On Thursday, we will explore merger antitrust settlements. Unavoidably, the materials for this unit are extensive. I will only be able to cover the highlights in class, so a lot of this unit you will have to learn through the class notes and reading materials. Hopefully, this reading guidance will ease the burden a bit. The bulk of the required reading are the papers associated with the consent settlement in the Iron Mountain/Recall Holdings investigation. Some of these papers are more important than others, as this reading guidance will explain.

Also, in this unit we will limit ourselves to settlements in horizontal merger cases. We will look at settlements in vertical merger cases later in the course.

Overview. In many transactions involving multiproduct companies or companies with multiple geographic locations, one or more parts of the deal may present antitrust problems while the rest of the transaction poses no competitive concerns. In these situations, the DOJ and FTC historically have agreed to allow the deal to proceed to closing provided that the buyer (or, in a merger, both merging parties) agree to "fix" the areas of competitive concern to the investigating agency in a way that ensures that the level of premerger competition will be preserved.[1] In horizontal transactions, this almost always means the divestiture of the lines of business and assets of one of the merging parties in each problematic area to a "divestiture buyer" that has the ability and incentive to continue the business postclosing with the same some to competitive force as the divestiture seller had premerger. In the vernacular, the divestiture buyer steps "into the shoes" of the divestiture seller. Ideally, with the fix in place, the number of competitors and their respective market shares will be the same postmerger as they were premerger; only the name of one of the competitors will change.

For example, in 2016 the FTC settled its investigation of the $28 billion supermarket merger between Koninklijke Ahold (Stop & Shop, Giant, and Martin's) and Delhaize Group (Food Lion and Hannaford) by accepting a consent settlement requiring the parties to divest 81 stores in 46 local markets in seven states to seven separate divestiture buyers. The FTC was concerned about the competitive effects of this transaction only where (1) the two companies operated

[1] The conventional wisdom since the early 1980s is that economic efficiencies provide the financial motivation for the parties to merge the parts of their deal that do not pose antitrust concerns and that society as well as the parties benefit from these efficiencies. Under this view, it is important for the investigating agency to carefully identify the antitrust-problematic portions of the deal and limit the settlement to the extent possible to only those portions, since an overly broad intervention will reduce the efficiencies resulting from the rest of the deal and deprive society of the associated benefits. As we will discuss in class, beginning in the last part of the Obama administration both the DOJ and the FTC became increasing skeptical that significant efficiencies arose from any part of the deal, and so overly broad settlements would not in fact harm society. This made the agencies much more demanding in seeking settlement relief even when the antitrust case was weak. Surprisingly, this skepticism—although not so openly expressed—appears to have continued in the Trump administration.

supermarkets in the same local area, and (2) within the local market there would be insufficient competition remaining following the merger if the companies were allowed to combine. The remainder of the deal—involving 1970 stores—did not present a competitive concern and the FTC allowed that part of the deal to proceed unimpeded. By requiring a divestiture of stores to various third parties in the problematic local markets, the FTC preserved the premerger number of competitors in those markets.[2]

I divide merger antitrust settlements into three separate exercises: (1) the negotiation with the staff of the substance of a consent settlement mutually acceptable to the investigating agency and the parties; (2) the reduction of the settlement agreement into a draft consent decree and the drafting of other documents required in the approval process; and (3) the approval of the consent decree by a federal district court (in the case of a DOJ challenge) or the full Commission (in the case of an FTC challenge) and the issuance of the consent decree as a judicially enforceable order.[3] We also will examine what happens when a party violates the provisions of a consent decree.

Negotiating the substance of the settlement. In horizontal mergers, the essence of a consent settlement is the lines of business and assets that the parties will be required to divest. Start with the overview on adjudicated relief and consent settlements (slides 4-8). This will provide you with some context for the rest of the materials in the unit.

The investigating staff takes the lead for the agency in negotiating a settlement. The staff will know the most within the agency about the potential competitive problems and have the best sense of what will be required to negate the competitive concerns. Negotiations with the staff can begin at any time during the investigation. Some counsel (I am one of them) will present a settlement proposal at the beginning of the investigation for problem areas that are easily identifiable by the staff and not reasonably defensible by the parties. The idea here is to cut your losses and not waste time and resources on the investigation of areas where there is little if any chance the agency will allow the deal to proceed without challenge. Better to get those areas behind you with a (partial) settlement so that the parties and the parties and the staff can focus on those areas that may be more defensible.

Slides 9-23 give a reasonably detailed treatment of what the antitrust agencies require in a consent settlement. In negotiating with the agencies, there are two overriding points to keep in mind:

(1) The agencies will require a consent settlement that they believe will negate their competitive concerns; they are not afraid of going to court and will not "compromise" by accepting less than the complete relief they believe is necessary just to get a settlement and avoid litigation.

(2) Relief in horizontal cases means *structural relief*—the merging parties will need to divest tangible and nontangible assets to a third party with the ability and incentive to operate them with the same competitive force postmerger as the divestiture seller did premerger. The federal agencies rarely accept any form of behavioral relief (promises to do or refrain

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2 See Decision and Order, *In re* Koninklijke Ahold, N.V., Dkt. No. C-4588 (F.T.C. Oct. 14, 2016). For a complete set of the publicly available documents relating to the consent settlement, see here.

3 Technically, only DOJ challenges result in consent *decrees*. FTC challenges formally result in consent *orders*. The common practice, however, is to use consent decrees and consent orders interchangeably without regard to the prosecuting agency.

> from doing something) and never accept commitments by the merging parties not to raise their prices as the basis for a settlement.[4]

After reading the slides, I would read the FTC Statement on Negotiating Merger Remedies (pp. 23-47). The statement, which was written in 2012 by the staff of the Bureau of Competition and represents staff views only, remains a good introduction to the consent decree negotiation process and is worth a careful read. While the basic principles remain in effect today, as the slides indicate the Commission has become more demanding in its requirements for acceptable relief. For example, a buyer upfront is usually required for any divestiture other than a standalone operating unit, divestitures of less than a standalone operating unit are increasingly difficult to get accepted, and a "mix and match" divestiture to cure a problem in a single relevant market is almost never accepted.[5] The DOJ has not released anything similar to the FTC Statement, but as a general rule the DOJ's practice is very similar to that of the FTC.[6]

I also have included in the reading materials excerpts from the 2017 FTC Merger Remedies Report (pp. 48-63). This is an important document, since it provides the empirical justification for the enforcement agencies taking a much more demanding approach to consent settlements.[7] In particular, the study found that all of the divestitures involving an ongoing business succeeded in preserving the premerger level of competition, but that only 70 percent of the divestitures involving less than an ongoing business succeeded. As an exception to the usual rule of reading everything in full text, I have included only the Executive Summary, the Introduction, and the section on Best Practices. The Best Practices section in particular deserves careful attention. A link to the full report is included in the Unit 5 supplemental materials on Canvas and AppliedAntitrust.com.

Drafting the settlement documents. There are a number of documents that must be prepared in connection with a consent settlement (slide 25). As we go through this section, I strongly suggest that you look at the corresponding documents in the Iron Mountain/Recall Holdings settlement. As

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[4] As we will discuss in class, the states are somewhat more willing to accept behavioral commitments in settlements than the DOJ and FTC.

[5] A mix and match divestiture is where the divestiture package consists of selected assets of both merging parties, rather than assets all from one party.

[6] FTC also maintains a page on its web site entitled Frequently Asked Questions About Merger Consent Order Provisions. I originally included it in the required reading but subsequently removed it in an effort to cut down the reading. While more current than the FTC's Statement on Negotiating Merger Remedies, the FAQs do not provide as much context for understanding consent decrees. If you have the time, you might want to take a look at it. In any event, you should know that it exists.

[7] A recent book by John Kwoka, which is very critical of the success of the antitrust settlements in preserving competition, is another source often cited by the agencies to justify a more demanding settlement policy. *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014). Both the FTC Remedies Study and the Kwoka book largely ignore two critical challenges in assessing the success of merger antitrust settlements: (1) the lack of a good metric for assessing quantitatively the level of competition in the market at any given point in time, and (2) determining how the premerger level of competition would have changed over time (if at all) in the absence of the merger. The first problem makes it fundamentally difficult to compare the level of competition in the market at the time of the study to the premerger level of competition (which, of course, is what these studies purport to do). Moreover, apart from the measurement difficulty, the correct comparison from a public policy perspective is not between the level of competition today under the settlement with the premerger level of competition, but rather between competition today under the settlement compared to what the level of competition would have been today in the absence of the transaction.

a start, read the DOJ news release to get your bearings (pp. 74-75). This will be important since we are going to skip around a bit as we go through the documents.

The complaint. In order for a consent decree to be enforced as a judicial or administrative order, it must be entered as a final judgment in the context of a litigation. Accordingly, a judicial or administrative *complaint* must be prepared to initiate the litigation (slide 26). Look at the Iron Mountain/Recall Holdings complaint (pp. 67-76), and then skim the docket sheet (pp. 77-79) to see how a typical consent decree proceeds in court. Most settlements, including Iron Mountain/Recall Holdings, are negotiated prior to the filing of the complaint, so that the complaint and the proposed consent decree are filed simultaneously by the agency (see p. 78 dkt. nos. 1, 4). In these precomplaint settlements, one important thing to keep in mind is that the agency does not finalize the complaint until after the agency has finalized the proposed consent decree. This ensures that the relief in the proposed consent decree completely will completely address the competitive concerns in the complaint. This practice incentivizes the merging parties to settle before litigation starts as well as protects the agency from the criticism that the settlement relief it negotiated does not resolve all of the competitive concerns in the complaint. If litigation starts without a settlement, the complaint will be drafted independently and may include allegations that increase the difficulty of reaching a settlement.

The proposed consent decree. The most important document, of course, is the *proposed consent decree* itself. This is the form of the consent settlement that the agency, with the support of the merging parties, will ask the court or full Commission to enter as the final judgment in the matter. As you will see, the consent decree contains many provisions in addition to the basic terms of what must be divested (slides 27-44). For example, in addition to requiring a divestiture of specified lines of business or assets, consent decree in horizontal merger settlements will:

1. Require the divestiture to be “absolute” (nonconditional)
2. State the purpose of the divestiture (for the purpose of construction in the event that the consent decree is ambiguous in application)
3. Authorize the Commission to appoint a divestiture trustee if the assets are not divested within the required time period
4. Possibly give the divestiture trustee the authority to expand the divestiture to include a larger package of assets
5. Require the merging parties to maintain the assets to be divested pending divestiture
6. Require the merging parties to represent that they can accomplish the remedy
7. Impose certain reporting obligations on the parties
8. Require the parties to provide the staff with access to company documents and employees.

In addition, a consent decree frequently contains other provisions, including specified transitional obligations, employee non-solicitation and incentive provisions, and information firewalls. Finally, in FTC settlements, the Commission’s Rules of Practice require a number of waivers and other recitations that must be included in every consent agreement. *See* Rule 2.32 of the Commission’s Rules of Practice, 16 C.F.R. § 2.32 (p. 18).

Technically, the consent decree at this stage is only a proposal for the court or the full Commission to review and then accept or reject according to the law governing the approval of consent decrees.

As you read the slides, look at the corresponding provisions in the Iron Mountain/Recall Holdings proposed final judgment (pp. 94-119). The Iron Mountain/Recall proposed final judgment follows the usual form for a DOJ settlement and contains the following sections:

	Whereas clauses
I.	Jurisdiction
II.	Definitions
III.	Applicability
IV.	Divestitures
V.	Appointment of Divestiture Trustee
VI.	Notice of Proposed Divestitures
VII.	Financing
VIII.	Hold Separate
IX.	Affidavits
X.	Compliance Inspection
XI.	Notification
XII.	No Reacquisition
XIII.	Retention of Jurisdiction
XIV.	Expiration of final Judgment
XV.	Public Interest Determination
	Signature line for the judge

Spend some time making sure that you know the purpose of each of these sections. Note that the remedial obligations in the settlement are drafted in the form of a court order (or an FTC cease and desist order), so that the judge or the FTC may enter the settlement as a final order without having to adapt its form.[8]

Order to maintain assets and hold separate. There is almost always some time, usually weeks if not months, between the time that the parties and the investigating agency reach a settlement and the time the divestiture sale is closed. During this time, the divestiture seller has some incentive to allow (if not cause) the businesses and assets to depreciate so as to diminish their competitive force in the hands of the future divestiture buyer for the future benefit of the combined firm. To prevent this, as part of the settlement the DOJ and FTC will insist that the parties maintain the viability, marketability, and competitiveness of the divestiture assets, operate them in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance), and use their best efforts to preserve the existing relationships with suppliers, employees, and others having a business relationship with the divestiture assets (slide 45).

In some settlements, where (1) the gap between the time of the settlement and the divestiture is likely to be several months (say, because the agency requires a buyer upfront and the parties want to run an auction process to sell the divestiture assets), and (2) it is possible to operate the divestiture assets on essentially a standalone basis (say, except for back office support), the agencies will require the combined firm to "hold separate" the divestiture assets (slide 47). The idea of a "hold separate" is to isolate the divestiture assets from the divestiture seller and operate them independently in the ordinary course of business, so that the divestiture seller cannot influence the business operations of the business unit to be divested and cannot obtain

8 As you know, when filing a motion—here, a motion to enter a final judgment—the moving party must include in its moving papers a form of the order it is asking the judge to enter.

competitively sensitive information with it. Separate management (usually management that will go with the divestiture assets to the divestiture buyer) will operate the business. The ordinary course restriction can affect the obligations of both the divestiture seller and the business to be divested. For example, if financial investments are necessary to maintain the divestiture business and the parent company ordinarily would provide these funds, then the parent company will be obligated to provide them under the hold separate order. Likewise, if the business plan contemplates certain investments that cannot be delayed until after the divestiture without harming the divestiture business, the parent company must make those investments. On the other hand, the ordinary course restriction precludes the management of the divestiture business from operating outside of the ordinary course, say, for example, by acquiring new businesses, expanding production capacity, entering into new sales territories not already contemplated by the preexisting business plan. The consent settlement will provide for a monitoring trustee to oversee compliance with any hold separate order.

In DOJ settlements, the maintain assets obligation and, if required, the hold separate obligation, will be contained in the proposed final judgment and perhaps in a separate order as well (see p. 109 (Proposed Final Judgement § VIII) and Hold Separate Stipulation and Order (pp. 84-83)). The parties stipulate they will observe pending the entry of the final judgment and these stipulations are "so ordered" by the court, thus making them judicially enforceable orders. In FTC settlements, the Commission will issue a separate *Order to Maintain Assets* or *Order to Hold Separate and Maintain Assets*, as the case may be.[9]

Competitive impact analysis. The Tunney Act, which governs the judicial procedure for approving and entering a DOJ consent decree as a final judgment, requires the DOJ to file with the district court and publish in the Federal Register a competitive impact statement providing:

1. the nature and purpose of the proceeding;
2. a description of the practices or events giving rise to the alleged violation of the antitrust laws;
3. an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
4. the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
5. a description of the procedures available for modification of such proposal; and
6. a description and evaluation of alternatives to such proposal actually considered by the United States.[10]

[9] See, for example, Order to Maintain Assets, *In re* Quaker Chem. Corp., No. C-4681 (F.T.C. issued July 23, 2019), and Order to Hold Separate and Maintain Assets, *In re* Linde AG, No. C-4660 (F.T.C. issued Oct. 19, 2018). Links to both order can be found in the supplemental materials.

[10] Tunney Act § 2(b), 15 U.S.C. § 16(b).

The Tunney Act also requires the DOJ to file with the court and make available to the public copies of any "materials and documents which the United States considered determinative in formulating" the consent decree proposal.[11]

The idea behind requiring the DOJ to prepare and publish a competitive impact statement is to provide the public with a document explaining the alleged violation, the proposed consent decree, and other pertinent factors to enable to public to make informed judgments and to submit comments to the court about whether acceptance of the consent decree would be in the public interest. The FTC prepares a similar document called an Analysis to Agreement Containing Consent Orders to Aid Public Comment.[12] Take a look at the class notes (slides 47-48) and the Competitive Impact Statement in Iron Mountain/Recall Holdings. This is a fairly typical statement. You can just skim the first ten pages of the competitive impact statement (pp. 120-29), since they largely follow the complaint and the proposed consent decree and do not add anything new. Section IV (pp. 130-31) contains a brief paragraph on the rights of private antitrust litigants, and Section V (pp. 131-32) describes procedures for modification of the consent decree both before and after the entry of the final judgment. Section VI (p. 132) on alternatives to the proposed consent decree was probably regarded by the draftsmen of the Tunney Act as one of the more important sections of a competitive impact statement, has devoted into a highly uninformative boilerplate paragraph. Section VII (pp. 132-37), on the standard of review under the Tunney Act, which by the way is not one of the sections enumerated in the Act to be included, is essentially the DOJ's brief to the court on the limited nature of the court's review of the proposed consent decree and is worth a careful read. Section VIII (p. 137), on determinative documents, again was regarded by the draftsmen as one of the more important sections, is typically given the back of the hand. It is very rare for the DOJ to identify any determinative documents.

Consent decree procedure. The entry of a consent decree was once a simple and quick procedure. In a DOJ challenge, for example, the DOJ would file a complaint and simultaneously file a stipulation containing the consent agreement along with a proposed final judgment embodying the obligations of the consent agreement and a motion to enter the final judgment. Judges typically would grant the motion and enter the order without paying much, if any, attention to the allegations of the complaint and whether the consent decree adequately addressed the alleged harm, effectively "rubber stamping" the proposed consent decree. Something analogous happened at the FTC, although presumably the Commission was closer to the staff than the judge was to the DOJ and so the Commission probably had a better idea of the potential for the deal to be anticompetitive and the whether the proposed consent order would negate these concerns.

This all changed in the early 1970s. On February 29, 1972, Jack Anderson, a syndicated investigative reporter, published an column reporting on an memorandum allegedly written by Dita Beard, a lobbyist for International Telephone & Telegraph (ITT), indicating that ITT had pledged $400,000 for the 1972 Republican National Convention to be held in San Diego and had leveraged that contribution into a favorable consent decree settlement in pending cases brought by the Antitrust Division challenging three ITT conglomerate acquisitions.[13] ITT at the time was a $6.7 billion enterprise, the nation's ninth largest company, and a leader in making conglomerate

[11] *Id.*

[12] *See* FTC Rule 2.34(c), 16 C.R.F. 2.34(c).

[13] See Jack Anderson, *Secret Memo Bares Mitchell-ITT Move*, Wash Post., Feb. 29, 1972, at B11In 2019 dollars, this is over $2.4 million.

acquisitions. Beard denied writing the memo and ITT, which owned three hotels in San Diego and stood to make considerable profits if the convention was held in the city, had a legitimate reason for making the contribution. Still, there was enough smoke here to convince Congress that there should be a process to determine whether proposed consent decrees were in the public interest and the Tunney Act was the result.

Read the slides (52-58) and materials on DOJ consent settlement procedures (pp. 5-16) and then skim or even skip the FTC procedures (pp. 18-21). There are differences, but if you know the DOJ procedure it is easy to pick up the FTC procedure later.

Although not required by the Tunney Act, the DOJ as a matter of practice files an Explanation of Consent Decree Procedures (pp. 80-83) to explain to the judge—here, Judge Amit P. Mehta of the District Court of the District of Columbia—how the Tunney Act works. Exhibit 1 of the Explanation is the Hold Separate Stipulation and Order (pp. 84-93), while Exhibit 2 is the Proposed Final Judgment (pp. 94-119), both of which you should have already examined.

Judge Mehta "so ordered" the Hold Separate Stipulation and Order (pp. 138-140), converting it from an agreement between the parties into a court order enforceable by the contempt sanction. With the "ordering" of this document, the DOJ will no longer seek to block the closing of the transaction. Many deals close the day of or the day after the stipulation is "so ordered." Due to outstanding approvals the parties still needed from Australia, the Iron Mountain/Recall deal did not close until almost a month later (pp. 141-143).

The Tunney Act requires each defendant—here, both Iron Mountain and Recall—to file with the court not later than 10 days after the filing of the proposed consent decree a description of any written or oral communications by or on behalf of the defendant with any officer or employee of the United States concerning or relevant to the consent decree proposal. The Tunney Act exempts communications made by counsel of record alone with the Attorney General or other DOJ employees from this disclosure requirement. Iron Mountain's filing indicates that it had nothing to disclose (pp. 144-146), which is almost always the case. (Recall filed an almost identical document, which I did not include in the reading materials.)

Just skim the Federal Register notice providing notice to interested parties that they may comment on the proposed consent decree (pp. 147-159). Comments are rarely submitted in Tunney Act proceedings, but this one had a comment from the National Records Centers (pp. 160-162). The Tunney Act requires the DOJ to respond to any comments and file both the comments are the DOJ with the court (pp. 163-177).

The DOJ did not find the NRC comment meritorious and so did not withdraw the proposed consent decree. Instead, the DOJ filed a motion for entry of the proposed final judgment (pp. 178-181). Exhibit A of the motion is the original proposed Final Judgment (p. 182), so I did not include it again in the reading materials. Exhibit B is the DOJ's certificate that it has complied with all of the requirements of the Tunney Act (pp. 183-185), which alerts the court that it may now rule on the motion.

The court granted the motion, entered the proposed final judgment as the court's final judgment, and issued a Memorandum Opinion (pp. 186-195). The opinion is worth reading, especially for the court's observations on the Tunney Act's public interest standard. Courts frequently enter the consent decree as a final judgment without writing an opinion. I suspect that Judge Mehta wrote a more explanatory opinion in Iron Mountain/Recall to provide his reasoning for entering the proposed final judgment, notwithstanding the NRC's objections.

State consent decrees. In some circumstances, the states are willing to accept consent decrees with behavioral provisions that the DOJ has never required nor accepted. The Utica Hospitals settlement with the New York Attorney General is a good example. Read the press release (pp. 197-198) and skim the consent settlement (in New York called an assurance of discontinuance) (pp. 197-220). I say skim the consent settlement, but it is a very worthwhile read.

Consent decree violations. Finally, DOJ consent decrees are court orders enforceable through the contempt sanction, while FTC consent orders are enforceable in civil penalties actions. I have included a few slides at the end of the class notes that address consent decree violations (slides 59-65).

If you have any questions or comments, send me an e-mail. See you in class.

P.S. Since there is more than enough reading here, there is no homework assignment for this class.