

## MERGER ANTITRUST LAW

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Georgetown University Law Center  
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Tuesdays and Thursdays, 3:30-4:55 pm  
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### **Class 7 (September 18): Merger Antitrust Settlements (Unit 6)**

On Tuesday, we will finish Unit 5 on merger antitrust litigation and get through most if not all of Unit 6 on merger antitrust settlements. Most of what you need to know for Unit 6 is in the class notes and reading materials, and I will only cover the highlights in class.

*Overview.* First, read the overview on adjudicated relief and consent settlements (slides 4-7). This will provide you with some context for the rest of the materials in the unit.

*Consent decree procedure.* Read the slides on consent settlement documents (slides 9-20) and the associated materials on DOJ consent settlement procedures in the reading materials (pp. 5-16). The consent settlement documents in the Iron Mountain/Recall case study will be easier to understand if you have this background. You should read the slides, which cover both DOJ and FTC procedures, and the reading materials on the DOJ procedure with some care, but you can just skim or even skip the FTC procedures in the reading materials (pp. 17-20). There are differences, but if you know the DOJ procedure it is easy to pick up the FTC procedure later.

After reading these materials, I suggest that you turn to the Iron Mountain/Recall case study. The Iron Mountain/Recall transaction was reviewed by the DOJ, so the DOJ consent settlement procedures under the Tunney Act apply and the consent decree ultimately will be entered as a final judgment in federal district court. Read the DOJ press release (pp. 49-51) and skim the complaint (pp. 52-60) to get your bearings. Pay some attention to the docket sheet (pp. 61-63), so that you can see what papers are filed with the court in the course of the Tunney Act proceeding. Although not required by the Tunney Act, the DOJ as a matter of practice files an Explanation of Consent Decree Procedures (pp. 64-67) 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. 68-77). You should read this with some care. Exhibit 2 is the Proposed Final Judgment (that is, the consent decree the parties are asking the court to enter) (pp. 78-103). SKIP that document for now, but quickly read the Competitive Impact Statement (pp. 104-121).

Judge Mehta “so ordered” the Hold Separate Stipulation and Order (pp. 122-124), 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. 128-130).

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. 125-127), which is almost always the case. (Recall filed an almost identical document, which I did not include in the reading materials.) What is going on here you may ask. The Tunney Act was part of the Watergate reforms. ITT, which provided a large portion of the funding for the 1972 Republican National Convention, was in contact with a sympathetic President Nixon to shut down or settle leniently three DOJ merger antitrust investigations into pending ITT acquisitions, although ultimately the White House did not interfere into the investigations. These efforts to influence the investigations came out in the Watergate hearings, and the Tunney Act disclosure requirement was one result to try to ensure that future communications of this sort would be revealed to the court if a consent decree did result.

Just skim the Federal Register notice providing notice to interested parties that they may comment on the proposed consent decree (pp. 131-143). Comments are rarely submitted in Tunney Act proceedings, but this one had a comment from the National Records Centers (pp. 144-146). The Tunney Act requires the DOJ to respond to any comments and file both the comments and the DOJ with the court (pp. 147- 161).

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. 162-165). Exhibit A of the motion is the originally proposed Final Judgment (pp. 78-103), so I did not include it 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. 166-67), 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. 170-179). 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.

*Substantive requirements.* With the procedure out of the way, we can now turn to the substantive requirements of a proposed consent decree. The slides will give you a quick overview (slides 22-34). The FTC's FAQs on merger consent order provisions (pp. 23-33) provide an even better background and the excerpts from the 2017 FTC Merger Remedies Report will give you the latest thinking on how the FTC is tweaking its policies. The DOJ has not released similar documents, but its thinking on merger consent decree provisions largely mirrors that of the FTC.

With this background, we can return to the case study. Review either the DOJ press release (pp. 49-51) or the complaint (pp. 52-60) to refresh your recollection of the 15 relevant markets as to which the DOJ alleged the transaction would violate Section 7. Both the DOJ and FTC state that they will not accept a consent settlement that does not completely resolve their competitive concerns about the transaction. This is largely true in practice, but keep in mind that in the typical case where the settlement is negotiated precomplaint and the complaint and the settlement documents are filed simultaneously (as here), the settling agency can work backwards from the settlement agreement to write a complaint that the settlement will completely fix. It can be a bit most sticky for the agencies and the merging parties when the settlement is crafted in the middle of litigation after the complaint has been filed.

The substantive provisions of the settlement are contained in the proposed Final Judgment (pp. 78-103). 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.<sup>1</sup>

*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 35-39).

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

Dale

P.S. There is no homework assignment for this class.

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<sup>1</sup> 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.