MERGER ANTITRUST LAW

LAWJ/G-1469-05 Tuesdays and Thursdays, 3:00-5:00 pm
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Class 4 (September 10): Merger Antitrust Litigation and Settlements (Unit 4)

> *The primary source materials for this unit are voluminous. I suggest, despite anything to the contrary below, that you focus your attention on this reading guidance and the class notes, and dip into the primary source materials in light of the priority I assigned it below, your personal interests, and your available time. That said, you should spend at least the required 4.5 hours in preparing for class. In light of the volume of material, there is no homework for the class.*

Recall that remedies risk reflects the consequences of a finding that the transaction violates the antitrust laws. Remedies risk can be analyzed in terms of the possible outcomes of a merger investigation (or a litigation on the merits) and their associated probabilities of occurrence. This includes the range of possible "fixes" (restructurings) of a transaction to eliminate the violation or otherwise negate the concern of the relevant decision maker—the agency or the court—and the associated costs of these restructurings, as well as the possibility that there is no "fix" that would eliminate the antitrust problem.

Recall that there are four possible outcomes of a DOJ/FTC merger antitrust investigation (see slide 4):

(1) The investigating agency closes the transaction without taking enforcement and allows the deal to close unimpeded.

(2) Before or at the end of the investigation, the investigating agency and the merging parties agree to a consent settlement that obligates the merging parties to take some action (typically divest some identified businesses or assets) in order to negate the agency's competition concerns. As a practical matter, this avoids litigation and allows the deal to close subject to the consent settlement commitments. Although the consent agreement will be embodied in a judicial or administrative consent decree (which requires the filing of a complaint, and so technically occurs in the course of litigation), no evidence will be taken, no findings of fact will be made, and the consent decree will explicitly recognize that the merging parties admit no violation of the law. This is by far the most common outcome of a transaction that the agency concludes is problematic. The challenge for the investigating agency is to obtain all of the restructuring relief necessary to eliminate the likely anticompetitive effects of the transaction; the challenge for the merging parties (or, more specifically, the buyer) is to convince the investigating agency to preserve as much of the original deal as it can.

(3) At the end of the investigation, the investigating agency and the merging parties do not settle and the matter proceeds to litigation. Importantly, the DOJ is only a prosecutorial agency: it cannot order relief on its own and rather must obtain preliminary or permanent

relief through litigation in federal district court.[1] By contrast, the FTC does have quasi-adjudicative authority to order permanent injunctive relief (called a "cease and desist order") after an administrative trial on the merits. The FTC, however, lacks authority to order preliminary injunctive relief, so if it wants to block the closing of a transaction pending an administrative adjudication of the merits it must seek and obtain a preliminary injunction from a federal district court.

(4) At the end of the investigation, the investigating agency and the merging parties do not settle and the merging parties find either the likelihood of success at trial too low or the costs of litigation too high to proceed to litigation. In this situation, the merging parties voluntarily will abandon their transaction and extinguish the need for litigation.

In class, we will cover both litigation and settlements in antitrust merger cases. There is a lot of material here. If you are pressed for time, I would concentrate on the class notes. To make things easier to find, I have divided the class notes into two decks: 4A on litigation and 4B on settlements.

Unit 4A: Merger antitrust litigation. First, pay particular attention to the slides on the means and incentives to raise challenges (Unit 4A slides 4-6) and plaintiffs and forums (slides 7-13). You should also review the statutes providing for rights of action to the DOJ, the FTC, and private parties (which, for this purpose, include the states) (pp. 6-8). The typical litigation paradigms for the DOJ and FTC (slides 14-16) will be critical to an understanding of merger antitrust litigation. You can quickly read the slides on litigation timing (slides 17-21), the contrasts between the DOJ and FTC (slides 22-25), types of interim injunctions in merger antitrust litigation (slides 26-27), the *Winter* test for injunctive relief (slides 28-29), preliminary injunctions (slides 30-40), temporary restraining orders (TROs) (slides 41-43), and permanent injunctions (slides 44-45), since we will see these in application when we began to read case opinions. Rule 65 of the Federal Rules of Civil Procedure applies to all injunctive proceeding in federal district court, and you should at least skim it (p. 10).

There is a vigorous debate on whether the preliminary injunction standard for the FTC under FTC Act § 13(b) is more lenient than the preliminary injunction standard for the DOJ under *Winter*. You might find the excerpts from the briefs in the *Ardagh/St. Gobain* case interesting to see how the FTC sought to exploit this difference while the parties sought to minimize it (if not eliminate it altogether) (pp. 11-28). As a practical matter, however, the debate to date has been largely academic: while judges pay lip service to the different articulations of the standards, at least in the D.C. District Court where most government merger antitrust cases are brought, the judges understand that deals never survive the entry of preliminary injunction and so they treat merger antitrust preliminary injunctions under a permanent injunction standard (even though they never say this in the opinion, which would be reversible error).

I also have included some charts on the recent history of merger antitrust litigation by the DOJ and FTC (slides 47-57), but there is no need to study them in any detail. Just try to get an idea of the steps in the process and the length of time it typically takes.

I thought about including a docket sheet for a fully litigated merger antitrust case so that you could see the types of papers filed in these proceedings. I ultimately decided we will have killed enough trees with the other materials. But I have created a separate packet in the supplemental materials on the DOJ's challenge to Energy Solutions' proposed acquisition of Waste Control Specialists, and it

[1] The DOJ has no authority to seek civil fines for violations of any of the antitrust laws.

is worth skimming the docket sheet to get an idea of what happens in court when the DOJ challenges a merger.

There is a very short order in *Arch Coal* on "litigating the fix" (pp. 30-34). The idea here is that if the investigating agency refuses to settle an investigation on terms the parties are willing to accept and proceeds to litigation, the parties can restructure the deal on their own and the court will then adjudicate the merits of the restructured transaction and not the original transaction on which the challenge was based. Initially, the agencies were very opposed to this, but now the principle appears to be well established in the courts. There remain, of course, questions of how far the parties have to go in the restructuring—do they have to have a signed agreement with a divestiture buyer or is simply a promise to divest enough?—and how much advance warning of the restructuring must be given to the prosecuting agency, and how much opportunity does the agency have to vet the restructuring before a court will adjudicate the restructured transaction. The question of whether the parties' "fix" is adequate to eliminate the competitive problem, of course, is a subject for litigation.[2]

The notes on appeals—both when an appeal can be taken (slides 59-67) and the standard of review on appeal (slides 68-71)—contain details that are fundamental to litigation practice and antitrust counseling. If you already know all this from another course, you can just skim these slides. If this material is new or if you have forgotten the details, the appeal section of the class notes is well worth studying with some care. I also have included the relevant statutes and rules in the required reading (pp. 36-43). You should read 28 U.S.C. § 1291 (final decisions of district courts) and 28 U.S.C. § 1292 (interlocutory decisions) with some care. These are important statutes and you should know them. There is no need to study the remaining appellate materials in depth, but you should at least skim them so that you have a general idea of what is in them.

Unit 4B: Merger antitrust settlements. Unavoidably, the materials for this section are extensive. I will only be able to cover the highlights in class, so a lot of this 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 been willing 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.[3] In horizontal

[2] We will see an example in Unit 12 when we study the T-Mobile/Sprint merger. The DOJ accepted a consent decree, but multiple states—led by New York and California—rejected the fix as inadequate and sued to block the transaction. The district court's decision largely analyses the adequacy of the fix.

[3] 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

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 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 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.[4]

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 administrative challenge) and the issuance of the consent decree as a judicially enforceable order.[5] 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 (Unit 4B 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 investigating 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

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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 increasingly 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 at both the DOJ and FTC.

[4] *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.

[5] 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 identity of the prosecuting agency.

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 an agreement on at least those aspects of a settlement so that 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.[6]

(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 from doing something) and never accept commitments by the merging parties not to raise their prices as the basis for a settlement.[7]

After reading the slides, I would read the DOJ press release and the DOJ's Merger Remedies Manual, which was released on September 3, 2020 (pp. 45-84). This will give you a very good overview of what the DOJ demands in a consent decree. As a general rule, the FTC's practice is very similar to that of the DOJ; indeed, the DOJ's practice is modeled after the FTC's practice.[8] I also have included in the reading materials excerpts from the 2017 FTC Merger Remedies Report (pp. 85-98). This is an important document, since it provides the empirical justification for the enforcement agencies taking a much more demanding approach to consent settlements.[9] In

[6] Indeed, I believe that in at least one of my deals a consent settlement was scuttled by the investigating staff precisely because they wanted to try the case in court. But, at least in my experience, this is a very rare occurrence.

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

[8] The FTC Statement on Negotiating Merger Remedies, which was written in 2012 by the staff of the Bureau of Competition and represents staff views only, remains a good introduction to FTC consent decree negotiation process. You can find it is the supplemental materials. While the basic principles remain in effect today, the Commission has become more demanding in its requirements for acceptable relief, as the class notes indicate. For example, a buyer upfront is usually required for any divestiture other than a stand-alone operating unit, divestitures of less than a stand-alone 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. (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.) The 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.

[9] An important 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

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 4 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 you go through this section, I strongly suggest that you look at the corresponding documents in the Iron Mountain/Recall Holdings settlement. As a start, read the DOJ news release to get your bearings (pp. 102-03). 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. 104-13), and then skim the docket sheet (pp. 114-16) to get an idea of how a typical consent decree proceeds in court.

Most settlements, including the one in 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. 115 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 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)

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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 if the transaction had never been attempted.

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 investigating agency 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.[10]

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. 131-56). 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

[10] *See* Rule 2.32 of the Commission's Rules of Practice, 16 C.F.R. § 2.32.

desist order), so that the judge or the FTC may enter the settlement as a final order without having to adapt its form.[11]

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 stand-alone basis (say, except for back office support), the agencies will require the combined firm to "hold separate" the divestiture assets (slide 46). The idea of a "hold separate" order 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 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, or 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. 136 (Proposed Final Judgement § VIII) and Hold Separate Stipulation and Order (pp. 121-30)). The parties stipulate they will observe these orders pending the entry of the final judgment and these stipulations are "so ordered" by the court, thus making them judicially enforceable orders. In FTC

[11] As you know, when filing a motion—here, a motion to enter a final judgment—the moving party must state in its moving papers the form of relief sought. Fed. R. Civ. P. 7(b)(1)(C). The common practice is to include a form of the order it is asking the judge to enter. Some courts, including the District Court for the District of Columbia, require this is their local rules. *See* D.D.C. Civ. R. 7(c).

settlements, the Commission will issue a separate *Order to Maintain Assets* or *Order to Hold Separate and Maintain Assets*, as the case may be.[12]

Competitive impact analysis. The Tunney Act,[13] 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.[14]

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.[15]

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 of Agreement Containing Consent Orders to Aid Public Comment.[16] 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 10 pages of the competitive impact statement (pp. 157-74), since they largely follow the complaint and the proposed consent decree and do not add anything new. Section IV (pp. 167-68) contains a brief paragraph on the rights of private antitrust litigants, and Section V (pp. 166-67) describes procedures for modification of the consent decree both before and after the entry of the final judgment. Section VI (p. 169) on alternatives to the proposed consent decree, probably regarded by the draftsmen of the Tunney Act as one of the more

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

[13] While commonly called the Tunney Act after Senator John V. Tunney (D-Calif.), who originally introduced the bill and was its principal proponent, officially it is Antitrust Procedures and Penalties Act § 2, P.L.93-528, 88 Stat. 1706 (1974) (codified as amended at 15 U.S.C. § 16(b)-(h)).

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

[15] *Id*.

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

important sections of a competitive impact statement, has devolved into a highly uninformative boilerplate paragraph. Section VII (pp. 169-74), 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. 174), 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 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 a column reporting on a 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.[17] ITT at the time was a $6.7 billion enterprise, the nation's ninth largest company, and a leader in making conglomerate 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) on DOJ and FTC consent settlement procedures. Pay particular attention to the chart on slide 53. If the reading was not already so extensive, I would ask you to read the statutes and regulations governing these procedures. The DOJ materials are straightforward.[18] The FTC follows similar procedures, although its regulations distinguish between pre-administrative complaint settlements ("Part 2 settlements") and post-administrative complaint settlements ("Part 3 settlements").[19] After the Commission has voted to issue an administrative complaint, whether or not it actually has been served by the Secretary, the case is in adjudicative status and is

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[17] *See* Jack Anderson, *Secret Memo Bares Mitchell-ITT Move*, Wash. Post, Feb. 29, 1972, at B11. In 2019 dollars, this is over $2.4 million.

[18] *See* Antitrust Procedures and Penalties Act, Pub. L. No 93-528, § 2. 88 Stat. 1706, § 2 (Dec. 21, 1974) (current version at 15 U.S.C. § 16(b)-(h)); U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual Ch. 4 D (5th ed. updated Mar. 2014).

[19] See 16 C.F.R. §§ 2.31-2.34 (for pre-administrative complaint settlements ("Part 2 settlements")); 16 C.F.R. § 3.25 (for post-administrative complaint settlements ("Part 3 settlements)).

subject to the prohibition on ex parte communications with the Commissioners.[20] A consent agreement or settlement offer may be considered by the Commissioners, and the Commissioners may receive advice and comments of the staff concerning the terms of the settlement, only after the case has been withdrawn from adjudication. As a result, Part 3 settlements are governed by different rules than Part 2 settlements, although apart from the withdrawal from adjudication the documents and the procedures are roughly the same.

Although not required by the Tunney Act, the DOJ as a matter of practice files an Explanation of Consent Decree Procedures (pp. 117-20) 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. 121-30), while Exhibit 2 is the Proposed Final Judgment (pp. 131-56), both of which you should have already examined.

Judge Mehta "so ordered" the Hold Separate Stipulation and Order (pp. 175-77), 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. 178-80).

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. 181-83), 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. 184-96). Comments are rarely submitted in Tunney Act proceedings, but this one had a comment from the National Records Centers (pp. 197-99). The Tunney Act requires the DOJ to respond to any comments and file both the comments and the DOJ response with the court (pp. 200-14).

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. 215-18). Exhibit A of the motion is the original proposed Final Judgment (p. 219), 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. 220-32), 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. 223-32). 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

[20] *See* 16 C.F.R. 4.7.

more explanatory opinion in Iron Mountain/Recall to provide his reasoning for entering the proposed final judgment, notwithstanding the NRC's objections.[21]

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 59-71). Enforcement actions for a violation of a consent decree are rare, both because the merging parties for the most part satisfy their obligations and because, when violations occur, the parties typically had been operating in good faith to comply with the decree and the agency exercised its discretion not to challenge the violation. Two enforcement action, however, are worthy of note and are addressed in the slides. The *Boston Scientific* enforcement action (slides 64-65) deals with the failure of BSC to divest all assets required by the consent order. The *Couche-Tard* enforcement action challenges the failure of the merged firm to make the required divestitures within the time required by the consent decree. Notably, the *Couche-Tard* action also alleges that the merged firm failed to satisfy its reporting obligations under the consent order and to maintain the viability of one of the retail stores to be divested in violation of the FTC's Order to Maintain Assets. After you have read the Couche-Tard slides, read the post by Maribeth Petrizzi, Assistant Director for Compliance of the FTC Bureau of Competition, on the FTC Bureau of Competition blog on Real Deadlines and Real Consequences (pp. 99-100).

Utica Hospitals New York AG Settlement. The last two documents in the reading materials pertain to the settlement of a merger antitrust investigation by the New York Attorney General's Office into the proposed affiliation of Faxton-St. Luke's Healthcare and St. Elizabeth Medical Center, the only two general acute care hospitals in Utica, NY (pp. 234-57). The hospitals had submitted a certificate of need application to the New York State Department of Health in October to move forward with the affiliation, driven by doubt from both hospitals concerning their respective abilities to continue functioning independently in the low-income area. Moreover, the Department of Heath had found that neither FSL nor SEMC, by itself, had at the time sufficient licensed inpatient beds to accommodate the needs of the patient population in the greater Utica area. The hospitals argued that their affiliation under a common controlling parent corporation would allow them, given their very close proximity to one another, to reorganize their operations to eliminate unnecessary duplicative operations and coordinate clinical programs, enhance their ability collectively to ensure patient access to qualified specialists in a timely manner, obtain other cost efficiencies, and become more viable financially.

The settlement with the NYAG allowed the two financially troubled hospitals to combine their operations to reduce costs and enhance the quality and availability of key healthcare services for patients in the greater Utica area. The settlement differs from the usual federal agency settlement in that it contains significant constraints and obligations on the hospitals' postsettlement behavior. The settlement, for example, provides for rate protection for insurers by giving insurers the right to continue their currently-existing relationships with the hospitals for five years at current prices, subjected to annual increases not to exceed historic levels; prohibits the hospitals from requiring

[21] It is worth noting that if Judge Mehta found the objections meritorious and concluded that the proposed consent decree would not be in the public interest unless modified, Judge Mehta himself had no power to modify the consent decree. All he could do was to tell the parties the nature of the required modification and let them decide whether or not they would accept it. If they accepted the modification, Judge Mehta could enter the modified consent decree. If one or both parties objected, Judge Mehta would deny the motion to enter a consent decree and the parties would proceed to litigation.

independent physicians to work exclusively at the hospitals; and allows the NYAG to ensure that the hospitals have implemented their promised efficiencies prior to termination of the rate-protection provisions.

The settlement was memorialized in an "assurance of discontinuance," which is a common instrument under state law. New York law, for example, provides:

> In any case where the attorney general has authority to institute a civil action or proceeding in connection with the enforcement of a law of this state, in lieu thereof he may accept an assurance of discontinuance of any act or practice in violation of such law from any person engaged or who has engaged in such act or practice. Such assurance may include a stipulation for the voluntary payment by the alleged violator of the reasonable costs and disbursements incurred by the attorney general during the course of his investigation. Evidence of a violation of such assurance shall constitute prima facie proof of violation of the applicable law in any civil action or proceeding thereafter commenced by the attorney general.[22]

Unlike a consent decree, an assurance of discontinuance, is not a judicial order and cannot be enforced by criminal or civil contempt. Accordingly, there is no judicial proceeding for approving or entering an assurance of discontinuance. An assurance of discontinuance nonetheless is a stipulation of settlement, and will not be set aside or departed from absent a showing of such good cause as would invalidate a contract.[23] Assurances of discontinuance are typically enforced by an action by the attorney general seeking relief for the underlying substantive violation and for specific performance of the obligations in the assurance. Significantly, in such action, an assurance of discontinuance serves as prima facie proof of the offense.

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.

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[22] N.Y. Exec. Law § 63(15).

[23] *See, e.g.*, Term Indus., Inc. v. Essbee Estates, Inc., 451 N.Y.S.2d 128 (N.Y. App. Div. 1982)