MERGER ANTITRUST LAW

LAW-1469 Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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Class 5 (September 10): Merger Antitrust Settlements (Unit 5)

This is a voluminous unit. Despite anything to the contrary below, I suggest you spend the bulk of your time first on the reading guidance and the class notes. To give you an idea of the relative importance of the materials in the class notes, I would allocate (1) one-half of your time to Consent Settlements: An Introduction, the DOJ/FTC's "Acceptance Calculus," and Some New Developments, (2) one-third of your time to Consent Remedies in Horizontal Cases: The Details, and (3) one-sixth of your time to the consent Decree Approval Process and Consent Decree Violations.

With one exception, consider the reading materials to be supplemental. To the extent you can, dip into them in light of the priority I assigned below, your personal interests, and your available time. The class notes will give you the concepts and the rules, but the primary source materials will give you agency materials and some actual applications. The exception is Commissioner Phillips' speech at the end of the reading materials. Be sure to read it.

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, alternatively, 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 investigating agency or the court—and the associated costs of these restructurings. Remedies risk also considers the possibility that there is no "fix" that would eliminate the antitrust problem to the satisfaction of the investigating agency or the court, leaving no outcome that permits the consummation of any part of the transaction.

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

(1) *Close investigation*: The investigating agency closes the transaction without taking enforcement action and allows the deal to close unimpeded.

(2) *Consent settlement*: 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—including, in horizontal mergers, the divestiture of some identified businesses or assets—to negate the agency's competition concerns. As a practical matter, a consent settlement 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 state that the merging parties admit no violation of the law. Historically, consent settlements have been 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 the agency believes will result from an unrestructured transaction. The challenge for the merging parties (or, more specifically in most cases, the buyer) is to preserve as much of the original deal as possible.

(3) *Litigation*: 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 instead must obtain injunctive relief through litigation in federal district court.[1] By contrast, the FTC does have quasi-adjudicative authority to order permanent injunctive relief through an administrative "cease and desist order" entered after a successful 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) *Abandonment of the transaction*: 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 is too low or the costs of litigation are too high to proceed to litigation. In this situation, the merging parties voluntarily abandon their transaction and extinguish the need for litigation.

(5) *"Fix it first"*: Sometime before the end of the investigation, the merging parties elect to "fix it first," that is, eliminate the agency's antitrust concerns by restructuring the transaction to remove the problematic overlaps *before* consummating the transaction.[2] In most situations, this will require the merging parties to find a qualified divestiture buyer to purchase the overlapping business of one of the merging parties and close the divestiture sale before closing the primary transaction. In some situations, however, it may be possible to restructure the transaction to leave the seller's problematic overlapping business with the seller. In all cases, the merging parties must obtain the agency's agreement that the restructured transaction will negate the agency's concerns; otherwise, the agency could challenge the restructured transaction as a violation of Section 7.[3] If the agency is satisfied, the parties may close the restructured deal without a consent decree.

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[1] Note that neither the DOJ or FTC has authority to seek civil fines for violations of any of the antitrust laws. Unlike many jurisdictions (including the European Union), there are no civil fines for violation the U.S. antitrust laws.

[2] The merging parties then file their HSR forms for the restructured transaction (pulling their original filings if necessary), which now does not contain the problematic horizontal overlap. The merging parties must complete the divestiture sale before closing the main transaction because the HSR forms do not cover a transaction with the horizontal overlap.

[3] Consider a situation where the parties restructure a horizontal grocery store transaction to to eliminate the problematic overlaps by leaving the seller's overlapping stores with the seller, the seller intends to convert the retained grocery stores to parking lots, and in the absence of the transaction the seller would have continued to operate all stores as grocery stores. While the restructured transaction would have no overlaps, a direct consequence of the transaction is to substantially lessen competition in the grocery store markets in which the retained stores operated. There is no doubt that, in this situation, the investigating agency would challenge the restructured transaction as a violation of Section 7.

This class will explore settlements and "fix it first" solutions in horizontal antitrust merger cases.[4] Throughout modern antitrust history, consent settlements have been the prevailing means of resolving the competitive concerns of the enforcement agencies. However, with the Biden administration, a notable shift in perspective has occurred. Both FTC and the Antitrust Division now take the position that consent settlements often—if not almost always—fall short in adequately addressing anticompetitive concerns, thereby allowing potentially anticompetitive transactions to proceed despite the conditions imposed by a consent decree. The FTC under Chair Lina Khan has accepted only a limited number of consent decrees, and the Antitrust Division under AAG Jonathan Kanter has yet to accept a consent decree.[5] As a result, litigation and voluntary termination of transactions have become more common outcomes of merger investigations where the investigating agency concludes the transaction would violate Section 7. In addition, the "fix it first" solution has gained some limited traction, especially at the DOJ. Therefore, it is essential for practitioners, whether within the agencies or in private practice, to have a good understanding of the agencies' substantive requirements when considering whether to accept a settlement or a "fix it first" solution.[6]

There are two aspects to antitrust consent settlements: substantive and procedural. The materials for this class cover both. The more important aspect for this course is substantive: what is the minimum relief reasonably necessary to "fix" the problem, will the investigating agency accept this relief in a consent decree, and, if not, what relief, if any, will the agency demand to settle the investigation? This is a critical consideration in valuing a deal both for the buyer (who must decide what it is willing to pay) and the seller (who must model the maximum gain to the buyer from doing the deal when negotiating the sale price).[7] While the procedural aspect is also important—especially the drafting of the various papers necessary to memorialize the settlement—it is more in the weeds and will not have a material effect on deal value. You should have a general familiarity with consent decree procedure, but you can learn the details if and when you are actually involved

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I know of only one case that illustrates the principle. *See* Complaint, *Vons Cos*., 115 F.T.C. 710 (Aug. 7, 1992) (alleging that Von's acquisition of grocery stores from the William Bros. Markets, Inc. violated Section 7 in the San Luis Obispo supermarket market where Von's sought to eliminate the problematic overlap by selling the overlapping Williams grocery store to a drugstore operator that would not operate the store as a grocery store); 1992 FED. TRADE COMM'N ANN. REP. 34 (discussing case).

[4] We will look at settlements in vertical merger cases later in the course.

[5] There is one exception to the DOJ's practice, but it is very much an outlier. The DOJ refused to accept a divestiture consent decree to settle its investigation into Assa Abloy's pending acquisition of Spectrum Brands' Hardware and Home Improvement Division. The DOJ commenced litigation and the merging parties "litigated the fix" they had proposed. After six days of trial, the court abruptly paused the proceedings. Four days later, with the trial still paused, the DOJ accepted the "fix" in a consent settlement. Although there has been no formal acknowledgment of what happened, it appears clear that the court informed the DOJ that it was going to lose the case and reminded the merging parties of their continuing offer to accept a consent decree. The parties then settled. *See* Release, U.S. Dep't of Justice, Antitrust Div., Justice Department Reaches Settlement in Suit to Block ASSA ABLOY's Proposed Acquisition of Spectrum Brands' Hardware and Home Improvement Division (May 5, 2023).

[6] A "fix" in litigation is always a consent settlement proposed by the merging parties that has been rejected by the investigating agency. In effect, the merging parties will try to convince the court that the "fix" negates any anticompetitive concerns in the transaction and that the investigating agency was wrong in refusing to accept a consent settlement. In principle, the factors the court will consider in evaluating the "fix" should be the same the agency should consider in evaluating whether to accept a consent settlement.

[7] More on this in Class 7—the investment banking portion of the course.

in a matter that might end with a consent decree. For this unit, focus more on the substance and just skim the procedure in the class notes and reading materials.

> *On both the graded homework assignment and the final exam, expect to be asked to evaluate the minimum divestiture relief necessary to eliminate any anticompetitive concerns you have identified in a transaction. This evaluation may involve either proposing a consent settlement, litigating the fix, or pursuing a "fix it first." I provide this warning every year, yet a surprising number of students still fail to prepare adequately to address this issue.*

The basics. 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.[8] In horizontal transactions, the agencies historically have insisted that the 'fix" includes the divestiture of the lines of business and associated 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. The idea is that, with the fix in place, the number of competitors and their respective market shares in the problematic market will be the same postmerger as they were premerger, although the identity 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 following the merger if the companies were allowed to combine as originally planned. 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.[9]

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[8] 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. Beginning in the last part of the Obama administration, both the DOJ and the FTC became increasingly skeptical that significant efficiencies arise 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. This same skepticism has continued—indeed, increased—in the Biden administration.

[9] *See* Decision and Order, *In re* Koninklijke Ahold, N.V., Dkt. No. C-4588 (F.T.C. Oct. 14, 2016). For a complete set

Read with some care the legal technicalities are also important (slides 24-31). An interesting aspect of consent decrees, supported by *Cleveland Firefighters*,[10] is that the parties can include relief in a consent settlement entered as a final judgment in litigation that the court could not order after a finding of the merits in a fully litigated proceeding, provided that the "additional relief" does not conflict or violate the law on which the settled claim was based (slides 32-33). This is not a well-known principle in antitrust circles, and the Biden administration has yet to take advantage of it.[11]

Settlements in practice. I divide the practice of 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 final judgment.[12]

Negotiating the substance of the settlement. In horizontal mergers, the essence of a consent settlement is the lines of business and associated assets that the parties will be required to divest. Before negotiating a consent settlement with the investigating staff, you need to know what the agency wants in a consent decree. In the class notes, I outline my thoughts on the DOJ/FTC "acceptance calculus," along with some recent history (slides 34-48). The history is important. The historical norm since at least the 1980s has been to settle competitive concerns in horizontal mergers through divestiture consent decrees. However, beginning in the second half of the Obama administration, agency attitudes have changed dramatically and become much more demanding—indeed, more hostile—toward consent decree solutions. The class notes explore the reasons for the

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of the publicly available documents relating to the consent settlement, see here.

[10] Int'l Ass'n of Firefighters Local 93 v. City of Cleveland, 478 U.S. 501 (1986).

[11] The only merger matter of which I am aware that might have implicated *Cleveland Firefighters* involved the consent decree in The Thomson Corporation's 1997 acquisition of West Publishing Company. (I was the lead counsel for Thomson). West, Lexis-Nexis, and Thomson were the only significant legal publishers in the United States. The consent decree primarily involved the divestiture of certain legal books and treatises, but the DOJ also insisted that the merged firm license West "star pagination"—the page numbers in the official reporters published by West in which West (backed by the Eight Circuit) claimed a copyright—to any interested third party. West historically refused to license its "star pagination." I thought that a mandatory star pagination license was relief unrelated to the DOJ competitive concerns and so court could not order a mandatory license as relief after fully litigating the merits. Although not an issue in court, Judge Paul L. Friedman, one of my favorite judges, found the mandatory license was related to the competitive concerns in the DOJ's complaint (win some, lose some), so it is not technically an application of *Cleveland Fighters*.

The saga of the acquisition over the opposition of the DOJ, seven states, Lexis-Nexus and numerous others is fascinating. It is one of the few contested Tunney Act proceedings. For a small taste of the machinations in the deal, see United States v. Thomson Corp., 949 F. Supp. 907 (D.D.C. 1996) (denying the DOJ's motion to enter the proposed consent order as a final judgment), and Civ. A. No. 96–1415(PLF), 1997 WL 90992 (D.D.C. Feb. 27, 1997) (entering revised proposed consent decree as the final judgment). The acquisition was the subject of a major article in the American Lawyer. *See* John E. Morris, *How West Was Won*, AM. LAW., Sept. 1996, at 72.

[12] 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.

change and some possible implications (including "fix it first" solutions and "litigate the fix" if the matter proceeds to litigation) (see slides 48-56).[13]

The investigating staff knows the most within the agency about the potential competitive problems and has the best sense of what will be required to negate the competitive concerns. They will take the lead in negotiating the scope of the required divestitures and other relief (with the involvement of the front office behind the scenes). 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 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 an investigation of areas where there is little 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.

The class notes give a reasonably detailed treatment of the antitrust agencies' requirements in a consent settlement for the last 25 or more years before the Biden administration (slides 57-76). The new developments slides address the new types of provisions the Biden antitrust agencies have required in consent decrees (slides 77-86). The most significant of these developments is the FTC's reimposition in July 2021 of a pre-1995 requirement that consent decrees contain a "prior approval" provision, that is, a provision requiring that the respondents in the case obtain the advance approval of certain future transactions. As the slides explain, there are significant problems with a policy requiring prior approval, especially if it is applied to transactions that are HSR-reportable. The DOJ has never had such a policy, although it may have included prior approval provisions in some consent decrees for non-HSR-reportable transactions and will do so in the future when (not if) the DOJ begins to accept consent settlements. FTC consent decrees in the Biden administration also sometimes include "prior notice" provisions, which require the merged firm to provide the agency with notice before any non-HSR reportable acquisition in some defined product and geographic space during the term of the consent decree. The details of the prior notice provision are designed to mimic the HSR process. Finally, some FTC consent decrees attempt to require the divestiture buyer—typically not a party to the consent decree—to obtain the agency's prior approval of any resale of some or all of the divestiture assets to a third party during the term of the consent decree.

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 be successful in negating any anticompetitive effect of an unrestructured transaction; 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.

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[13] Another practical problem faced by the policy of the Biden antitrust agencies of rejecting most consent decrees is that courts think that divestiture consent decrees can and do work to negate antitrust concerns. As we will see, DOJ consent decrees must be approved by a district court—historically, almost always a distict court in the District of Columbia—and entered as a final judgment in the case. In these "Tunney Act" proceedings, the DOJ takes the lead in convincing the district court that the proposed consent decree divestiture will negate all the competitive concerns raised by the transaction. Moreover, the DOJ has not returned to a modern court to argue that a consent decree failed. So it is only natural for courts to be skeptical of the agencies' new resistance to consent settlments. This history also naturally makes courts more receptive in "litigate the fix" cases to rule against the government when the fix looks like the type of divestiture relief accepted in consent settlements by prior administrations.

(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 in horizontal mergers.[14]

After reading the slides, I would read the DOJ press release and the DOJ's Merger Remedies Manual, which the DOJ released on September 3, 2020 (pp. 5-44). Although predating the Biden administration, these materials will give you a very good overview of what the DOJ has demanded in the past in a consent decree. As a general rule, the FTC's practice is very similar to that of the DOJ; indeed, the DOJ models its practice after the FTC's practice.[15] I also have included in the reading materials excerpts from the 2017 FTC Merger Remedies Report (pp. 45-58) and a Petrizzi blog post (pp. 59-60). These are important documents since they provide the empirical justification for the enforcement agencies taking a much more demanding approach to consent settlements.[16] In particular, the study found that although all the divestitures involving an ongoing business succeeded in preserving the premerger level of competition, 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. I have included a link to the full report in the Unit 5 supplemental materials on Canvas and AppliedAntitrust.com.

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[14] As we will discuss in class, the states are somewhat more willing to accept behavioral commitments in horizontal merger settlements than the DOJ and FTC. Behavioral commitments were the common form of relief in problematic vertical mergers prior to the Trump administration. More on that later in the course when we take up vertical mergers.

[15] 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.

[16] A 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 if the transaction had never been attempted.

Before continuing, I should note that the merging parties can elect to complete the fix before the investigation is concluded, which can eliminate the need for a consent decree in some deals. The idea for a "fix it first" is for the parties to restructure the deal to eliminate any problematic horizontal overlap before the investigation ends so that there is no antitrust concern when the restructured deal closes. The most common situation is where the buyer is acquiring only part of the seller's business, the seller will remain in operation after the acquisition closes, the buyer and seller are willing to restructure the deal so that the seller retains its business(es) that create the antitrust concern, and the agency agrees that the seller can and will operate the retained business postmerger with the same competitive force as it had premerger. In effect, the seller becomes the divestiture "buyer." Since the problematic business will remain in the seller's hands and never be acquired by the buyer, the agency typically will not require a consent decree.

The Tupy/Teksid transaction illustrates this type of "fix it first" solution (pp. 62-64). Originally, Tupy was to acquire Teksid's entire iron automotive components business. In the investigation, the DOJ staff expressed concerns that the transaction would combine the two most significant suppliers of engine blocks and cylinder heads for heavy-duty engines to customers in North America. In response, the parties agreed to restructure the deal so that Tupy would acquire only Teksid's iron operations in Brazil and Portugal. With the restructuring, Teksid would retain its Mexico plant and other assets used to manufacture iron blocks and heads for U.S. automotive customers. With this restructuring, the DOJ permitted the deal to proceed without a consent decree.

Another "fix it first" scenario is where the primary buyer recruits a second buyer for a joint bid for the target. The purchase agreements—there is often one purchase agreement for each buyer, with the closing of each transaction contingent on the closing of the other transaction—provide for the second buyer to purchase directly from the seller the lines of business that would create an antitrust problem if acquired by the primary buyer. In some deals with multiple markets and uncertainty as to which markets on the margin the investigating agency will find problematic, the purchase agreements will allow the primary buyer to "put" additional lines of business and associated assets of the seller to the second buyer. In these situations, the purchase agreements usually contain price adjustments that satisfy both buyers and preserve the total consideration the seller will receive upon closing both transactions.[17]

Drafting the settlement documents. A number of documents must be prepared in connection with a consent settlement (see slide 88 for a summary). As you go through this section, if you have the time, look at the corresponding documents in the Iron Mountain/Recall Holdings settlement. Read the DOJ news release to get your bearings (pp. 66-67). This will be important since we will skip around a bit as we review the documents.

The complaint. For a consent decree to be enforceable as a judicial or administrative order, it must be entered as a final judgment in a litigation. Accordingly, a judicial or administrative *complaint* must be prepared to initiate the litigation (slide 89). First, look at the Iron Mountain/Recall Holdings complaint (pp. 68-77), and then skim the docket sheet (pp. 78-80) 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 before the filing of the complaint. This is called "settling the investigation." In these situations, the

[17] A variation is where the primary buyer has the right to "put" some of its own lines of business to the second buyer, enabling the primary buyer to "trade up" by acquiring the seller's overlapping line of business.

investigating agency simultaneously files the complaint and the proposed consent decree (see p. 79 dkt. nos. 1, 4). In these precomplaint settlements, an important thing to remember is that, in practice, the agency does not finalize the complaint until *after* the agency has finalized the proposed consent decree. This sequence enables the staff to draft a complaint that the relief in the proposed consent decree will completely address. If litigation starts without a settlement, the agency will draft the complaint assuming there will not be a settlement and may include allegations that increase the required scope of relief (e.g., include more markets in which there is an alleged anticompetitive problem), making settlement more difficult.[18]

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 the Commission (as the case may be) to enter as the final judgment in the litigation. As you will see, the consent decree contains many provisions besides the basic terms of what must be divested (slides 90-132). For example, in addition to requiring a divestiture of specified lines of business or assets, a 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 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 fulfill their obligations in the consent decree
7. Impose certain reporting obligations on the parties
8. Require the parties to provide the staff access to company documents and employees for the purpose of monitoring compliance with the consent decree.

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 precomplaint settlements, the Commission's Rules of Practice require a number of waivers and other recitations that must be included in every consent agreement.[19]

Technically, the consent decree at this stage is only a proposal for the court or the Commission to review and then accept or reject. As you read the slides, look at the corresponding provisions in the Iron Mountain/Recall Holdings proposed final judgment (pp. 95-120). The Iron Mountain/Recall

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[18] The FTC's Rules of Practice contain separate sections for settlements that occur during the course of an investigation ("Part 2 settlements") and settlements that occur after the issuance of an administrative complaint ("Part 3 settlements"). These are terms of art you should know. *See* 16 C.F.R. §§ 2.31-2.34 (nonadjudicative consent settlements), § 3.25 (consent settlements during administrative adjudication).

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

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 Commission may enter the settlement as a final order without having to adapt its form.[20]

Order to maintain assets and hold separate. There is almost always some time, usually weeks if not months, between the parties and the investigating agency finalizing their settlement negotiations and closing the divestiture sale. 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. 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 (see slides 115-16).

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 (slides 117-18). 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

[20] 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).

influence the business operations of the business unit to be divested and cannot obtain competitively sensitive information from it. Separate management (usually management that will go with the divestiture assets to the divestiture buyer) will operate the divestiture business. The ordinary course requirement 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 these funds 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 a monitoring trustee to oversee compliance with any separate hold 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. 110 (Proposed Final Judgement § VIII) and Hold Separate Stipulation and Order (pp. 85-94)). The parties stipulate they will observe these orders pending the entry of the final judgment and presumably are enforceable by the agency in contract.[21] However, once these stipulations are "so ordered" by the court, they become court orders enforceable through contempt sanctions. 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.[22]

Competitive impact analysis. The Tunney Act,[23] 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 ("CIS") 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

[21] This has not been tested to my knowledge.

[22] *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.

[23] 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 the Antitrust Procedures and Penalties Act § 2, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended at 15 U.S.C. § 16(b)-(h)).

6. a description and evaluation of alternatives to such proposal actually considered by the United States.[24]

(Slide 133). 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.[25]

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 the 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.[26] Look at the class notes (slides 133-34) and then at the Competitive Impact Statement in Iron Mountain/Recall Holdings. The Iron Mountain CIS is fairly typical of competitive impact statements, which, contrary to congressional design, are usually not very informative. You can skim the first ten pages of the CIS (pp. 121-31) since they largely follow the complaint and the proposed consent decree and do not add anything new. Section IV (pp. 131-32) contains a brief paragraph on the rights of private antitrust litigants, and Section V (pp. 132-33) describes procedures for modification of the consent decree both before and after the entry of the final judgment. Section VI (p. 133) on alternatives to the proposed consent decree, probably regarded by the drafters of the Tunney Act as one of the more important sections of a competitive impact statement, has devolved into a highly uninformative boilerplate paragraph. Section VII (pp. 133-38), 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. 138), on "determinative documents," again was regarded by the drafters 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 in their Tunney Act filings.

Consent decree procedure. The entry of a consent decree was once a quick and straightforward procedure. In a DOJ challenge, for example, the DOJ would file a complaint and simultaneously file a stipulation containing the consent agreement, a proposed final judgment, 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 complaint's allegations or 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, 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 in San Diego and had leveraged that

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

[25] *Id*.

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

contribution into a favorable consent decree settlement in three pending cases brought by the Antitrust Division challenging three ITT conglomerate acquisitions.[27] 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 class notes (slides 135-45) on DOJ and FTC consent settlement approval procedures. Pay particular attention to the chart on slide 137. 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.[28] The FTC follows similar procedures, although, as I noted earlier, its regulations distinguish between pre-administrative complaint settlements ("Part 2 settlements") and post-administrative complaint settlements ("Part 3 settlements").[29] After the Commission has voted to issue an administrative complaint, whether or not the Secretary has served it, the case is in adjudicative status and hence subject to the prohibition on ex parte communications with the Commissioners.[30] The Commissioners may consider a consent agreement or settlement offer, and the Commissioners may receive advice and comments from the staff concerning the settlement terms 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 motion regarding 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. 81-84) 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. 85-94), while Exhibit 2 is the Proposed Final Judgment (pp. 95-120), both of which you should have already examined.

Judge Mehta "so ordered" the Hold Separate Stipulation and Order (pp. 139-41), 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's practice is to permit 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. 142-44).

> *An important aside*. On at least one occasion, the presiding judge was surprised—and not too happy—to learn out that a deal had closed shortly after the judge "so ordered" the stipulation (which said nothing about the ability of the merging parties to close) and long before the

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[27] *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.

[28] *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).

[29] *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)).

[30] *See* 16 C.F.R. § 4.7.

public notice and comment period, much less when the judge was to make a final decision under the Tunney Act on whether entry of the consent decree is in the public interest. This happened to Judge Richard J. Leon in the CVS/Aetna transaction.[31] Judge Leon found out in an early status conference that the transaction had closed the day before and expressed his unhappiness to the DOJ lawyer with some vigor. The DOJ attorney was not really at fault for failing to inform Judge Leon of the closing since the DOJ had consistently followed the practice of allowing deals to close after the stipulation was "so ordered" in dozens of cases before the District Court of the District of Columbia over the past two or three decades. The DOJ reasonably assumed that its practice was well-known to the judges on the court. Regardless of who was at fault here (if anyone), judges do blow up at times at attorneys, and a reading of the short transcript (pp. 223-49) will help prepare you if you find yourself before an unhappy judge. It is hard to get through a career as a litigator without this happening. Take five minutes and read the transcript.

The Tunney Act requires each defendant—here, both Iron Mountain and Recall—to file with the court not later than ten 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. 145-47), 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 to interested parties inviting comments on the proposed consent decree (pp. 148-60). Third parties rarely submit comments in Tunney Act proceedings, but there was a comment from the National Records Centers in Iron Mountain/Recall (pp. 161-63). The Tunney Act requires the DOJ to respond to any comments and file both the comments and the DOJ response with the court (pp. 164-78). Although not required, the merging parties can elect to respond to any public comments as well. In this case, as in most cases, the merging parties elected not to respond and instead relied on the DOJ's response.

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. 179-82). Exhibit A of the motion is the original proposed Final Judgment (p. 183), so I did not duplicate 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. 184-86), 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. 187-96). 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.[32]

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[31] *See* United States v. CVS Health Corp., 407 F. Supp. 3d 45 (D.D.C. 2019) (entering consent decree). For links to some of the major filings in the case, see Unit 13 in AppliedAntitrust.com.

[32] 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

Another aside. Having finished federal consent decree procedure, in your spare time think about the separation of powers issues presented in the exchange between Judge Leon and the DOJ attorney in CVS/Aetna. What exactly was Judge Leon's role under the Tunney Act? If he did not approve of the consent decree, did he have any options other than to deny the DOJ's motion to enter the proposed consent decree as the final judgment? If Judge Leon denied the DOJ's motion, what options did the DOJ have? Suppose the DOJ and the merging parties could not negotiate a new proposed consent decree to satisfy Judge Leon's concerns (the typical course of action). Would the DOJ be required to proceed to litigate the merits for a permanent injunction of divestiture? Could the DOJ simply voluntarily dismiss the case and not attempt to disturb the now-consummated transaction?

Consent decree violations. Finally, DOJ consent decrees are court orders enforceable through the contempt sanction, while FTC consent orders are enforceable in civil penalty actions. I have included a few slides at the end of the class notes that address consent decree violations. The class notes give the necessary background (slides 146-52). Pay particular attention to the efforts beginning in the Trump administration and continuing in the Biden administration to include language in consent decrees that purport to change the standard for proving civil contempt (slides 149-51). I applaud their creativity, but can an agreement between the DOJ and the merging parties change the traditional judicial standard for finding civil contempt?

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. Three enforcement actions, however, are worthy of note and are addressed in the slides. The *Boston Scientific* enforcement action (slides 153-54) 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 (slides 155-66). 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. The *7-Eleven* action involves the failure to observe a prior notice requirement (slides 161-62). After you have read the *7-Eleven* 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. 59-60).

Utica Hospitals New York AG Settlement. In 2013, the parties settled 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. 198-221). Earlier, the hospitals had submitted a certificate of need application to the New York State Department of Health to move forward with the affiliation, driven no doubt by

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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, the parties would submit an amended proposed consent decree, which Judge Mehta could enter. If one or both parties objected to the modification and the parties could not negotiate an alternative amended proposed consent decree that satisfied Judge Mehta, Judge Mehta would deny the motion to enter a consent decree. Unless the merging parties voluntarily terminated their transaction, the matter almost certainly would proceed to litigation before Judge Mehta. (Remember, the proceeding before Judge Mehta started with the filing of a Section 7 complaint challenging the transaction on the merits; the consent decree was offered as a settlement in that merits proceeding.)

concerns by both hospitals regarding their respective abilities to continue functioning independently in the low-income area where they operated. The NYS Department of Health 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 New York AG was concerned that the affiliation agreement would amount to a merger to monopoly but, at the same time, recognized the need for restructuring the delivery of hospital services in the Utica area. 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 independent physicians to work exclusively at the hospitals, and allows the New York AG to ensure that the hospitals have implemented their promised efficiencies before termination of the rate-protection provisions.

The settlement was memorialized in an "assurance of discontinuance" (pp. 223-49), 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.[33]

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.[34] 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 actions, an assurance of discontinuance serves as prima facie proof of the offense.

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[33] N.Y. Exec. Law § 63(15).

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

A coda. Be sure to read then-Commissioner Noah Phillips' remarks at the Berkeley M&A Spring Forum (pp. 251-61). It is invaluable in understanding the current disputes at the FTC on settlement policy between the Neo-Brandeisians and the traditionists.

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