MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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Class 2 (August 28): TransDigm/Takata (Unit 1)

After finishing anything left over from Tuesday's class, we will turn to the remedy in *TransDigm/Takata*. In its complaint, the DOJ alleged that TransDigm's acquisition of SCHROTH from Takata violated Section 7 of the Clayton Act by posing a reasonable probability of substantially lessening competition in four worldwide markets. The government's request for relief appears in paragraph 43 of the complaint (p. 21):

IX. REQUEST FOR RELIEF

43. The United States requests that this Court:

a. adjudge and decree TransDigm's acquisition of SCHROTH to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. order TransDigm to divest all assets acquired from Takata Corporation on February 22, 2017 relating to SCHROTH Safety Products GmbH and Takata Protection Systems and to take any further actions necessary to restore the market to the competitive position that existed prior to the acquisition;

c. award the United States its costs of this action; and

d. grant the United States such other relief as the Court deems just and proper.

TransDigm faced a strategic choice: litigate the DOJ's claims or try to negotiate a settlement. The core divestiture demand was clear from paragraph 43(b): sell the SCHROTH business. But the DOJ's additional requests for relief created settlement complexity. The language requiring TransDigm to "take any further actions necessary to restore the market to the competitive position that existed prior to the acquisition" left undefined what those additional actions might entail. Similarly, the request for "such other relief as the Court deems just and proper" gave the government broad discretion to seek remedies beyond simple divestiture. To settle the case, TransDigm would need to negotiate not only the divestiture terms but also the full scope of what the DOJ might require to restore premerger competition.

TransDigm's settlement illustrates a broader strategic question that arises whether or not the deal has closed. In each case, the merging parties facing likely enforcement action confront the same basic choice: fight the government in court or negotiate a settlement that restructures the deal to address competitive concerns. When litigation prospects appear poor, can the parties craft a settlement that satisfies the agency's competitive concerns while still allowing some version of the transaction to proceed?

As you work through the TransDigm documents and remedies materials, focus on two key analytical questions: First, what drives agency settlement demands—why does the DOJ seek broad 'further relief' language beyond simple divestiture, and how do the remedies principles and divestiture paradigms explain those demands? Second, analyze the strategic calculus facing merging parties—what factors should influence whether to accept agency settlement terms or litigate on the merits? Pay particular attention to how the bargaining dynamics and legal technicalities in the class notes inform both the government's negotiating position and the company's response options.

Begin by reading the TransDigm consent settlement materials in the primary source readings (pp. 24–62). These include the complaint, the proposed final judgment (i.e., the consent decree), the Competitive Impact Statement, the stipulation, and the asset preservation order. Each of these documents plays a specific role in the formal process by which the DOJ settles merger cases under the Tunney Act. The complaint frames the legal theory of harm; the proposed final judgment sets forth the settlement terms; the Competitive Impact Statement explains how those terms remedy the harm and why they serve the public interest; the stipulation governs timing and process; and the asset preservation order provides interim relief to protect the remedy.[1]

Focus first on understanding the possible outcomes of merger investigations and how settlements fit into the broader enforcement landscape (pp. 135-38 and Unit 1B slides 2-3). Review the investigation outcomes note for detailed explanations of the five resolution paths available when agencies investigate mergers. As you work through these options, pay particular attention to how consent settlements historically dominated when agencies identified competitive problems, and note how the Biden administration's skepticism toward settlements disrupted this pattern (slides 4-7). The recent policy statements from Trump 2.0 officials suggest a return to more traditional settlement practices, making consent decrees once again the likely primary resolution mechanism (pp. 140-63 and slide 8). While you can skim these Trump 2.0 materials if pressed for time, they are central to understanding the administration's current consent decree policies. Consider how the availability of these different outcomes shapes the strategic choices and bargaining leverage of both agencies and merging parties—dynamics that will be central to analyzing the TransDigm case and the other settlement examples you will encounter throughout the course.

Next, focus on understanding the fundamental ideas behind divestiture remedies and what makes them work (slides 9-12). The core concept is deceptively simple: the divestiture buyer must 'step into the shoes' of the divestiture seller to preserve premerger competition levels. As you review the basic requirements, pay attention to the three keys that determine whether a consent decree will succeed: the existence of non-problematic deal elements, the separability of problematic parts, and the divestiture buyer's ability to operate with the same competitive force as the original seller. Consider how these requirements connect to Section 7's prohibition on transactions that "substantially lessen competition." Note also the legal nature of consent decrees, which are both contracts and judicial orders. This dual character shapes how they are negotiated, interpreted, and enforced.

The DaVita/University of Utah example illustrates these principles in action (slides 13-16). Notice how the FTC required divestiture of only the three Provo clinics that created the

[1] These documents are required by the Tunney Act and the DOJ's standard settlement practices in merger cases. We will examine the DOJ's settlement approval process—including the function of each document and the applicable statutory requirements—at the end of this reading guidance and in the corresponding section of the class notes.

problematic overlap, while allowing DaVita to acquire the other 15 clinics without issue. Review the divestiture process and key practical requirements that agencies impose (slides 17-18). Pay particular attention to how agencies ensure the divestiture buyer can operate immediately upon closing and the various restrictions placed on the divesting company to prevent interference with the divestiture buyer's competitive effectiveness. Then work through the three basic divestiture paradigms: standalone businesses, operating businesses, and asset packages (slides 19-23). Pay attention to how the choice among these approaches depends on the nature of the overlapping businesses and the capabilities of potential divestiture buyers, and note how the increasing preference for 'buyer upfront' requirements reflects agency skepticism about postsettlement execution risks.

You can skim the following materials if pressed for time, but you should be aware that they exist and inform the agencies' current thinking about remedy design and the relative effectiveness of different divestiture approaches. The DOJ Merger Remedies Manual will help you understand how these principles translate into practical enforcement standards, and will assist you in analyzing the TransDigm divestiture and explaining why the DOJ structured that remedy as it did (pp. 165-204). The excerpts from the FTC's 2017 Merger Remedies Report evaluate the success of selected FTC consent decrees from 2006 through 2012 (pp. 205-18). The study examined 89 merger orders and found that in the vast majority of cases, the Commission's remedies successfully protected or restored competition. Notably, all divestitures involving ongoing businesses were successful. While most divestitures of limited asset packages also succeeded, they performed less well. This empirical evidence supports the theoretical preference for divesting complete business units rather than asset fragments.

Now examine the strategic dynamics that drive settlement negotiations between agencies and merging parties (slides 24-26). Focus on understanding what gives each side leverage in these negotiations. Agencies can threaten costly litigation, seek broad hold-separate orders that freeze deal integration, and impose burdensome and distracting discovery obligations. Meanwhile, merging parties can threaten to force agencies to prove their case on the merits, which carries the risk of losing entirely. Pay particular attention to why certain factors that might seem important (like reputational risk to companies or litigation costs to agencies) actually provide little leverage in practice. Notice how the postclosing context affects this bargaining dynamic. Once a deal has closed, agencies gain additional leverage because they can disrupt ongoing operations, while merging parties face pressure to resolve matters quickly to minimize business disruption. These dynamics help explain why the broad relief language in the TransDigm complaint ("any further actions necessary" and "such other relief as the Court deems just and proper") creates settlement pressure, and why agencies structure their complaints to maximize negotiating leverage. Understanding this bargaining framework is essential for analyzing the strategic choices facing parties in all the settlement examples you'll encounter.

Work through the four postclosing settlement examples to see how divestiture principles play out in different competitive contexts (slides 27-37).[2] These cases illustrate patterns that are critical for both deal planning and enforcement strategy. Merging parties need to assess potential divestiture requirements early in a transaction's life (often before negotiations even commence). At the same time, agencies must determine whether problematic mergers can be remedied through divestitures or should be blocked entirely. Start with *TransDigm/Takata*, noting how the

[2] We will examine a number of preclosing settlements later in the course.

DOJ structured a clean divestiture of the entire acquired SCHROTH business with a management buyout consortium—this represents the gold standard of divestiture remedies. Then, examine D&B/QED, where post-acquisition integration forced the agency to require divestiture of much more than was originally acquired, creating a 'cloned' database that exceeded what QED possessed at the time of acquisition. The Parker-Hannifin/CLARCOR case illustrates how agencies often require divestiture of businesses beyond the specific competitive overlap to ensure viability of the divested operations, while MSC.Software/Nastran shows the complexity of addressing software acquisitions where the acquired products were discontinued and integrated into the buyer's operations. Pay attention to the common themes: the risks companies face when they integrate acquisitions before settlement, the agencies' preference for divesting complete business units rather than asset fragments, and how the passage of time between acquisition and settlement can complicate remedy design.

> *In both the graded home assignment and the final exam, you should expect to be asked whether a consent decree could resolve an antitrust problem raised by a merger, and, if so, what restructuring the agency is likely to require for the consent decree to be acceptable.*

Now work through the four distinct pathways for implementing divestiture solutions (slides 38-42): (1) a consent decree to settle an ongoing investigation, (2) a consent decree to settle ongoing litigation, (3) a divestiture that merging parties advance in litigation as a complete solution to "fix" the competitive problems (known as "litigating the fix"), and (4) a preemptive divestiture occurring before the main transaction closes (known as "fix it first"). Pay attention to how these different pathways affect timing, risk allocation, and the parties' relative bargaining positions. The procedural mechanics differ significantly across these approaches, but the substantive standards for evaluating divestiture adequacy remain essentially the same. Understanding these distinctions will help you appreciate why the TransDigm case followed the traditional consent decree path and why fix-it-first solutions may become less common under the Trump administration's return to conventional settlement practices.

Settlements in litigation typically arise when the merging parties "litigate the fix," that is, when the parties, having proposed a divestiture remedy that the agency rejected during the investigation, proceed with the fix and then defend that remedy in court as sufficient to resolve the competitive concerns. This posture became increasingly common during the Biden administration, when agencies categorically refused to settle on terms they viewed as inadequate, even if the parties believed the fix fully addressed the alleged harm.

Litigation settlements in this posture typically arise for one of two reasons. On the one hand, the parties may become willing to accept relief they previously refused to offer to meet the agency's demands. This shift often reflects a postcomplaint reality check: civil discovery—especially from third parties—may reveal that their chances on the merits are worse than they believed during the investigation. Faced with this new information, the parties may conclude that the likely outcome of litigation is an injunction blocking the entire deal—and that a more encompassing consent settlement is better than no deal at all.

On the other hand, the agency may back away from demands it insisted on during the investigation. In many of these cases, the parties are litigating the fix—pressing for a litigated judgment approving a divestiture package that the agency previously rejected. What looked like a winnable position at the time may seem overreaching in light of what staff learn in discovery or how the court responds to early motions or evidentiary disputes. In these cases, the agency may accept essentially the same settlement it previously rejected—but typically insists on some modest additional relief to save face, preserve institutional credibility, and claim that litigation produced a superior outcome.

The class notes then examine a range of legal technicalities associated with consent decrees—procedural and interpretive issues that shape how consent settlements function as enforceable legal instruments (slides 43–51). The slides address the role of prosecutorial discretion in entering into consent decrees, the dispensation of findings of fact or legal liability, consent decrees as final judgments, the legal significance of party consent, and the "dual nature" of consent decrees, which are both contractual agreements and judicial orders. Finally, the slides touch on how courts interpret and, when necessary, modify consent decrees over time.

Cleveland Firefighters illustrates the unusual flexibility of consent decrees (slides 52-53). Parties may agree to contest relief that a court could not have ordered after a trial on the merits, so long as that relief is within the general scope of the complaint, advances the statutory objectives, and does not violate the law. In *Cleveland Firefighters*, the Supreme Court upheld a consent decree that required the city to take action inconsistent with its collective bargaining obligations to a third-party union. While that relief would have been unavailable in a litigated judgment, the Court enforced the decree because the city had consented to it and the relief furthered the objectives of the underlying civil rights statute. Although the case arose outside the antitrust context, it articulates principles that apply across all areas of federal consent decree practice. These principles are often underappreciated in merger antitrust enforcement, where agencies and merging parties tend to assume that settlement terms must mirror remedies a court could impose after trial. *Cleveland Firefighters* reminds us that a consent decree can go further, provided it does not transgress legal boundaries.[3]

The final section of the class notes walks through the formal legal process by which a DOJ consent settlement is finalized (slides 54-66). The process begins with the parties executing a stipulation and the DOJ filing a complaint, proposed final judgment (i.e., the consent decree), and a Competitive Impact Statement with the court. These filings are required by the Tunney Act, which also mandates a public comment period and a judicial determination that entry of the decree is in the public interest. The class notes explain the statutory and procedural requirements

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[3] 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 found the mandatory license was related to the competitive concerns in the DOJ's complaint, 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.

in detail, including how the DOJ coordinates internally and how final approval is typically obtained.

At the end of the class notes, you will find a brief overview of how the FTC's consent decree process compares to the DOJ's (slides 67-70). Although the economic substance of consent settlements is generally similar at both agencies, the procedural mechanisms differ. While the DOJ's process is governed by the Tunney Act and requires judicial review, the FTC operates through internal administrative proceedings. Commission regulations govern the FTC's acceptance of a proposed order and do not require court involvement. However, the FTC process still includes a public comment period and an internal determination that the proposed order serves the public interest. The final slide summarizes these similarities and differences.

Finally, read the materials on settlements without consent decrees (pp. 220-21). The Tupy/Teksid transaction illustrates how merging parties may resolve competitive concerns without entering into a formal consent decree—by restructuring the deal and closing on the divestiture before agency staff complete their investigation. Tupy initially agreed to acquire Teksid's entire iron automotive components business, but DOJ staff expressed concern that the deal would combine the two leading suppliers of engine blocks and cylinder heads for heavy-duty engines in North America. In response, the parties restructured the transaction so that Tupy would acquire only Teksid's operations in Brazil and Portugal, while Teksid would retain its plant in Mexico and other assets used to supply U.S. customers. The DOJ concluded that the restructured transaction eliminated the competitive concerns and closed its investigation without seeking a consent decree.