Unit 1B. Consent Decrees and Horizontal Divestiture Remedies

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Outcomes in DOJ/FTC Reviews

Outcomes in DOJ/FTC reviews

Close investigation

- Agency closes investigation without taking enforcement action
- If the HSR Act waiting period has not expired, agency may grant early termination

Litigate

- DOJ: Seeks preliminary and permanent injunctive relief in federal district court
- FTC: Currently, same as DOJ
  Historically, sought preliminary injunctive relief in federal district court and permanent injunctive relief in an administrative trial

Settle w/consent decree

- Typical resolution for problematic mergers
- DOJ: Consent decree entered by federal district court
- FTC: Consent order entered by FTC in administrative proceeding

Parties terminate transaction

- Parties will not settle at the agency's ask and will not litigate, or
- Agency concludes that no settlement will resolve the agency's concerns and the parties will not litigate
  - Examples: AT&T/T-Mobile, NASDAQ/NYSE Euronext

"Fix it first"

- Merging parties restructure transaction to eliminate problematic overlap by narrowing assets to be purchased or selling assets to a third party
- Merging parties file new HSR notifications for the restructured transaction
- When done to the agency's satisfaction, eliminates the need for a consent decree or other enforcement action

Some Recent History

Some recent history

- Agency practice
  - Historically, from at least 1982 until the Biden administration, the vast bulk of transactions that the antitrust agencies concluded were likely to violate Section 7 have been settled by a consent decree
    - Horizontal transactions consistently settled by a consent decree requiring one or the other party's overlapping business and assets in each problematic market to be divested to a third party acceptable to the investigation agency
    - Vertical mergers were almost always settled by "behavioral" consent decrees—that is, consent decrees designed to ensure that the combined firm would not foreclose or discriminate against rivals at one level that was a customer or supplier of the firm at the other level

Some recent history

- Obama and Trump 1.0 administrations
  - Over time, however, both agencies grew increasingly skeptical that consent decrees—whether structural or behavioral—would preserve the competition that they believed otherwise would have been lost due to the transaction
  - Beginning in the late Obama administration, the agencies increasingly demanded—
    - Greater confidence that the divested business and assets would preserve premerger competition in the markets of concern
    - Divestiture of operating business units rather than isolated assets
    - A signed definitive divestiture agreement with an "upfront" divestiture buyer
  - During the Trump 1.0 administration, the agencies became substantially more skeptical of behavioral remedies—the traditional solution to problematic vertical mergers—on the grounds that they were too difficult to monitor and enforce, and the DOJ ultimately categorically rejected them

Some recent history

- The Biden agencies
  - The DOJ took skepticism of consent decrees to the extreme
    - During Jonathan Kanter's tenure as AAG (November 16, 2021−December 20, 2024), the Antitrust Division did not accept a consent decree to settle any merger antitrust investigation
      - When the agency concluded there was a problem, the parties had only two choices—
        - Put the agency to its proof in litigation in federal district court, *or*
        - Voluntarily terminate the merger agreement and abandon the transaction
      - In some instances, however, the Antitrust Division agreed to a "fix it first" solution without a consent decree
        - This requires the merging parties to divest one party's overlapping business to a divestiture buyer acceptable to the agency before the main transaction is consummated
        - In a normal consent decree, the merging parties would close the main transaction first and then have a short period of time (often measured in days) to consummate the divestiture transactions—this means that the merged company would own and operate both sides of a problematic overlap for a short period of time
        - As a result of the preclosing divestiture, the merged company never owned both sides of a problematic overlap, so there is nothing for a consent decree to fix
        - While "fix it first" solutions allow the DOJ to keep its record of not accepting consent decrees, they are troubling from a public policy perspective because they achieve the same solutions as a consent decree but without the protections of a consent decree.
    - The FTC, under Chair Lina Khan, accepted only 15 divestiture consent decrees out of 67 total enforcement actions—about 22%, much less than the historical FTC average[1]

[1] *See* Fed. Trade Comm'n, Accomplishments: June 2021–January 2025 (Jan. 19, 2025).

Some recent history

- The Trump 2.0 agencies
  - Trump 2.0 administration has returned to the more traditional practice of accepting properly tailored consent decrees to settle merger investigations[1]
  - Although it remains early in the administration, statements by senior DOJ and FTC officials indicate that:
    - Structural remedies will once again be the preferred tool for resolving horizontal mergers that raise competitive concerns
    - The agencies are open to using divestiture consent decrees, subject to rigorous standards for buyer suitability and asset scope
    - Behavioral remedies remain disfavored, particularly as standalone remedies, though not categorically rejected
  - This return to traditional practice restores the full range of settlement options that merging parties and agency staff have historically relied on to resolve investigations: litigation, abandonment, consent settlement, and fix-it-first restructuring

[1] *See* Bill Rinner, Dep. Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Remarks to the George Washington University Competition and Innovation Lab Conference Regarding Merger Review and Enforcement* (June 4, 2025); Melissa Holyoak, Comm'r, Fed. Trade Comm'n, Structural Merger Remedies Keynote Address at the USC Gould/Analysis Group Global Competition Law Thought Leadership Conference, Los Angeles, CA (June 5, 2025); Statement of Chairman Andrew N. Ferguson Joined by Commissioners Melissa Holyoak and Mark R. Meador, In re Synopsys, Inc./Ansys, Inc., Matter No. 2410059, at 7-8 (F.T.C. May 28, 2025).

Consent Decree Divestiture Solutions[1]

[1] We will focus on remedies in horizontal transactions in this unit. We will pick up remedies in nonhorizontal transactions later in the course.

The basic idea

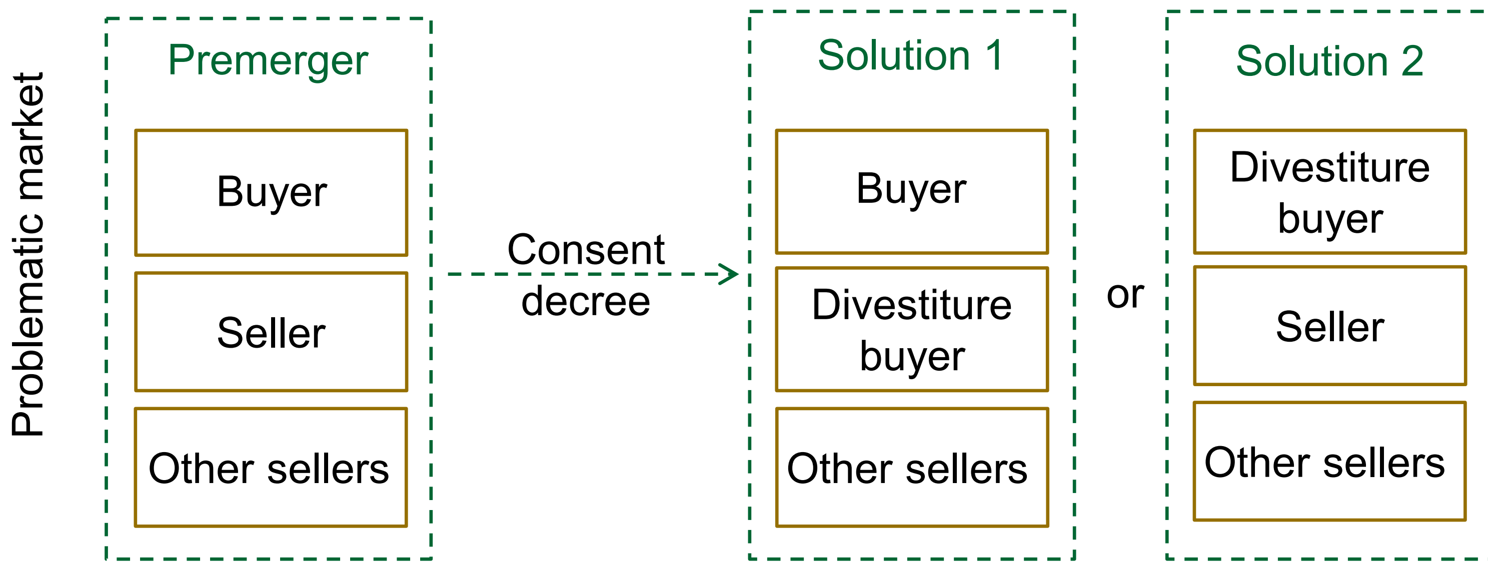
- Divestiture solutions in horizontal mergers
  - A horizontal transaction violates Section 7 because the combination of the respective businesses of the parties would likely result in a substantial lessening of competition or a tendency to monopoly in some relevant market
  - The violation could be avoided if the parties did not combine the problematic businesses in the relevant market
  - *Solution*:
    - Divest the overlapping business of one of the parties to a third party capable of operating the divested business postmerger with the same competitive force as the divestiture seller did premerger.
    - *Schematically*: Buyer is to acquire multiple businesses from Seller. The only business in which both parties manufacture and sell ("overlap") is widgets, which are sold nationwide. The FTC alleges that the combination of two widget businesses would violate Section 7. The merging parties sell the Seller's widget business to a Divestiture Buyer who can operate the business with the same competitive force postmerger as did the Seller premerger. Premerger, Buyer competed with Seller in the manufacture and sale of widgets. Postmerger, Buyer competes with Divestiture Buyer in the manufacture and sale of widgets. In principle, with this divestiture, no competition will be lost from Buyer acquiring Seller.

The basic idea

- The basic requirement:

  The divestiture buyer must preserve the level of premerger competition in the market of concern following the closing of the main transaction

  - The divestiture buyer is said to "step into the shoes" of the divestiture seller
    - The identity of the owner of the divestiture business changes, but the structure of the problematic market remains unchanged:



Divestiture buyer buys seller's overlapping business

Divestiture buyer buys buyer's overlapping business

The basic idea

- The legal nature of a consent decree
  - The obligation to divest is entered as a final judgment in a judicial or administrative proceeding
    - A judicial or administrative complaint must initiate these civil proceedings
  - DOJ consent decrees are federal district court injunctions
    - Violations are enforceable through civil and criminal contempt sanctions
  - FTC consent orders are administrative “cease and desist orders”
    - Violations are enforceable through federal district court action for civil penalties
      - Penalties are inflation adjusted
      - In 2026, the maximum penalty is $53,088 (adjusted annually) per day during the period of the violation[1]
    - The district court will also issue an injunction to prevent future violations of the FTC consent order
      - These district court orders are enforceable through judicial contempt sanctions (criminal and civil)
      - Contempt sanctions can expose the company to greater liability than the per day civil penalty

[1] Fed. Trade Comm’n, Adjustments to Civil Penalty Amounts, 90 Fed. Reg. 5580 (Jan. 17, 2025). Due to the government shutdown, BLS was unable to produce the October 2025 data necessary to make the 2026 adjustment. Therefore, the 2025 maximums remained in effect. *See* Cancellation of Penalty Inflation Adjustments for 2026, Regarding the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, OMB No. M-26-11 (Apr. 17, 2026).

Basic Divestiture Relief Practice

Basic divestiture relief practice

- There are three keys to a consent decree—
  1. The existence of parts of the deal that do not present antitrust problems (preferably where the main transaction has demonstrable significant procompetitive effects)
  2. The separability of the parts of the deal from the buyer or the seller that do have antitrust problems
  3. The divestiture of the problematic parts to a divestiture buyer that has the ability and incentive to operate the divestiture assets with the same competitive force postmerger as the divestiture seller had premerger

Basic divestiture relief practice

- *Illustration*: DaVita/University of Utah
  - The deal
    - In September 2021, DaVita, the largest operator of outpatient dialysis clinics in the United States, agreed to acquire the University of Utah's 18 dialysis clinics in and around Utah in a non-HSR reportable transaction
  - The antitrust problem
    - In the greater Provo market, there are only three dialysis providers: UoU (3 clinics); DaVita (4 clinics); Fresenius (1 clinic)
    - Barriers to entry into dialysis clinics are very high and no new entry was likely postmerger
    - The transaction would reduce the number of competitors in the Provo market from three to two (a "3 → 2 transaction"), with DaVita operating seven out of the eight clinics in the area
  - The FTC found no antitrust problems with DaVita's acquisition of the other 15 UoU clinics

Basic divestiture relief practice

- *Illustration*: DaVita/University of Utah
  - The consent decree
    - The FTC and DaVita resolved the FTC's concerns at the end of the investigation through a consent decree requiring DaVita to—
      - Divest the three UoU Provo clinics to Sanderling Renal Services, Inc. ("SRS"), a small but established operator of dialysis clinics nationwide but without any presence in Utah
      - Provide transition services to SRS for up to one year
      - Assist SRS in hiring the employees at the divested clinics and refrain from soliciting those employees for 180 days
      - Refrain from entering into any non-solicitation agreement with SRS that would prevent SRS from soliciting DaVita's employees for hire
      - Refrain for two years from directly soliciting patients receiving services from the divested clinics
      - Refrain from entering into or enforcing noncompete agreements with any University nephrologist
      - Obtain prior approval from the Commission for any future acquisition of any ownership interests in any dialysis clinic in Utah

Requires a "buyer upfront" (standard in most cases)

Think about what each of these provisions is intended to accomplish

Once the FTC provisionally accepted the consent order on October 25, 2021, the parties were free to close the main transaction. The settlement, however, required DaVita to divest the three Provo clinics to SRS within ten days of the closing of the main transaction.

Basic divestiture relief practice

- Negotiating a consent decree—The process
  1. The enforcement agency and parties agree on the antitrust concern to be resolved
  2. The parties negotiate a package of business operations, assets, and ancillary commitments that would permit a qualified third-party divestiture buyer to maintain the premerger level of competition after the restructured deal closes
  3. The parties memorialize the divestiture package in a proposed consent decree and related documents
  4. The merging parties find a divestiture buyer
  5. The divestiture buyer applies for agency approval
  6. The agency approves the divestiture package and divestiture buyer
  7. DOJ files a complaint and motion for entry of the consent decree in federal district court/FTC provisionally accepts an administrative consent order
  8. The agency publishes the proposed consent decree in the Federal Register and other venues inviting public comments
  9. The court/FTC considers public comments and agency response
  10. The court/FTC decides if entry of the consent decree as a final judgment is in the public interest

Basic divestiture relief practice

- Some observations
  1. The divestiture assets must encompass everything necessary for the divestiture buyer to operate the divestiture business postmerger with at least the same competitive force as the divestiture seller premerger
     - The agencies strongly prefer complete, stand-alone businesses to be divested
  2. The divestiture buyer must have the incentive and the ability to operate the divestiture assets postmerger with at least the same competitive force as the divestiture seller premerger
     - The agencies will insist on approving the divestiture buyer and will vet the divestiture buyer, its experience, financial condition, and business plan to operate the divestiture assets
  3. The divestiture seller must operate the business independently in the ordinary course until the closing of the divestiture sale with the divestiture buyer
  4. The divestiture buyer must be able to operate in the divestiture business immediately upon the divestiture's closing to ensure that there is no temporary loss of competition in the relevant market
     - This often requires the combined company to offer the divestiture buyer some short-term *transition services* as the divestiture buyer gets up and running
  5. The divestiture buyer must be able to operate the divestiture business without any entanglements with or impediments from the combined company
     - For example, the combined company cannot supply the divestiture buyer with a critical input (apart from any transition services agreement) or provide the divestiture buyer with financing, and the combined company may have to release key employees from any noncompete employment restrictions to enable the employees to accept employment with the divestiture buyer
  6. The divestiture to the divestiture buyer cannot create its own antitrust problems

Divestiture Consent Decree Paradigms

Divestiture consent decree paradigms

- Three basic divestiture consent decree paradigms
  1. Divest standalone business
     - Complete with all necessary back office and other support
     - *Example*: Ardagh/St. Gobain[1]
       - Ardagh agreed to divest Anchor Glass Container Corporation, which Ardagh acquired in 2012 to build its U.S. glass bottle business, to Glass Container Acquisition LLC, an affiliate of KPS Capital Partners L.P., a private equity firm, in connection with Ardagh's acquisition of Saint-Gobain Containers, Inc.
       - In addition to Anchor's manufacturing facilities, the divestiture operation included U.S. management and all Ardagh's U.S. back office operations
       - Given that Anchor Glass was a standalone business unit, the Commission was willing to entertain and ultimately approve a private equity firm as the divestiture buyer
     - Observations
       - Divestiture of a legal entity—a corporation or an LLC—is desirable since all employees and contracts with the company follow the sale to the divestiture buyer
       - Buyer approval, but no buyer upfront
         - The Commission provisionally accepted the consent order without an identified divestiture buyer and permitted Ardagh to close the Saint-Gobain acquisition.
         - Ardagh subsequently entered into a definitive agreement to sell Anchor to GCA/KPS, and the Commission approved the buyer and divestiture before the divestiture closed
         - The Commission finally approved the consent order only after the divestiture buyer had been approved

[1] Complaint, Ardagh Group, S.A., 157 F.T.C. 1548 (June 28, 2013); Application for Approval of Divestiture of Anchor Glass Business to Glass Container Acquisition LLC, Ardagh Group, S.A., No 9356 (F.T.C. Apr. 28, 2014); Decision and Order, *id*. (F.T.C. June 17, 2014); Letter Order Approving Divestiture of Certain Assets, Ardagh Group, S.A., 157 F.T.C. 1879 (June 17, 2014).

Divestiture consent decree paradigms

- Three basic divestiture consent decree paradigms
  2. Divest an operating business
     - Core business operations divested—Divestiture buyer to provide back office and other support
     - *Example*: Koninklijke Ahold/Delhaize Group[1]
       - Merging parties
         - Ahold owns and operates supermarket chains in ten states in the United States, including supermarkets operating under the Giant, Martin's, and Stop & Shop banners
         - Delhaize owns and operates supermarket chains in 17 states in the United States, including supermarkets operating under the Food Lion and Hannaford banners
       - Ahold and Delhaize agreed to sell 81 stores to settle FTC concerns that their proposed $28 billion merger would likely be anticompetitive in 46 local markets in Delaware, Maryland, Massachusetts, New York, Pennsylvania, Virginia, and West Virginia
       - The 81 stores were divided into seven regional packages and sold to seven different divestiture buyers
       - Each divestiture buyer operated a supermarket chain in the region and was able to provide management, wholesale supply, back office support, and strategic direction to the divestiture stores
         - Back office support includes, for example, customer service, information technology and data processing, human resources, accounting, and related administrative functions
     - Agencies almost always demand an upfront buyer

[1] Complaint, Koninklijke Ahold, N.V., C-4588, 162 F.T.C. 945 (July 22, 2016); Decision and Order, *id*. at 964 (F.T.C. provisionally accepted June 22, 2016); Decision and Order, *id*. (F.T.C. Oct. 14, 2016) (final acceptance).

Divestiture consent decree paradigms

- Three basic divestiture consent decree paradigms
  3. Divest assets necessary for divestiture buyer to operate the divestiture business
     - Divestiture buyer to provide all support necessary to operate the business
     - *Example*: Danaher/GE Biopharma[1]
       - Danaher's $21.4 billion acquisition of GE Biopharma (General Electric's biopharmaceutical business)
       - Danaher agreed to divest to Sartorius AG all rights and assets to research, develop, manufacture, market, and sell ten products that companies use to manufacture biopharmaceutical drugs to resolve the FTC's concerns in ten product markets for products used to manufacture biopharmaceutical drugs
       - Sartorius AG, the divestiture buyer, had to satisfy the FTC that it could provide all the infrastructure, management, and distribution necessary to operate the divestiture assets and maintain competition in the problematic market
       - Although Sartorius AG, the divestiture buyer, was a new entrant into the business, in approving the divestiture sale, the FTC found that "Sartorius's existing biopharma business includes products that are highly complementary to the divestiture assets. Sartorius has the expertise, worldwide sales infrastructure, and resources to restore the competition that otherwise would have been lost due to the proposed Acquisition."[2]
     - Agencies always demand an upfront buyer

[1] Decision and Order, Danaher Corp., No. C-4710 (F.T.C. May 29, 2020); *see* Petition for Prior Approval of Sartorius Stedim Biotech S.A.'s Proposed Acquisition of Novasep Process SAS's Chromatography Equipment Business, *id*. (F.T.C. Oct. 28, 2021); Letter Order Approving Acquisition, *id*. (F.T.C. Jan. 31, 2022).

Four Ways To Implement a Divestiture Solution

Four implementations

1. Consent decree to settle an ongoing investigation
   - The investigating agency and merging parties agree on a divestiture (and a divestiture buyer) that will negate the agency's antitrust concerns
   - The settlement agreement—
     - Is reduced to a *proposed* final judgment ("consent decree") in a litigation the agency will file simultaneously with the complaint, and
     - Once the proposed consent decree is entered as a final judgment (often months later), will be enforceable through sanctions for a violation of the judgment
   - The merging parties will be allowed to close their transaction pending final approval of the consent order once:
     - *In a DOJ settlement*: The court has "so ordered" the joint stipulation on interim requirements pending final approval (most significantly on asset preservation and independent operations)
     - In an FTC settlement: The Commission has provisionally accepted the proposed consent order
   - The divestiture must be completed within a time specified in the proposed decree

Four implementations

2. Consent decree to settle an ongoing litigation
   - The investigating agency and merging parties fail to agree on a divestiture solution during the investigation, and the agency challenges the transaction in court
   - During the litigation, the merging parties reopen settlement discussions and offer an augmented version of the divestiture solution they advanced during the investigation
     - The agency's receptivity will depend on how discovery and other litigation developments have affected its assessment of its prospects in court on liability and remedy
     - The additional relief the agency demands can range from extensive to modest: the stronger the agency perceives its litigation position to be, the more additional relief it is likely to demand
     - Even if the agency perceives that it is likely to lose in court, it will demand some additional relief—however modest in substance—in order to publicly justify rejecting the original settlement proposal in the investigation
       - Although the merging parties may believe that the additional relief is unnecessary, they are likely to accept it to eliminate even a relatively small risk of losing at trial
   - The mechanics are essentially the same as for a consent decree settling an investigation

Four implementations

3. "Litigate the fix"
   - The investigating agency and merging parties fail to agree on a divestiture solution, and the agency challenges the transaction in court
   - Early in the litigation, the merging parties enter into a contingent divestiture agreement with a divestiture buyer (the "fix") and defend the *restructured* transaction on the ground that it does not violate the antitrust laws
     - The fix almost always embodies a consent decree solution that the merging parties proposed during the investigation and the agency rejected
   - Unless the parties settle the litigation through a consent decree, the court will decide whether the restructured transaction should be enjoined
   - In assessing the competitive merits of the restructured transaction, the court will consider—
     - The Section 7 concerns presented by the original transaction
     - Whether the proposed divestiture package, in the hands of a qualified divestiture buyer, would eliminate each of those concerns
     - Whether the proffered divestiture buyer has the incentive and ability to operate the divested business so that the package will in fact eliminate those concerns
   - Outcomes
     - If the merging parties prevail, the court will deny the requested injunction, and the transaction may proceed subject to the fix presented to the court
     - If the agency prevails, the court will enjoin the transaction

Four implementations

4. Negotiated "fix it first"
   - During the investigation, the investigating agency and merging parties agree on a divestiture solution (almost always including a divestiture buyer) that the parties will implement before closing their transaction
     - Since the problematic overlap will be eliminated before the main deal is closed, the restructured acquisition will not be anticompetitive and the agency will permit the transaction to proceed without requiring a consent decree or taking other enforcement action
     - A negotiated "fix it first" solution allows what amounts to a consent decree solution without the protections afforded to the agency by a consent decree
   - The practice
     - This solution became more prominent during the Biden administration, when the Antitrust Division under AAG Kanter had, in effect, a policy not to accept consent decrees to settle merger investigations but accepted a number of negotiated "fix it first" solutions
       - Perhaps because these solutions lacked the protections of a consent decree, the Antitrust Division generally did not publicize when it accepted them
     - With the return to the more traditional acceptance of consent decrees, negotiated "fix it first" solutions are likely to become much less prominent
       - They may remain attractive, however, when the competitive problem is obvious and substantial, the adequacy of the fix is noncontroversial, and the parties can often (but not always) implement the solution simply by leaving the problematic business with the original seller

The Settlement Bargaining Game

The bargaining game

- Key concept:

  A settlement is possible only if there is at least one resolution that both sides, based on their own assessments, prefer to the expected consequences of failing to agree

- Each side compares every possible settlement with its expected outcome if negotiations fail
  - If there is no resolution that both sides regard as making them better off, there will be no settlement
  - If multiple resolutions would make both sides better off, those resolutions constitute the *bargaining range*
  - Within the bargaining range, some resolutions will favor the agency; others will favor the merging parties

The bargaining game

- Leverage
  - The bargaining game determines where within the bargaining range the settlement will land
  - Each side’s leverage depends on the costs and risks it can impose on the other if negotiations fail, compared with the costs and risks it faces itself
  - The parties’ *reservation payoffs* (payoffs in the absence of a settlement), and therefore the bargaining range, are shaped principally by—
    - Each side’s assessment of the agency’s probability of prevailing on liability and remedy
    - The relief a court is likely to impose if the agency prevails
    - The costs, burdens, delay, and business disruption associated with continued litigation
  - The negotiated outcome within the range reflects the parties’ relative leverage

The bargaining game

- Agency's leverage over the merging firms to accept agency terms
  - The commencement or continuation of litigation—
    - Imposes litigation costs and burdens on the merging parties, especially in discovery
    - Burdens senior decision-makers and distracts them from running their businesses
    - May cause the target or acquired business to deteriorate because of delay and restrictions on integration, whether before closing or after closing under a hold-separate order—
      - May prevent the business from pursuing a coherent long-term strategy or making necessary investments
      - May lead customers to shift business to competitors because of uncertainty about the business' future
      - May prompt key employees to leave because of uncertainty about their roles or continued employment
      - May delay or eliminate anticipated integration benefits and efficiencies

The bargaining game

- Agency’s leverage over the merging firms to accept agency terms
  - If the transaction has not closed, delay may also—
    - Require the buyer in a highly leveraged transaction to pay substantial commitment, extension, hedging, and other costs to preserve acquisition financing through the conclusion of litigation
    - Trigger ticking payments or additional merger consideration because of the delayed closing
    - Increase the risk that the financing, market conditions, or merger agreement will not remain viable through the conclusion of litigation
  - If the transaction has closed, litigation may also—
    - Expose the merged firm to a broad interlocutory hold-separate or asset-preservation order that freezes further integration, potentially including integration of nonproblematic portions of the acquisition
    - Increase the risk that the court will impose more invasive and burdensome relief than the agency is proposing in settlement
  - However, litigation is unlikely to provide agency leverage through reputational harm to the merging parties
    - The business community generally views merger cases as routine regulation rather than misconduct, so reputational damage is negligible

The bargaining game

- Bottom line
  - A settlement is possible only when the parties' reservation payoffs create a bargaining range
  - Where the settlement falls within that range depends on the parties' relative leverage
  - In merger litigation, delay often increases the agency's leverage, while the merging parties' principal counter-leverage is the risk that the agency will lose on liability or obtain less relief than it demands

Postclosing Divestiture Examples

TransDigm/Takata[1]

- DOJ concern
  - The acquisition by TransDigm of SCHROTH from Takata (which had already closed) eliminated competition in four worldwide markets for airline restraints:
    - Two-point lapbelts used on commercial airplanes
    - Three-point shoulder belts used on commercial airplanes
    - Technical restraints used on commercial airplanes
    - Inflatable restraint systems used on commercial airplanes
- Consent decree: Requires—
  - TransDigm to divest all of the shares and assets it acquired from Takata in their entirety (including its facilities in Pompano Beach, Florida, and Arnsberg, Germany)
  - A buyer upfront: Here, a consortium including SCHROTH management and financial investors
  - Divestiture to occur within 30 calendar days of—
    - the receipt of all regulatory approvals (Committee on Foreign Investment in the United States ("CFIUS") and German Federal Ministry of Economic Affairs and Energy, or
    - the Court's signing of the Hold Separate Stipulation and Order in this matter

    whichever is later
  - Combined company had to operate the divestiture assets separately from the rest of its business pending the closing of the divestiture sale ("hold separate")

[1] *See* the TransDigm/Takata case study in supplemental reading materials.

D&B/QED[1]

- The FTC complaint
  - Dun & Bradstreet and QED signed the acquisition agreement on January 29, 2009, and presumably closed the transaction shortly after that. The purchase price was $29 million.
  - Dun & Bradstreet's MDR subsidiary held a 90% share of the K-12 educational marketing data market
  - *Claim*: The acquisition eliminated D&B's only significant competitor in the market, thereby creating a de facto monopoly likely to raise prices, reduce quality, and stifle innovation
- Consent decree: Significant provisions—
  - D&B to divest all assets used in QED's U.S. marketing data business, including:
    - A copy of the database updated to match D&B's internal current version as of the divestiture date
    - Proprietary algorithms, software codes, IP, customer contracts, and key personnel
    - Purge all data acquired from QED imported into the MDR database after June 1, 2010
  - D&B required to permit any current or former employee—
    - who was employed by QED or Scholastic on the day before the acquisition , or
    - whose responsibilities primarily involved the sale of K-12 data

    to be hired by the divestiture buyer without restriction or interference
  - D&B must permit any MDR customer to terminate its MDR contract for 21 months
  - D&B required to provide transition services for up to 12 months
  - Divestiture
    - Within 5 days of the order becoming final: Divest QED K-12 Data Business Assets
    - Within 30 days of the order becoming final: Divest the Augmented QED K-12 Database
  - Monitor to monitor compliance with consent decree obligations

[1] For the significant litigation and consent decree filings, see D&B/QED in AppliedAntitrust.com.

D&B/QED

- Observations
  - Non-HSR reportable transaction, investigated postclosing, settled mid-litigation
  - The consent decree essentially created a clone of the MDR database, which was significantly larger in coverage than the acquired QED database was at the time of acquisition or would have been if QED had not been acquired

    As a result, D&B was required to divest much more than it had acquired—a significant risk in all postclosing divestiture solutions when the acquiring company integrates the assets of the acquired company

  - Upfront buyer required
  - D&B was able to retain all data imported from the QED database prior to June 1, 2010
- Final notes
  - The K-12 data included in the database were publicly available from most schools or school districts for the asking. The major cost of the business was the cost of collecting and updating the data
  - MCH, the upfront buyer, was the smallest of the three companies that supplied K-12 educational marketing data
    - lacked a K-12 database comparable to MDR or QED's,
    - generally served a different customer base,
    - was not viewed by many MDR and QED customers as capable of meeting their needs, and
    - had a very small share of the K-12 data market
  - It appears that MCH, after acquiring the divested business, did little to continue to update the database or market it

[1] *See* Analysis of Agreement Containing Consent Orders To Aid Public Comment 1 (Nov. 23, 2009).

Parker-Hannifin/CLARCOR[1]

- The deal
  - December 16, 2016: Parker announces it will acquire CLARCOR for $4.3 billion in cash
  - January 17, 2017: HSR waiting period expired (no second request)
  - February 28, 2017: Parties closed deal
  - Following customer complaints, the DOJ opened an investigation
- DOJ complaint (filed Sept. 26, 2017)
  - *Claim*: Merger to monopoly in EI-qualified aviation fuel filtration systems and EI-qualified aviation fuel filtration elements, likely resulting in increased prices, longer delivery times, less favorable terms of service, and reduced innovation
    - CLARCOR sold aviation fuel filtration products through its PECOFacet subsidiary
- Consent decree: Significant provisions—
  - Parker to divest the Facet filtration business, including its—
    - Aviation fuel filtration assets (including its international facilities)
    - Commercial marine, offshore drilling, and military marine filtration applications sold under the PECOFacet brand,
    - Oil/water filtration and separation systems and sewage treatment systems sold under the PECOFacet brand.
    - The assets of Parker used in the design, development, manufacturing, testing, marketing, sale, distribution or service of aviation fuel filtration products used in aviation ground fuel filtration and sold under the Facet or PECOFacet brands

[1] For the significant litigation and consent decree filings, see Parker Hannifin/CLARCOR in AppliedAntitrust.com.

Parker-Hannifin/CLARCOR

- Consent decree: Significant provisions (cont.)—
  - Intellectual property
    - The divestiture assets only included a license to use the “Clarcor,” “PECO,” or “PECOFacet“ trade names for a maximum period of one (1) year and then only to the extent the divestiture buyer was required under existing U.S. military contracts to use those names
    - However, Parker was required within two (2) years to use reasonable best efforts to transition retained (non-divested) products sold under the “PECOFacet” brand to a brand that does not include the “Facet” name
  - Parker was required to provide the divestiture buyer with back-office and information-technology services and support
  - As to all personnel primarily involved in the design, development, manufacturing, testing, marketing, sale, distribution or service of the divestiture products (except employees specifically exempted in an appendix), Parker must—
    - Provide the acquirer with detailed information about, and access to, the relevant personnel
    - Not obstruct or interfere with the divestiture buyer’s hiring of these employees
    - Waive noncompete and nondisclosure agreements for employees hired by the divestiture buyer
    - For 12 months, not solicit or hire any employee hired by the divestiture buyer unless the divestiture buyer (1) terminates or lays off the employee or (2) consents in writing to the solicitation or hire
  - Parker-Hannifin and Clarcor were prohibited from reacquiring any part of the divestiture assets that is primarily related to aviation fuel filtration products qualified to EI standards during the term of the final judgment
    - CLARCOR, then operating as a Parker subsidiary, was named a party-defendant in the litigation and bound by the final judgment
  - Term: 10 years (with an early termination option by the DOJ after 5 years)

Parker-Hannifin/CLARCOR

- Observations
  - Scope of divestiture
    - The complaint alleged problems only in EI-qualified aviation fuel filtration systems and EI-qualified aviation fuel filtration elements, but the divestiture assets also included CLARCOR's—
      - Aviation fuel filtration products business
      - Marine and offshore filtration systems
      - Environmental filtration systems
    - Undoubtedly, the DOJ's reasons for including assets outside the alleged relevant markets were to—
      - Ensure the viability of the divested business in the hands of the divestiture buyer
      - Divest all business lines produced in the divestiture plants (to avoid problems of separation)

Rule: In most cases, the DOJ and FTC will insist that the divested assets comprise an operating business unit

Except in the rare case where the divestiture buyer can easily absorb the divested assets into its own operations without the need of an operating business unit

Example: When the divestiture buyer is a major pharmaceutical company and the divested product is a drug that the buyer can easily manufacture

MSC.Software/Nastran acquisitions[1]

- The acquisitions
  - June 24, 1999: MSC acquires Universal Analytics, Inc. for approximately $8.4 million
  - November 4, 1999: MSC acquires Computerized Structural Analysis & Research Corp. (CSAR) for about $10 million
  - Following each acquisition, MSC integrated its technologies and customer bases into its own operations and discontinued the acquired software products
- FTC complaint (filed Oct. 9, 2001)
  - *Claim*: The acquisitions substantially lessened competition and tended to create a monopoly in the market for advanced versions of Nastran
- Consent decree: Significant provisions—
  - Divestiture of software assets and IP
    - MSC was required to divest at least one clone copy of its current advanced Nastran software by granting one or two FTC-approved acquirers perpetual, royalty-free, nonexclusive worldwide licenses to—
      - The most current version of MSC.Nastran
      - All intellectual property and code acquired from UAI and CSAR
    - Divestiture could be made to up to two FTC-approved acquirers within 150 days of the public comment date or 90 days from the effective date of the order, whichever was later
    - Acquirers could use, develop, sublicense, and make derivative works of the licensed software.

[1] For the significant litigation and consent decree filings, see *MSC.Software/Universal Analytics/CSAR* in AppliedAntitrust.com.

MSC.Software/Nastran acquisitions

- Consent decree: Significant provisions (cont.)—
  - Transfer of supporting materials and customer information: MSC had to provide—
    - Copies of customer files, sales and marketing materials, and support logs relating to MSC.Nastran U.S. customers
    - Documentation and manuals necessary for installation, migration, and development of the licensed software
  - Personnel access and hiring
    - Acquirers were granted access to interview and hire current MSC employees involved with MSC.Nastran and former nonclerical UAI and CSAR employees
    - MSC was required to—
      - Provide personnel lists and facilitate employment transfers
      - Waive noncompete and confidentiality restrictions to allow employee movement to acquirers
    - Refrain from re-hiring transferred employees for one year
  - Technical assistance and transitional support
    - MSC had to provide 12 months of technical assistance to acquirers for MSC.Nastran at cost
    - Acquirers could use the relevant MSC.Nastran trademarks for at least three years solely to identify themselves as licensees
  - Customer contract rescission rights
    - For one year postdivestiture, MSC customers who had switched from annual to paid-up MSC.Nastran licenses (25-year terms) after the acquisitions could:
      - Rescind their contracts in whole or part
      - Receive a pro rata refund (based on the lesser of 4 years or the contract term)
    - MSC had to notify affected customers of rescission rights within 14 days of the divestiture

MSC.Software/Nastran acquisitions

- Consent decree: Significant provisions (cont.)—
  - Interoperability and non-retaliation requirements
    - For 3 years post-divestiture, MSC had to—
      - Maintain interoperability between MSC's complementary software (like MSC.Patran) and the divested Nastran
      - Maintain input/output file formats
      - Avoid retaliating against customers or vendors that did business with the acquirer
  - Prior notice of future Nastran-related acquisitions
    - For 10 years, MSC was required to—
      - Notify the FTC before acquiring any Nastran developer or related assets that would otherwise escape HSR review
      - Comply using a modified HSR notification form filed only with the FTC
  - Compliance, monitoring, and trustee provisions
    - The FTC could appoint—
      - A Monitor to oversee compliance
      - A Trustee to complete the divestiture if MSC failed to do so.
    - MSC had to—
      - Submit compliance reports every 60 days until divestiture and every 6–12 months afterward as required
      - Maintain the assets in good condition pending divestiture
  - Term: 10 years

MSC.Software/Nastran acquisitions

- Observations
  - Non-HSR reportable acquisitions challenged approximately two years after closing
    - The transactions presumably came to FTC's attention from postclosing customer complaints
    - NOTE: Even MSC.Nastran customers could have complained about the acquisitions if they wanted to keep the acquired companies as independent companies that could be competition to MSC
  - Consent decree required MSC to clone its software and divest copies to FTC-approved buyers
    - Consent decree provided for the divestiture of "at least one clone copy" of the software
      - WDC: Presumably designed to require two divestitures to restore two independent competitors
      - BUT MSC would satisfy obligations if, as was the case, only one qualified buyer came forward
    - Divestiture to be accomplished with a non-exclusive, perpetual, royalty-free license
      - This amounted to a "sale" of a copy of the cloned software
  - Only one firm—Unigraphics Solutions (UGS)—stepped forward as a qualified acquirer.

As we have seen before, MSC was required to divest much more than it had acquired—the acquired software almost surely lacked the full functionality of MSC.Nastran. Yet MSC was required to divest clones of the current version of its own software, not the software it had acquired.

Some Important Legal Technicalities

Some important legal technicalities

1. Exercising agency discretion
   - The decision whether to enter into consent decree negotiations is committed to the investigating agency's discretion
   - The investigating agency also can refuse to accept a proffered consent decree for any reason that is not independently unlawful
     - Agency decisions to refuse to accept a consent decree are not subject to review under the Administrative Procedure Act
       - Unless provided by statute, only "final agency actions" are reviewable under the APA[1]
       - A decision to refuse to settle an investigation is not a "final agency action" because it is interlocutory and does not impose an obligation, deny a right, or fix a legal relationship[2]
         - Agency action is "final" within the meaning of the APA only if—
           - The action marks the "consummation" of the agency's decision-making process, *and*
           - the action is one by which "rights or obligations have been determined" or from which "legal consequences will flow"[2]
         - Moreover, it is likely that a decision to refuse to settle is "committed to agency discretion by law" within the APA and so separately exempt from APA review[3]

[1] 5 U.S.C. § 704.
[2] Bennett v. Spear, 520 U.S. 154, 177 (1997).
[3] *See* Chicago & S. Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 112-13 (1948) ("But administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.")

Some important legal technicalities

2. Dispensing with finding of facts and liability
   - Consent decrees are entered by the court or FTC without adjudication of the merits or the finding of any facts
     - There is typically no active litigation: Most consent decrees are negotiated prior to the filing of the complaint and filed simultaneously with the complaint
     - Antitrust consent decrees historically have contained an explicit disclaimer that the parties' acceptance of the consent settlement—
       1. Is for settlement purposes only
       2. Does not constitute an admission by Respondents that they violated the law as alleged in the complaint
       3. Does not constitute an admission by the respondents that the facts as alleged in the complaint (other than jurisdictional facts) are true
          - *Note*: Consent cannot create jurisdiction. The parties admit jurisdictional facts on which the court or Commission may rely, but jurisdiction must exist independently under the governing statutes.

Some important legal technicalities

3. Understanding the role of consent
   - In the absence of an adjudication of the merits, the power of the court or agency to enter a consent settlement as a final order rests on the consent of the parties to the settlement:

> [I]t is the parties' agreement that serves as the source of the court's authority to enter any judgment at all. More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.[1]

   - Corollaries
     - Because the source of the court's authority to enter a consent decree is the parties' agreement and not a violation of law, no proof or admission of a violation of a legal obligation is needed before a court can enter and enforce a consent decree as a judicial order
     - Conversely, a person—including a party to the same litigation—that is not a signatory to a consent decree is not bound by it, and the decree cannot modify a third party's rights or impose obligations or duties on a third party[2]
       - Accordingly, if a consent decree imposes obligations on a party that result in a breach of that party's obligations to a third party, the third party may sue for breach, and the consent decree does not provide immunity for the breach

[1] Int'l Ass'n of Firefighters Local 93 v. City of Cleveland, 478 U.S. 501, 522 (1986) (citations omitted).
[2] *Id.* at 529; United States v. Ward Baking Co., 376 U.S. 327 (1964); Hughes v. United States, 342 U.S. 353 (1952).

Some important legal technicalities

4. Entering consent decrees as final judgments
   - A consent decree "embodies an agreement of the parties" and is also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees."[1]
   - As a final judgment, a consent decree has the same res judicata/claim preclusion effect as a litigated judgment[2]
     - Special rules may apply in some areas of the law (e.g., patent validity and infringement), but there is no reason to believe that antitrust consent decrees are not claim preclusive absent a clear indication in the decree to the contrary
     - In principle, consent decrees may also contain reservations of right (such as the right to appeal a merits issue), but I am not aware of any reservations in a modern merger antitrust consent decree
     - Because disputed issues ordinarily have not been actually litigated and decided, a consent decree ordinarily does not have issue preclusive effect
     - *WDC*: But no doubt antitrust consent decrees could be clearer on the preclusive effect. The standard boilerplate that the agencies use, for example, contains no language to the effect that the final judgment settles all claims raised by the complaint

[1] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992).

[2] *See* United States v. S. Ute Tribe or Band of Indians, 402 U.S. 159, 174 (1971); United States v. Int'l Bldg. Co., 345 U.S. 502, 506 (1953) ("Certainly the [consent] judgments entered are res judicata of the tax claims for the years 1933, 1938, and 1939, whether or not the basis of the agreements on which they rest reached the merits.").

Some important legal technicalities

5. Recognizing the dual nature of consent decrees
   - *Basic rule*: United States v. ITT Cont'l Baking Co. (1975):

> Consent decrees and orders have attributes both of contracts and of judicial decrees or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency. Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.[1]

   - Whether a consent decree will be treated as a contract will depend upon the particular context in which the issue arises

[1] United States v. ITT Cont'l Baking Co., 420 U.S. 223, 237 n. 10 (1975) (internal citation omitted).

Some important legal technicalities

6. Construing consent decrees
   - Courts generally construe consent decrees as contracts between the settling parties
     - Consent decrees “closely resemble contracts” and their “most fundamental characteristic” is that they are voluntary agreements negotiated by the parties for their own purposes[1]
     - As a general rule, courts construe consent decrees to give effect to the parties’ intent as expressed in the decree itself
     - “[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation.”[2]
       - *Query*: Is this still the state of the law?
   - But the contract analogy does not extend to third-party beneficiary enforcement
     - A consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it[3]
     - Even intended third-party beneficiaries of a consent decree lack standing to enforce its terms

[1] Int'l Ass'n of Firefighters Local 93 v. City of Cleveland, 478 U.S. 501, 519, 522 (1986).
[2] United States v. ITT Cont'l Baking Co., 420 U.S. 223, 236-37 (1975).
[3] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975).

Some important legal technicalities

7. Modifying consent decrees
   - Modification with consent of all parties
     - Courts generally will modify the terms of a consent decree with the consent of all parties, provided that the modification does not contravene the public interest
   - Modification over the opposition of a party
     - In *United States v. Swift & Co.*, the Supreme Court rejected the contention that a consent decree should be considered a contract for purposes of determining whether the courts have the power to modify such a decree absent the parties' consent:

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. The result is all one whether the decree has been entered after litigation or by consent. In either event, a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.[1]

[1] 286 U.S. 106, 114-15 (1932) (internal citations omitted); *see* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 378 (1992) ("[A consent decree] is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.").

Some important legal technicalities

7. Modifying consent decrees
   - Modification over the opposition of a party (cont.)
     - Three scenarios
       1. Conditions have changed since the entry of the consent decree, the restrictions in the consent decree now affirmatively harm the public interest, and the private party bound by the restrictions seeks modification. The government opposes.
          - Under Rule 60(b)(5), a court may modify or terminate a consent decree over the government's opposition if the moving party demonstrates a significant change in factual conditions or law that warrants modification
          - The modification must be suitably tailored to the changed circumstances; relief may be warranted when continued enforcement would harm the public interest[2]
       2. Conditions have changed since the entry of the consent decree, and the government concludes that the restrictions it negotiated in the consent decree are now inadequate to preserve competition and seeks modification to include new or enhanced restrictions. The private party opposes.
          - *WDC*: Courts likely will be reluctant to impose new obligations unless the decree expressly contemplates modification in light of changed circumstances
       3. Conditions have not changed since the entry of the consent decree, but the government concludes it has negotiated inadequate relief to preserve competition and seeks to include new or enhanced restrictions. The private party opposes.
          - *WDC*: In the absence of changed circumstances, courts are likely to deny modifications to strengthen the consent order over the respondent's opposition, reasoning that the government must live with the relief it originally negotiated.

[1] 286 U.S. 106, 114 (1932).
[2] Fed. R. Civ. P. 60(b)(5); *see* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 378 (1992) (noting application of Rule 60(b) to a consent decree).

An important aside: *Cleveland Firefighters*

- *Cleveland Firefighters*
  - *Rule*: A court may enter a consent decree as a final judgment even if the consent decree contains relief that a court could not award in a litigated proceeding

> [A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must com[e] within the general scope of the case made by the pleadings, and must further the objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. *Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.*[1]

- *Corollary*: An agency may demand relief in a consent decree that a court could not award the agency in a litigated proceeding
- The Court qualified this rule in two significant ways:
  1. The consent decree cannot conflict with or violate the law on which the complaint was based
  2. Inclusion of relief in a consent decree does not immunize the parties from a claim that compliance with the decree violates another law or breaches a contractual obligation to a third party
     - *Query*: Would the court abuse its discretion if it entered a consent decree that it knew required the respondent to violate some law or breach some contract?

[1] Int'l Ass'n of Firefighters Local 93 v. City of Cleveland, 478 U.S. 501, 525 (1986) (internal quotation marks and citations omitted; emphasis added).

An important aside: *Cleveland Firefighters*

- *Cleveland Firefighters*
  - Facts*:*
    - In 1980, the Vanguards, an organization of Black and Hispanic firefighters, filed a class action against the City of Cleveland alleging employment discrimination on the basis of race and national origin in hiring, assigning, and promoting firefighters
    - The district court entered a consent decree that encompassed race-conscious relief (including specific numbers of promotions to be given to minority firefighters and minority promotional goals)
    - The Cleveland firefighters union, which had intervened as a party-plaintiff, objected on the grounds that—
      - the consent decree's racial preferences (embodied in the quotas) may benefit individuals who are not themselves actual victims of illegal discrimination, *and*
      - the statute (Title VII) on which the plaintiffs' claims were premised prohibits a court from ordering relief requiring the promotion of an individual for a reason other than illegal discrimination[1]
  - Holding
    - Whether or not Title VII's enforcement provision precludes a court from ordering race-conscious relief after trial, that restriction does not apply to relief awarded in a consent decree
      - The Court found that in fashioning the enforcement provision, Congress sought to avoid undue federal interference with managerial discretion
      - But with a consent decree, management agrees with its terms, and hence there is no interference with managerial discretion

[1] Civil Rights Act of 1964, § 706(g) (current version at 42 U.S.C. § 2000e-5(g)) (Title VII enforcement provision).

The Consent Decree Approval Process

DOJ consent decrees: Tunney Act overview[1]

- The Tunney Act governs DOJ antitrust consent decrees, but not FTC consent orders
  - Enacted in 1974 as part of the Watergate reforms to ensure transparency and protect the public interest in DOJ settlements of antitrust cases
- DOJ initiates the Tunney Act review by filing with the court—
  - The complaint
  - The settlement in the form of a proposed final judgment
  - A Competitive Impact Statement
- The proposed settlement is published for a 60-day public-comment period, after which DOJ files the comments and its responses
- The court may enter the proposed final judgment only after determining that entry is in the public interest

[1] Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 2, 88 Stat. 1706, 1706-08 (1974) (codified as amended at 15 U.S.C. § 16(b)-(h)); see U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual ch. 4.D (5th ed. updated Mar. 2014).

DOJ consent decrees

- From settlement agreement to closing
  - DOJ staff negotiate the settlement in coordination with the AAG and other senior officials
  - After the AAG approves the settlement, DOJ files the complaint, proposed final judgment, Competitive Impact Statement, and a joint stipulation and proposed interim order
  - In a preclosing settlement, the interim order ordinarily—
    - Requires compliance with the proposed final judgment as though it were already in effect and
    - Imposes any asset preservation or hold separate obligations negotiated as part of the settlement
  - Once the court "so orders" the stipulation, DOJ permits the main transaction to close without awaiting final Tunney Act approval[1]

[1] At least one district judge was surprised—and not pleased—to learn that the merging parties had closed before the judge had reviewed the proposed settlement under the Tunney Act. *See* Transcript of Motions Hearing 4-18, United States v. CVS Health Corp., No. 1:18-cv-02340 (D.D.C. Nov. 29, 2018) (Leon, J.). The major filings in the case may be found here. The transcript is well worth reading.

DOJ consent decrees

- Competitive Impact Statement and public comments
  - The Competitive Impact Statement explains the alleged violation, the proposed remedy, its anticipated competitive effects, and alternatives actually considered by DOJ
  - It provides the public and the court with the agency's justification for the settlement
  - Any person may comment on the proposed settlement during a 60-day public comment period
  - DOJ must respond to the comments and file the comments and responses with the court
  - Comments rarely alter the settlement, although they may produce additional explanation, revision, or heightened judicial scrutiny

DOJ consent decrees

- Final approval and judicial review
  - After the comment process, DOJ moves for entry of the proposed final judgment
  - Before entry, DOJ may withdraw its consent, renegotiate the settlement, or proceed with litigation
  - The court must independently determine that entry is in the public interest[1]
    - May not merely rubber-stamp the proposal, although it may give substantial deference to DOJ's predictions
    - May not reject the decree simply because it prefers another remedy[2]
  - Courts ordinarily decide the motion on the written record; evidentiary hearings and outright rejection are rare[3]

[1] 15 U.S.C. § 16(e).
[2] *See* United States v. Iron Mountain, Inc., 217 F. Supp. 3d 146, 150 (D.D.C. 2016).
[3] There are exceptions. A contested evidentiary hearing was conducted, for example, in United States v. CVS Health Corp., 407 F. Supp. 3d 45 (D.D.C. 2019).

FTC consent orders

- The FTC process largely parallels the DOJ process, but it occurs within the Commission rather than in federal court and uses different documents and terminology[1]
  - DOJ complaint → FTC administrative complaint
  - Proposed final judgment → proposed consent order
  - DOJ stipulation and interim order → Agreement Containing Consent Orders and any Order to Maintain Assets or Hold Separate Order
  - Competitive Impact Statement → Analysis to Aid Public Comment
- The Commission provisionally accepts the settlement, issues the administrative complaint and any interim order, and ordinarily permits the parties to close and begin implementing the divestiture
- The proposed settlement is published for a 30-day public-comment period, after which FTC staff responds to any comments
- The Commission considers the comments and decides whether to make the consent order final

[1] *See* 16 C.F.R. §§ 2.31-2.34 (precomplaint settlements ("Part 2 settlements")); *id*. § 3.25 (postcomplaint settlements ("Part 3 settlements")); id. § 4.7 (ex parte communications in adjudicative proceedings).

Typical settlement process—Summary

Negotiations with investigating staff

Staff drafts consent decree and other necessary documents

DOJ	FTC
AAG approves filing of settlement papers with federal district court	FTC Bureau management recommends settlement
Court "so orders" stipulation (including maintain assets/hold separate)	Commission provisionally accepts consent settlement and enters Maintain Assets/Hold Separate Order

Merging firms may close transaction

DOJ	FTC
60-day public comment period commences with Federal Register and newspaper notice	30-day public comment period commences with Federal Register notice
DOJ responds in court filing to public comments (if any)	FTC staff responds to public comments (if any)
Court enters proposed consent decree as the final judgment in the case	Commission enters provisionally accepted consent order as the final cease and desist order in the case