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IT AIN'T OVER TILL IT'S OVER: REVIEW OF DOJ M&A SETTLEMENTS UNDER THE TUNNEY ACT

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Following a long antitrust review, you successfully negotiated a divestiture with the U.S. Department of Justice Antitrust Division ("DOJ") that allows your company to close its multibillion dollar acquisition, subject to a divestiture in one line of business. The DOJ filed its settlement papers with the court, and you have made your divestiture to a buyer that the DOJ approved. All that's left is court approval under the Tunney Act. Surely, you can move on from antitrust and focus on merger integration? One court has raised doubts.

Last month, the U.S. District Court for the District of Columbia approved a settlement between the DOJ and CVS related to its acquisition of Aetna. The approval comes 21 months after CVS' announcement of the transaction and nearly a year after the transaction closed. The court's decision ended one of the longest and most in-depth judicial reviews of a merger settlement under the Tunney Act in U.S. history. The case also is a rare example of a court requiring live testimony to inform its decision about the merits of the settlement under the Tunney Act.

This article details requirements of the Tunney Act and the role that the parties, the DOJ, and the court play in merger settlements that must undergo Tunney Act review. We also detail the likelihood that your transaction will be subject to a long Tunney Act review.

Why Do We Have the Tunney Act?

The Tunney Act, officially the Antitrust Procedures and Penalties Act, subjects civil antitrust settlements with the DOJ, including merger settlements, to federal district court review. The Tunney Act does not apply to settlements with the Federal Trade Commission.

At its core, the Tunney Act is a sunshine law. Before the Tunney Act, there was no formal judicial review of the DOJ's settlements in merger cases. Then, as now, consent decree settlements comprised the overwhelming majority of the DOJ's enforcement activity, approximately 80% of its civil antitrust suits in the decades leading up to the passage of the Tunney Act.[1]

In 1971, during the Nixon Administration, the DOJ settled litigation with International Telephone & Telegraph Corporation ("ITT") that required divestiture of three subsidiaries of the Hartford Fire Insurance Company. Subsequent confirmation hearings revealed controversial reasons for the

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settlement. Then, in 1972, ITT contributed $400,000 to fund the Republican National Convention. Although there was no proof of any quid pro quo, these events triggered calls for increased transparency into DOJ settlements and ultimately, passage of the Tunney Act in 1974.[2] This history as a sunshine law helps explain the procedures of the Tunney Act and the courts' role in reviewing settlements.

What Is the Tunney Act?

At a high level, the Tunney Act requires judicial review of the DOJ's settlements and a notice and comment period before a consent decree can be finalized.[3] Once the merging parties and the DOJ agree on the terms of a settlement, the DOJ files a complaint in federal district court alleging that the transaction is anticompetitive. However, the DOJ also simultaneously files a proposed final judgment ("PFJ") and a hold separate order (or, in some cases, an asset preservation order) that settle the complaint. The hold separate order mandates that the merged company operate the divested business separately and independently from the merged company. It also requires that merging parties comply with the PFJ, which details the terms of the divestiture. In most cases, once the court signs and enters the hold separate order, the parties are free to consummate the main transaction, and the divestiture transaction occurs sometime thereafter. Although the timeline varies, courts typically enter the hold separate order within a few days of the DOJ's filing with the court.

The court cannot enter the PFJ as a final judgment until the Tunney Act requirements have been met. The Tunney Act generally requires at least three months to complete and imposes three basic obligations: (1) disclosure of information by the DOJ about the proposed consent agreement; (2) a 60-day public comment period to allow input on the proposed remedy reflected in the consent decree; and (3) the district court's determination that entry of the proposed agreement serves the public interest.

To provide the public with information about the merits of the proposed settlement, the DOJ files a competitive impact statement ("CIS") at the same time as the complaint. The DOJ must publish both the CIS and the PFJ in the Federal Register at least 60 days before the court can enter the decree. A condensed version of the proposed settlement and the CIS also must be published (at the expense of the parties) for at least seven days during a two-week period in a general circulation newspaper in the district in which the case was filed, the District of Columbia, and any other districts that the court may direct.

The purpose of the notification and publication requirements is to inform the public, facilitating public comments on the proposed consent decree to aid the court in making its determination about whether the settlement is in the public interest. Any public comments also become part of the public record of the proceeding. After the public comment period closes, the DOJ analyses them, and publishes in the

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Federal Register all public comments received, along with its response to the comments. The number of public comments range from no comments to many in highly publicized matters like the *Microsoft* consent agreement. Comments range from the not serious to substantive discussions of the merits of the case. In rare cases, the DOJ has modified consent decrees in response to public comments.

The primary disclosure obligation required of the merging parties is submission of a statement describing any contacts with government officials relating to the proposed settlement, excluding contacts solely between counsel of record and the DOJ. This requirement is intended to ensure public disclosure of political or "lobbying" contacts that might have influenced the DOJ in accepting the agreement, but not of typical "lawyering" contacts involving the party's outside legal counsel and the DOJ staff.

The final required step is the court's determination that the consent decree is "in the public interest." The court can only approve or disapprove a PFJ; it has no ability to change its terms. In making this determination, the court may take various steps to ensure that it has an adequate record to evaluate the decree, including holding hearings, consulting with experts, allowing full or limited third-party participation, and reviewing the comments submitted during the comment period. Most judges make the public interest determination through the least complicated and least time-consuming process possible. Thus, hearings on proposed decrees are relatively uncommon, and most decrees are approved solely on the written submissions.

Tunney Act proceedings lead to results that are strange to the uninitiated.

- In most cases, merging parties close their main transaction within days of the DOJ's first court filings and months before the court's Tunney Act review concludes.
- In most cases, following the Tunney Act's public comment period, the court makes its public interest determination long after the main transaction has closed and typically after the divestiture has occurred.
- Because courts have limited powers under the Tunney Act and few cases generate significant public comments, reviews are typically perfunctory.

How Can the Tunney Act Become a Concern?

Closing the Transaction

The most common question that merging parties ask is when during Tunney Act review they can close their transaction. As noted above, in most cases, parties are free to close their transaction once the court signs and enters the hold separate order, which requires the merged company to operate the divested assets separately from the merged business. The hold separate order, which the DOJ files at the same time as its complaint, preserves the competitive status quo until the divestiture can take place.

In the last seven years, courts entered hold separate orders in approximately 20% of all merger settlements on the same day that they were filed and approximately 38% within two business days. Courts took more than two business days in the remaining 43% of merger cases, the longest of which was 16 business days. Although the reason for a period of more than two days is not always apparent, in most cases, DOJ filed the case over the holidays or a judge was reassigned. Therefore, in most cases, parties can quickly close their transaction after the DOJ files its complaint and hold separate order.

The Court's Public Interest Review

Although courts typically make their public interest determination swiftly and on the filed papers, on rare occasions, courts have conducted a more thorough investigation. In October 2018, the DOJ (and five states) settled charges that CVS' acquisition of Aetna would substantially reduce competition in the market for Medicare Part D prescription drug plans. To remedy the DOJ's concern, the parties agreed to divest Aetna's Part D business to WellCare. The DOJ filed its complaint and hold separate order on October 10, which the court entered on October 25. The parties closed the acquisition on November 28 and completed the divestiture two days later.

In a status conference in early December, Judge Leon raised concerns that the proposed settlement was not sufficiently broad, and even questioned whether the transaction should be unwound. Following a show cause hearing, and over the objections of the parties and the DOJ, he ordered CVS to operate Aetna as a separate business unit with independent control over prices and product offerings; freeze

compensation and benefits; and implement a firewall to prevent the exchange of competitively sensitive information.

The DOJ received more than 170 public comments totaling 1,800 pages. As is typical, the DOJ summarized and responded to the public comments, determined that no changes to the settlement were necessary, and recommended that the court enter the PFJ as final. However, Judge Leon determined that a public hearing was necessary to make the public interest determination, in part, because of concerns about the adequacy of the DOJ's response to public comments.

In June 2019, the court held a two-day, eight-hour public hearing that consisted of live testimony from third parties, company witnesses, and economic experts. The court took an active role in questioning witnesses, including challenging the proposed benefits of the transaction. Over its objection, the court also denied the DOJ the opportunity to cross examine witnesses who opposed the settlement.

In September, Judge Leon approved the settlement. Throughout the proceeding the DOJ and the court sparred over the proper role of the court in Tunney Act review. The DOJ contended that the court's public interest review is limited to markets that are the subject of the government's complaint. The DOJ therefore urged the court to set aside any evidence related to markets outside of Part D prescription drugs. Indeed, a number of public commenters, including witnesses at the June hearing, alleged harms outside of the market in the DOJ's complaint. The court, however, found that while it could not consider "claims" the government did not make, it could consider "harm" in other markets. The court acknowledged that the DOJ's settlements merit "great deference—if not a presumption of accuracy," but noted that "[i]f the Tunney Act is to mean anything, it surely must mean that no court should rubberstamp a consent decree approving the merger of 'one of the largest companies in the United States' and 'the nation's third-largest health-insurance company.' " The court concluded that while concerns related to other markets "warranted serious consideration," the markets were competitive today and would remain so post-merger.

Constitutional Questions

By requiring a court to approve an exercise of prosecutorial discretion by an arm of the executive branch, the Tunney Act has, at times, raised constitutional questions regarding the separation of powers. As explained above, the statute's enactment was driven in significant part by Congress' desire to ensure judicial oversight of the DOJ's settlements. But courts and the D.C. Circuit, in particular have not always been comfortable with judicial oversight of DOJ's decision-making, concerned that overly exacting judicial review risks improperly encroaching on DOJ's discretion in determining whether a merger is in the public interest.

This issue came to a head in a non-merger Tunney Act review involving Microsoft's alleged maintenance of a monopoly on the operating system for IBM-compatible personal computers. In 1995, the U.S. District Court for the District of Columbia found the DOJ's settlement proposal in the *Microsoft* case too narrow, too difficult to enforce, and insufficient to address certain antitrust concerns, so the court blocked entry of the agreement.[4] The U.S. Court of Appeals for the District of Columbia Circuit overturned this decision, concluding that the district court had exceeded its authority under the Tunney Act.[5] Cautioning that a district judge reviewing a Tunney Act application "must be careful not to exceed his or her constitutional role," the D.C. Circuit concluded that district courts' authority under the Tunney Act extended only to disapproving consent decrees that "appear[] to make a mockery of judicial power."[6] In the absence of any such "mockery," the court endorsed a deferential standard of review, explaining that "a court should not reject an agreed-upon modification unless 'it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.' "[7]

Partially in reaction to *Microsoft* and other decisions, Congress amended the Tunney Act in 2004 to provide additional guidance on the factors relevant to courts' analyses and decision-making process, and to make clear that Tunney Act review was not a judicial "rubber stamp."[8]

The changes included:

- stating that courts "shall," not just "may," use the Tunney Act's enumerated factors in its review;
- adding a new factor, *i.e.*, the impact of the consent

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decree on competition in the relevant market, for courts to consider; and

- clarifying that courts do not need to conduct an evidentiary hearing or permit intervenors.

Supporters of the 2004 amendments intended to make clear that the court's Tunney Act review was not limited to the D.C. Circuit's "mockery of the judicial function" standard.

The court in the CVS case appears not to have perceived risk of transgressing separation of powers in Tunney Act judicial proceedings. If anything, the court appeared more concerned about the abdication of judicial power that could result if it were to wave through any deal that the DOJ blessed subject to settlement.

As a practical matter a court's options are limited because it can only accept or reject, not alter, a settlement. In the case of a rejected settlement, the DOJ and the parties might try to negotiate a new settlement, but the parties are under no obligation to do so. If the parties refuse a new settlement, the DOJ's only option is to litigate and at that stage of a Tunney Act review, the main transaction typically has closed and the divestiture has occurred. Therefore, there is no longer a competitive problem to remedy. In the alternative, the DOJ might decide to withdraw its complaint, removing the case from the jurisdiction of the court. However, this may not be palatable to the DOJ because it would lose protections in the consent decree that survive the divestiture, such as preventing reacquisition of the divested assets for a period of time or the provision of back-office transition services to the divested business. Likewise, if the DOJ withdraws its complaint and in hindsight, the divestiture seller failed to meet its consent decree obligations, *e.g.*, it did not properly turnover all tangible and intangible assets such as contracts or customer lists, the DOJ likely would have no recourse against the seller. So far, the DOJ and merging parties have never faced this question.

Lessons for Merging Parties

1. It Ain't Over Till It's Over

The CVS case demonstrates that Tunney Act review can have a significant impact on a transaction. Although the parties closed the transaction once the court entered the asset preservation order, the court ordered CVS to hold Aetna separate until it concluded the Tunney Act review more than nine months later. During that period, the parties (and consumers) were unable to reap the benefits of the deal. For example, the parties projected $750 million in near-term synergies, and anticipated new products and services flowing from the combination of Aetna's medical information and analytics with CVS' pharmacy data, resulting in earlier health interventions, improved outcomes, and lower costs.

2. Know Your Judge

The DOJ typically files its settlements, and sometimes litigates mergers, in the U.S. District Court for the District of Columbia. That court and its judges have ample experience with antitrust issues, consent decrees, and government settlements more generally. For example, Judge Leon oversaw the Tunney Act review of Comcast's acquisition of NBC Universal in 2011 and presided over contentious litigation related to AT&T's acquisition of Time Warner in 2018.

Outside the antitrust context, Judge Leon has rejected proposed settlements with government agencies in the past. For example, in a 2011 case, he rejected a settlement with the Securities and Exchange Commission, which led to a new settlement agreement with enhanced reporting obligations. In 2015, Judge Leon rejected a deferred prosecution agreement with the DOJ for violations of trade sanctions, arguing that the settlement would "undermine the public's confidence in the administration of justice," a decision which was overturned. Because Judge Leon has closely scrutinized settlements with government agencies in the past, it was not altogether surprising that he closely reviewed the settlement in this case.

3. Tunney Act Review Is Not Likely to Hold Up Your Deal

Although the CVS case involved a lengthy public interest review, the fact remains that most deals (nearly 60%) can close within two business days of the DOJ's complaint. Even in the CVS case, the court entered the asset preservation order 15 days after the DOJ's complaint, enabling the parties to close the transaction before the Tunney Act proceedings came to an end. Although the DOJ's filings include a description of Tunney Act procedures for the court,

in cases where the assigned judge has not previously reviewed a DOJ settlement under the Tunney Act, it may be advisable to contact (jointly with DOJ staff) the court to discuss the procedures.

Likewise, lengthy public interest proceedings are rare, and relatively few merger cases generate substantial or serious public comments that are likely to draw interest from the court. Federal courts have busy dockets. When presented with a settlement between the DOJ and merging parties that resolves competitive concerns, and there are no public comments, courts are not likely to conduct an independent investigation.

Between 2013 and 2018, the average length of a Tunney Act review was 122 days, excluding the CVS case. By comparison, the Tunney Act review in the CVS case was 329 days. The longest Tunney Act review in that period was 345 days, and Tunney Act review was longer than 6 months (roughly 180 days) in less than 15% of cases. Moreover, in the last few years (2016 through 2018), the length of Tunney Act review has trended downward, lasting just 106 days on average. These data demonstrate that the lengthy Tunney Act review in the CVS case was an outlier.

4. Is My Transaction Likely to Be the Outlier?

As the court's decision in the CVS case suggests, high profile transactions or transactions that involve a substantial volume of serious public comments are more likely to attract attention during Tunney Act review. Of course, health care has been a sensitive political topic in recent years. However, even transactions with these characteristics will not necessarily lead to a long Tunney Act review. For example, the DOJ received no public comments regarding its settlement in United Technologies' acquisition of Rockwell Collins and Tunney Act review lasted just 64 days. Likewise, the DOJ received just one public comment regarding its settlement in Disney's acquisition of Twenty-First Century Fox and Tunney Act review lasted just 64 days.

Conclusion

In sum, the CVS case may have been the perfect storm of factors that led to an unusually long and detailed Tunney Act review. But in the end, like most Tunney Act reviews, the court permitted the parties to close the transaction shortly after the DOJ's complaint and it ultimately entered the final judgment. Although the CVS case might lead to longer Tunney Act reviews on the margin, merging parties should not expect dramatic change.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they associated.

ENDNOTES:

[1]118 Cong. Rec. at 31,674 (statement of Sen. Tunney). *See generally* Report of the Antitrust Subcomm. of the House Comm. on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Con., 1st Sess., at ix, 7-8 (House Comm. Print 1959).

[2]119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney).

[3]15 U.S.C.A. § 16.

[4]*United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C.).

[5]*United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

[6]*Id.*

[7]*Id.* at 1460.

[8]Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub.L. No. 108-237 § 213, 118 Stat. 661 (2004).

APPRAISAL AFTER *ARUBA NETWORKS*: WHAT DO *JARDEN*, *COLUMBIA PIPELINE*, AND *STILLWATER MINING* TEACH US?

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About six months ago, the Delaware Supreme Court issued its long-awaited decision in the *Aruba Networks* appraisal action.[1] Since then, the dust has settled, and the Court

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