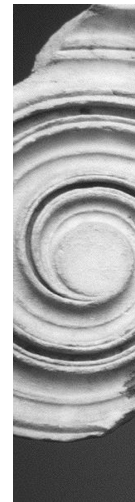


## **Merger Review Under the Tunney Act: Recent Travails**

ABA Section of Antitrust Law  
Spring Meeting  
2007

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February 2007



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## **Renewed Interest in Tunney Act Proceedings**

- Driven by Judge Sullivan's review of Verizon/MCI and SBC/AT&T settlements.
- Complaint and consent decree filed in October 2005 and there is still no relief (as of February 2007).
- This is first significant Tunney Act Proceeding since the 2004 amendments.

## **Verizon/MCI and SBC/AT&T**

- Mergers announced in 2004.
- DOJ filed complaint and proposed Final Judgment in October 2005.
  - DOJ found mergers reduced competition in the provision of local private lines at more than 700 buildings.
  - Proposed Final Judgment required the grant of certain leases to use fiber in these buildings.

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## **The Tunney Act Proceedings in Verizon/MCI and SBC/AT&T**

- Papers filed by DOJ in October 2005 for 60 day comment period.
- Interveners claimed that remedies were insufficient and even claimed mergers themselves were against the public interest.
- In July 2006, Judge Sullivan refused to sign the proposed final judgments without more information.
  - Court required DOJ to submit additional evidence, which resulted in two declarations from DOJ and thousands of pages of supporting materials – offers a rare glimpse into DOJ thinking.
- Still no decision from Judge Sullivan (as of February 2007).
- Mergers were completed in 2005 but remedies have still not been imposed.

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## Tunney Act 2004 Amendments

- Amendments principally driven by Congressional displeasure with *Microsoft* settlement.
- Supporters of amendments believed the legislation would “make clear” that the DC Circuit’s interpretation of the Tunney Act in *Microsoft* was too narrow.

“[I]t would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of a district court to ...determining whether entry of those consent judgments would make a mockery of the judicial function.”

- Also intended to insure that courts take meaningful and measured scrutiny of antitrust settlements.

“The purpose of this section is to effectuate the original Congressional intent in enacting the Tunney Act and to ensure that United States settlements of civil antitrust suits are in the public interest.”

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## Senator Kohl Proposed Drastic Changes

- Senator Kohl proposed changes:

“(e) (1) Before entering any consent judgment proposed by the United States under this section, the court shall independently determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider...”

(2) The Court shall not enter any consent judgment proposed by the United States under this section unless it finds that there is reasonable belief, based on substantial evidence and reasoned analysis, to support the United States' conclusion that the consent judgment is in the public interest. In making its determination as to whether entry of the consent judgment is in the public interest, the Court shall not be limited to examining only the factors set forth in this subsection, but may consider any other factor relevant to the competitive impact of the judgment.”

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## The Amendments

- Amendments produced two seemingly modest changes:
  - Now states that courts “shall” rather than “may” take various factors into account in the analysis of a proposed consent decree.
  - Added a provision that the Act did not require courts to conduct evidentiary hearings or to permit anyone to intervene.
- But also enumerated many factors that the courts “shall” consider.

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## Tunney Act As Amended

“Before entering any consent judgment proposed by the United States under this section, the court shall determine that the *entry of such judgment is in the public interest*. For the purpose of such determination, the court shall consider...”

- A) . . . any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
- (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.”

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## Unintended Consequences?

- Change of “may” to “shall”
  - Suggests a more aggressive role for courts was envisioned.
- Seemingly continued limitation that proceeding looks at remedy (“judgment”) and not underlying case
  - Interveners in telecomm cases have attempted to “litigate” the merits of the merger.

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## Unresolved Questions ???

- Did Tunney Act Amendments intend to significantly expand role of judicial oversight of merger settlements?
  - DOJ seems to say “no” – nothing in Tunney Act “requires US to prove underlying case.” (*DOJ Submission 9/21/06*)
  - Some members of Congress seem to think otherwise – “amendments intended to “heighten the scrutiny courts must apply to review these settlements.” (*Kohl/Leahy Ltr to AAG*)
- Should (or will) courts take on a more aggressive oversight role?
- Will DOJ craft complaints more narrowly to minimize ability to challenge DOJ actions?
- Will DOJ change its approach in accepting merger settlements (i.e., more “fix-it-firsts” or prohibit closing until Tunney Act review completed)?
- Will merging parties change settlement strategies?

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