

# The Tunney Act: A House Still Standing

**Joseph G. Krauss, David J. Saylor, and Logan M. Breed**

*“Well, he huffed, and he puffed, and he huffed and he puffed,  
but he could not blow the house down.”<sup>1</sup>*

The recent debate over the proper role of the courts in reviewing U.S. Department of Justice Antitrust Division settlements in antitrust cases might remind some of the childhood story about the wolf and the three little pigs. After lots of “huffing and puffing,” the Tunney Act “house” is still standing—although the DOJ may find it worthwhile to reinforce the walls of the house in certain future cases.

Periodically, there has been considerable “huffing and puffing” by the DOJ’s critics and some members of Congress that the courts were not properly fulfilling their responsibilities in reviewing DOJ settlements under the Tunney Act. Much of the criticism followed the approval by the District of Columbia Circuit Court in 1995 and 2002 of the consent orders resolving the DOJ’s cases against Microsoft, which many saw as abrogating the original intent of the Tunney Act. Passed in 1974, the Antitrust Procedures and Penalties Act, commonly referred to as the Tunney Act, requires federal courts to review each consent decree in civil antitrust cases filed by the DOJ to ensure that the remedy proposed in the consent is in the public interest. Courts have long been perceived as simply “rubber stamping” DOJ settlements; but following the *Microsoft* decisions, Congress decided to address these concerns and amended the Tunney Act in 2004. While the modifications were relatively minor, the legislative history indicates Congress (or at least the members that introduced the legislation) intended to strengthen the judicial role in the process and provide more effective oversight of antitrust consent decrees.

The first significant test of the amendments arose recently in Judge Emmet Sullivan’s reviews of the DOJ’s proposed consent decrees in two of the largest telecommunications mergers in American history, the Verizon/MCI and AT&T/SBC transactions. The DOJ’s narrow approach to market definition and its proposed remedy drew intense criticism from consumer groups and some state regulatory agencies, and a number of entities filed briefs arguing that the 2004 amendments required the court to play an extremely active supervisory role. Judge Sullivan initially appeared to take these arguments to heart, holding several hearings and requiring the DOJ to produce significant evidence to support its contentions. But in the end, the 2004 amendments appear not to have made any substantive impact—Judge Sullivan ultimately approved the consent decrees and expressly reconfirmed that the *Microsoft* court’s overarching decisional principles are not inconsistent with the 2004 amendments.

And so, after all the “huffing and puffing,” Judge Sullivan found that the requirements of the Tunney Act had remained largely unchanged—the Tunney Act “house” remained standing and looked a lot like it did before 2004.

■  
**Joseph G. Krauss**  
and **David J. Saylor**  
are partners, and  
**Logan M. Breed** is  
an associate, in the  
Washington, D.C. office  
of Hogan & Hartson,  
L.L.P.

---

<sup>1</sup> From the *Tale of the Three Little Pigs*, by Joseph Jacobs, first published in 1898.

## History of the Tunney Act

Prior to the Tunney Act, there were no formal statutory procedures governing the DOJ's antitrust consent decrees. The Act was inspired largely by the DOJ's settlement of antitrust suits challenging International Telephone & Telegraph Corp.'s mergers with several other corporations during the Nixon Administration.<sup>2</sup> The settlements prompted allegations of improper influence by ITT because they contained far less relief than was sought in the original complaint and they came on the heels of a \$400,000 donation by ITT to the Republican National Committee.

To avoid future allegations of impropriety in antitrust consent decrees, the Tunney Act imposed specific rules for the notification of consents, the opportunity for third parties to provide comments, and judicial review of the consent. The DOJ must prepare and file a complaint and Competitive Impact Statement (CIS) simultaneously with the proposed consent decree explaining both the alleged antitrust violation and the proposed remedy. These documents are published in the *Federal Register* for public comment.<sup>3</sup> The DOJ then files the Comments publicly with the court and appends its own Response to those comments.

Before entering the consent, the court must determine whether entry of the decree is in the public interest. Specifically, the Tunney Act lays out two sets of factors for the court to consider. First, the court assesses the decree's competitive impact, including the duration of relief sought, the anticipated effects of alternative remedies actually considered by the DOJ, and "any other considerations bearing upon the adequacy" of the decree.<sup>4</sup> Second, the court should examine the impact of the consent decree "upon the public generally and individuals alleging specific injury" from the violations stated in the complaint.<sup>5</sup> The Act provides the court broad leeway to determine the necessary scope of its review. The court may hold hearings, take testimony of government officials or experts, appoint special masters, consultants or expert witnesses, admit amicus curiae or intervenors, review written comments, responses and objections, and "take other such action in the public interest as the court may deem appropriate."<sup>6</sup>

Courts have generally deferred to the DOJ and approved decrees with little fanfare, but judges in a few instances have used their Tunney Act powers more expansively.<sup>7</sup> The first widely publicized judicial discussion of the Tunney Act was the 1982 review of the AT&T consent decree. In a lengthy opinion, Judge Greene stated that, although the Act contemplated some deference to the prosecutorial discretion of DOJ,

It does not follow . . . that courts must unquestioningly accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the 'rubber stamp' role which was at the crux of the congressional concerns when the Tunney Act became law.<sup>8</sup>

<sup>2</sup> See 119 CONG. REC. 24,598 (1973) (statement of Sen. Tunney).

<sup>3</sup> 15 U.S.C. §§ 16(b), 16(e).

<sup>4</sup> *Id.* § 16(e)(1).

<sup>5</sup> *Id.* § 16(e)(2).

<sup>6</sup> *Id.* § 16(f).

<sup>7</sup> For example, in a few cases, the parties have withdrawn the decree and resubmitted a modified version in response to opposition by third parties or the court. See, e.g., *United States v. Thomson Corp.*, 949 F. Supp. 907 (D.D.C. 1996); *United States v. NBC*, 449 F. Supp. 1127 (C.D. Cal. 1978).

<sup>8</sup> *United States v. AT&T*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The AT&T case technically was not a Tunney Act proceeding because the settlement there involved the modification of an existing consent decree,

*Courts have generally deferred to the DOJ and approved decrees with little fanfare, but judges in a few instances have used their Tunney Act powers more expansively.*

He refused to approve the consent decree as written, insisting that the court's ongoing oversight authority was inadequate. The parties consented to the court's proposed modifications, and the modified decree was entered.

But intense judicial scrutiny of DOJ settlements was the exception, not the norm, and debate over the proper scope of the Tunney Act review remained largely quiet until the 1995 review of the DOJ's consent decree with Microsoft regarding its alleged anticompetitive marketing practices. The D.C. District Court for the first time used its powers under the Tunney Act to prohibit the decree on substantive grounds. The district court denied the DOJ's motion to grant the decree because the DOJ "did not provide the court with the information it needs to make a proper public interest determination,"<sup>9</sup> the scope of the decree was too narrow, and the parties refused to adequately address certain practices that concerned the court (such as "vaporware," or product preannouncement). The court requested more information regarding the details of the settlement negotiations between the DOJ and Microsoft, and asked the DOJ whether it would continue to investigate certain alleged anticompetitive practices that were not mentioned in the complaint or addressed in the consent.

On appeal, the DC Circuit held that the district court had overstepped its bounds by reformulating the issues and "effectively redraft[ing] the complaint."<sup>10</sup> The court emphasized that the district court's authority to review the decree depends entirely on the DOJ's exercise of its prosecutorial discretion. Using language that would later form the basis of the arguments in favor of the 2004 Tunney Act amendments, the court implied (at least to some readers) that district courts should accept all decrees that do not "appear[ ] to make a mockery of judicial power."<sup>11</sup> The D.C. Circuit reversed and ordered the district court to enter the consent decree.

In 2002, the D.C. Circuit Court was asked once again to approve an antitrust consent decree involving Microsoft when the DOJ agreed to settle its civil suit regarding Microsoft's monopolization of the operating system market. The DOJ had already won on the issue of liability, and the only remaining issue was the proper remedy. This time—despite a prior district court ruling in the case that had ordered the breakup of the company,<sup>12</sup> as well as intense opposition from Microsoft's competitors, customers, and many voices in academia—the court entered the consent decree with only minor modifications.<sup>13</sup>

### The 2004 Amendments

Following the approval of the second Microsoft consent decree, Congress considered changes to the Tunney Act. Senator Herbert Kohl (D-WI) proposed some drastic changes, most notably that the district court may not accept any consent decree offered by the Department of Justice "unless it finds that there is *reasonable belief, based on substantial evidence and reasoned analysis, to*

---

indeed one that was entered in 1956, many years before the Tunney Act. Judge Greene followed Tunney Act procedures without deciding that the Tunney Act applied to the modification of a consent decree in the long-settled case and the dismissal of a different case that he had partially tried.

<sup>9</sup> *United States v. Microsoft Corp.*, 159 F.R.D. 318, 332 (D.D.C. 1995).

<sup>10</sup> *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995).

<sup>11</sup> *Id.* at 1462.

<sup>12</sup> *See United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000), *rev'd*, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>13</sup> *See United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002), *aff'd*, *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

support the United States' conclusion that the consent judgment is in the public interest."<sup>14</sup> The proposed amendment also potentially expanded the scope of the review by allowing the court to "consider any other factor relevant to the competitive impact of the judgment."<sup>15</sup>

Despite these sweeping proposals, Congress ultimately enacted several relatively minor changes to the Tunney Act as part of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. First, the Act now states that courts "shall" (instead of "may") take the enumerated factors into account in an analysis of the consent decree. Second, there is a new enumerated factor: The judge "shall" consider "the impact of the entry of such judgment upon competition in the relevant market or markets."<sup>16</sup> Third, a provision was added stating that the Act did not require the court to conduct an evidentiary hearing or to permit anyone to intervene. Importantly, the amending legislation also stated in the "Congressional findings and declarations of purposes" preamble: "[I]t would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a 'mockery of the judicial function.'"<sup>17</sup>

Congressional Record statements by the amendments' supporters indicated they believed the legislation would "make clear" that the D.C. Circuit's 1995 interpretation of the Tunney Act (in particular, the "mockery of the judicial function" language) was too narrow.<sup>18</sup> Senator Kohl stated that the amendments would "insure that the courts can take meaningful and measured scrutiny of antitrust settlements."<sup>19</sup> However, the DOJ apparently did not find these changes very significant—in a press release discussing the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, the DOJ did not even mention that the legislation altered the Tunney Act.<sup>20</sup>

### Verizon/MCI and SBC/AT&T: The 2004 Amendments in Practice

The meaning of the 2004 amendments became the subject of intense debate in 2005 and 2006 when the DOJ sought approval of its consent decrees regarding the Verizon/MCI and SBC/AT&T transactions. The settlements provided narrow relief involving only partial divestitures of fiber into specific buildings. As in the *Microsoft* cases, the proposed decrees received strong criticism from many industry participants and commentators who believed that the remedies were insufficient. Critics argued that the DOJ should have sought additional divestitures and that the amended

---

<sup>14</sup> See *United States v. SBC Communications, Inc.*, 2007 WL 1020746, \*15 n.8 (D.D.C. Mar. 29, 2007) (emphasis added). The ABA Section of Antitrust Law strongly opposed this drastic proposed alteration in the Tunney Act which would have made the process similar to courts' review of administrative agency regulatory decisions under the Administrative Procedure Act and very different from the usual judicial function in law enforcement matters. The Antitrust Section was concerned that such a radical reworking of the Tunney Act would discourage settlements, derail efficiency-enhancing transactions, and prove very time-consuming and burdensome. See Comments of the ABA Section of Antitrust Law on HR 1086: Increased Criminal Penalties, Leniency, Detrebling, and the Tunney Act Amendments (Jan. 2004), available at <http://www.abanet.org/antitrust/at-comments/2004/01-04/increasedcriminalpenalties.pdf>.

<sup>15</sup> See *id.*

<sup>16</sup> 15 U.S.C. §§ 16(e)(1)(A) & (B). Another new factor added in 2004 is "whether its [i.e., the consent decree's] terms are ambiguous." *Id.* § 16(e)(1)(a).

<sup>17</sup> Pub. L. 108-237, Title II, § 221(a)(1)(B), June 22, 2004, 118 Stat. 668.

<sup>18</sup> 150 CONG. REC. S3615-18 (Apr. 2, 2004) (statement of Sen. Kohl).

<sup>19</sup> *Id.* at S3617.

<sup>20</sup> See Press Release, U.S. Dep't of Justice, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (June 23, 2004), available at [http://www.usdoj.gov/atr/public/press\\_releases/2004/204319.htm](http://www.usdoj.gov/atr/public/press_releases/2004/204319.htm).

Tunney Act required more in-depth review. The merging parties and the DOJ argued that the court's inquiry was limited to the competitive issues identified in the complaint, and the DOJ asserted that the 2004 amendments did not alter this principle.

***The DOJ's Position—Narrow Harm, Narrow Remedy.*** The DOJ filed complaints in both cases on October 27, 2005, along with proposed final judgments incorporating remedies that the DOJ argued were tailored to the harm alleged in the complaints. The settlements focused on restoring competition in (1) "local loops," or the "last mile" connections between commercial buildings and the carrier's network, and (2) "local private lines" (LPLs), or dedicated, point-to-point telecommunications circuits that originate and terminate within a single metropolitan area and encompass one or more local loops.<sup>21</sup> The DOJ alleged that the transactions would reduce competition for LPL service (and the retail voice/data telecommunications services provided via LPLs) for a narrowly defined number of specific commercial buildings where the mergers were "2 to 1"—in other words, they eliminated the only competing alternative to the Regional Bell Operating Company (RBOC)—and entry by another firm was not likely.<sup>22</sup> The parties were required to issue an "indefeasible right of use" (i.e., a long-term leasehold interest) to specified strands of their fiber assets serving those buildings.<sup>23</sup>

***Tunney Act Proceeding—How Far Will the Judge Go?*** The DOJ filed its motion for entry of the proposed final judgments on April 5, 2006, and the Tunney Act review of the DOJ's proposed consent decrees was assigned to Judge Emmet Sullivan of the D.C. District Court. On July 12, 2006, Judge Sullivan held an unprecedented hearing to determine (1) whether the court should rely on the DOJ's examination of the evidence or if it needed to review the evidence itself, (2) whether the DOJ had produced sufficient evidence, and (3) the proper scope of the court's review. In advance of the hearing, Judge Sullivan issued an order asking the parties to consider a number of questions that created the possibility for a broad debate on the relevance of the 2004 amendments and the proper standard of review in a Tunney Act proceeding, including the following:

- "What authority, if any, does the Court have to question the scope of the government's Complaints in these two cases?"
- "What weight should the Court give to the legislative history of the amended Tunney Act . . . in its determination of what the appropriate standard of review is under the 2004 amended Tunney Act?"
- "What specific evidence is the government relying on for its assertion that its proposed remedies would replace the competition that would be lost as a result of the two mergers?"
- "Has the government provided the Court with sufficient information for it to make an independent determination as to whether entry of the proposed consent decrees is in the public interest? If not, what other information should the government have provided to the Court?"
- "Through the eyes of a layperson, the mergers, in and of themselves, appear to be against public interest given the apparent loss in competition. In layperson's terms, why isn't that the case?"<sup>24</sup>

---

<sup>21</sup> *SBC*, 2007 WL 1020746 at \*3.

<sup>22</sup> *Id.* at \*3–\*4.

<sup>23</sup> *Id.* at \*5.

<sup>24</sup> *United States v. SBC Communications, Inc.*, Nos. 03-2512, 03-2513 (D.D.C. July 7, 2006) (order regarding July 12, 2006 hearing).

At the hearing, Judge Sullivan expressed concern that the DOJ and the merging parties had not submitted enough evidence to support the remedies. He also granted motions by several critics to participate as amici.

On July 25, 2006, Judge Sullivan held another hearing and refused to sign the consent decrees without more information, complaining that the record “consisted largely or exclusively of unverified legal pleadings.”<sup>25</sup> He ordered the DOJ to produce “any material necessary for the Court to satisfy its judicial and statutory function” by August 7, 2006.<sup>26</sup> He also indicated that it was “premature” to order a full evidentiary hearing, but he refused to rule out the possibility of such a hearing in the future.

In response, the DOJ filed (1) a detailed memorandum explaining its submission, (2) a declaration by W. Robert Majure, the DOJ economist who directed the economic analysis of the transactions, and (3) extensive technical materials the DOJ had gathered from the parties and their competitors. All of the admitted amici also filed supplemental submissions, including several declarations by economists and other experts. The DOJ submitted a reply to those responses, including a reply by Majure. On November 30, 2006, Sullivan held another hearing to discuss these filings. Finally, the parties submitted supplemental responses regarding specific issues raised at the hearing, particularly amici’s claims that (1) the DOJ’s analysis did not follow the steps outlined in the agencies’ Merger Guidelines, and (2) the DOJ “made up” some of the facts upon which it relied.

**The Outcome—The More Things Change, the More They Stay the Same.** Following the final hearing on November 30, 2006, the antitrust bar waited with anticipation for Judge Sullivan’s ruling. His statements from the bench during the review process led some to speculate that, in his view, the 2004 amendments changed the Tunney Act procedurally, and maybe substantively as well. This speculation was also fueled by Judge Sullivan’s requests for significant supplemental material to complete the record, which may trace back to the new factor in the 2004 amendments that the judge “shall” consider “the impact of the entry of such judgment upon competition in the relevant market or markets.”<sup>27</sup> Sullivan also required the DOJ to persuade him with some factual data that the screen or algorithm used to determine which “2 to 1” situations required divestiture was a reasonable predictor of likely entry and thus within the reaches of the public interest.<sup>28</sup>

When Judge Sullivan issued his opinion on March 29, 2007, he quickly put to rest any speculation that the 2004 Amendments drastically changed the way the statute worked. In his first paragraph, he stated that “[t]he only question facing this Court, under the procedures crafted by Congress, is whether the divestitures agreed upon by the merging parties and the Department of Justice are ‘in the public interest.’”<sup>29</sup> Indeed, throughout his opinion he favorably cited the Justice Department’s favorite incantation that the decree need only be “within the reaches of the public interest.”<sup>30</sup> Despite the amici’s heated protestations over the allegedly inadequate scope of the DOJ’s remedy, Judge Sullivan expressly refused to “decid[e] whether these mergers as a whole run afoul of the antitrust laws, nor whether they are altogether in the public interest, nor whether

*When Judge Sullivan issued his opinion on March 29, 2007, he quickly put to rest any speculation that the 2004 Amendments drastically changed the way the statute worked.*

<sup>25</sup> *SBC*, 2007 WL 1020746 at \*8.

<sup>26</sup> *Id.*

<sup>27</sup> 15 U.S.C. §§ 16(e)(1).

<sup>28</sup> *SBC*, 2007 WL 1020746 at \*17.

<sup>29</sup> *Id.* at \*1.

<sup>30</sup> *See, e.g., id.* at \*14, \*16, \*20, \*21, \*23.

they should be approved by other branches of the federal government.”<sup>31</sup> In short, while Judge Sullivan required the DOJ to provide more evidence than what was in their Competitive Impact Statement and Response to Public Comments to support the proposed decrees, he applied basically the same substantive test that the courts used under the pre-2004 version of the Tunney Act.

In fact, Judge Sullivan’s opinion mounted a three-step defense of the *Microsoft* decision, which had ostensibly spurred the 2004 amendments. First, Sullivan noted that the amendments were spawned in part by Congressional reaction to the *Microsoft* settlement, particularly the perception that the court misinterpreted the Tunney Act standard when it apparently held that courts may reject settlements only if they “make a mockery of judicial power.”<sup>32</sup> However, Sullivan determined that the *Microsoft* court’s holding was actually compatible with the Tunney Act’s traditional purpose—the *Microsoft* court’s controversial statement just meant that “district courts cannot reach beyond the complaint unless the limited nature of the complaint makes a mockery of judicial power.”<sup>33</sup> In other words, Judge Sullivan held that the language of the Tunney Act requires the court to focus on whether the proposed decree adequately remedies the alleged harm in the complaint, not whether the complaint encompasses all of the potential anticompetitive harm arising from the transaction. This position—that the court is not empowered to determine whether the decree is the best possible resolution of the potential anticompetitive harm—is hardly novel; it is the standard that reviewing courts have traditionally applied in Tunney Act reviews for decades.<sup>34</sup>

According to Judge Sullivan, the Tunney Act interpretation that Congress disapproved came not from *Microsoft*, but from the subsequent *Massachusetts School of Law at Andover, Inc. v. United States* decision.<sup>35</sup> In that case, the court transformed the *Microsoft* “mockery” phrase into an element of the substantive standard of review, writing:

The district court must examine the decree in light of the violation charged in the complaint and should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes a “mockery of judicial power.”<sup>36</sup>

Under this formulation of the test, the “mockery” phrase modifies all of the preceding clauses and therefore becomes determinative. Sullivan argued that the 2004 amendments were really Congress’s response to this development, evidenced by (1) the new requirement that the courts evaluate “all of the enumerated factors” and (2) the statement in the Congressional findings that the Tunney Act review process is not limited to a determination of whether the decree would make a mockery of the judicial function.<sup>37</sup>

---

<sup>31</sup> *Id.*

<sup>32</sup> *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

<sup>33</sup> *SBC*, 2007 WL 1020746 at \*12.

<sup>34</sup> *See, e.g.*, *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) (“The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is within the reaches of the public interest.”); *United States v. Alcoa, Inc.*, 2001 WL 1335698, \*16 (D.D.C.) (“More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.”); *United States v. Western Elec. Co.*, 592 F. Supp. 846, 856 (D.D.C. 1984); *NBC*, 449 F. Supp. 1127; *United States v. Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975).

<sup>35</sup> 118 F.3d 776 (D.C. Cir. 1997).

<sup>36</sup> *Id.* at 783 (quoting *Microsoft*, 56 F.3d at 1462).

<sup>37</sup> *SBC*, 2007 WL 1020746 at \*12.

Second, Judge Sullivan addressed the issue of whether courts may consider matters other than those specifically mentioned in the DOJ's complaints. He pointed back to *Microsoft* for the proposition that the court cannot go beyond the scope of the complaint, and he found nothing in the Tunney Act or the 2004 amendments to alter that determination. In particular, he reasoned that the language of the statute and the legislative history were both focused on the competitive impact of the judgment rather than the competitive impact of the transaction at issue.<sup>38</sup> Under this reading of the Tunney Act, the court's sole responsibility is to ensure that the remedy hits the target set out in the complaint—and “the 2004 amendments have left in place the Circuit's holding [in *Microsoft*] that this Court cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.”<sup>39</sup>

*He pointed back to Microsoft for the proposition that the court cannot go beyond the scope of the complaint, and he found nothing in the Tunney Act or the 2004 amendments to alter that determination.*

Third, Judge Sullivan addressed the issue of the proper standard of review, i.e., the proper level of deference accorded to the DOJ's evaluation of the adequacy of the proposed settlements. Judge Sullivan found that neither the original Tunney Act, the 2004 amendments nor the legislative history answered this question. The Act itself lists the factors the court should consider but it is “silent as to whether the court should defer to the government's conclusions regarding those factors.”<sup>40</sup> Most of the statements in the legislative history provided only vague phrases such as “carefully review,” “undertake meaningful and measured scrutiny,” and “independently review.”<sup>41</sup> The only exceptions Sullivan found were comments by Senator Kohl, including a statement that courts should ensure that decrees are “analytically sound.”<sup>42</sup> While this statement may indicate an objective standard for the court's independent review, Judge Sullivan ultimately held that it was not persuasive because it was not adopted in the language of the amendments: “The statement of a lone legislator, unaccompanied by a corresponding change in the statutory language, is insufficient to override a well-established judicial construction of the statute.”<sup>43</sup>

Because Congress had given no precise direction on this point, Judge Sullivan turned to the controlling D.C. Circuit Court precedent: *Microsoft*. He noted that under *Microsoft*, the Tunney Act does not require the DOJ to employ any specific type of analysis in evaluating and settling cases, nor does it require DOJ to prove its underlying allegations in a Tunney Act proceeding.<sup>44</sup> Moreover, *Microsoft* confirmed that “[t]he government need not prove that the settlements will *perfectly remedy* the alleged antitrust harms; it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.”<sup>45</sup> Therefore, Judge Sullivan held that the relevant inquiry is whether there is a factual foundation for the DOJ's decisions that make its conclusions reasonable.

Applying these principles to the cases at hand, Judge Sullivan approved the decrees. He noted that it was “quite possible” that buyers of the proposed divestiture assets would not be able to offer overall services of the same quality as the merging parties.<sup>46</sup> Nevertheless, he found that DOJ

<sup>38</sup> See *id.* at \*13–\*14.

<sup>39</sup> *Id.* at \*14.

<sup>40</sup> *Id.*

<sup>41</sup> 150 CONG. REC. S3616–17.

<sup>42</sup> *Id.* at 3618.

<sup>43</sup> *SBC*, 2007 WL 1020746 at \*15.

<sup>44</sup> See *id.* at \*14–\*15, \*20.

<sup>45</sup> *Id.* at \*16 (emphasis added).

<sup>46</sup> *Id.* at \*20.



had “presented a reasonable basis for concluding that the proposed settlements will replace much of the competition lost to the mergers, if perhaps not all of it,” and therefore the remedy was within the public interest.<sup>47</sup> Similarly, Judge Sullivan noted potential shortcomings of the DOJ’s entry analysis, but found that it was “a reasonable, practical prediction of likely entry” and therefore was “within the reaches of the public interest.”<sup>48</sup> Finally, he held that the DOJ’s complaints were not so narrow as to make a mockery of judicial power and that all of the other enumerated factors were satisfied.<sup>49</sup>

## Conclusion

Judge Sullivan’s lengthy opinion should put to rest—at least for now—the question of what is the proper role for the courts in reviewing DOJ consent decrees.<sup>50</sup> The answer is substantially the same as it was before 2004—to determine whether the order is in the public interest and not to decide whether the proposed merger runs afoul of the antitrust laws.

Although Judge Sullivan clearly stated that the scope of review under the Tunney Act did not change, the process he invoked to review these consent orders may imply a significant change for future Tunney Act proceedings. He required the parties to generate a detailed record, including papers that provide significant insight into the DOJ’s analysis of the proposed mergers and why the proposed remedies were sufficient to address the competitive concerns described in the complaint. He left unanswered an important question: Are courts required to compile such an extensive record in all Tunney Act proceedings, or was this case unique as a case of first impression following the 2004 amendments? If the former is true, the antitrust bar may have opportunities in the future to gain unprecedented behind-the-curtain insight into how the DOJ’s merger review process actually works in practice. Alternatively, if these decrees were in a small universe of highly controversial settlements in technically complex industries where supplementation of the record was necessary so the court was better informed and did not risk abusing its broad discretion by proceeding in the absence of a fuller record, then these proceedings may be an anomaly.

Third parties that are dissatisfied with future consent decrees may find it worthwhile to try to intervene (or at least submit amici briefs) to force the DOJ to defend the link between the complaint and the proposed remedy with detailed evidence and legal argument. In rare cases, this heightened scrutiny of the DOJ’s decision-making process may expose inexplicable inconsistencies between the harm alleged in the complaint and the proposed remedy—which may then lead to more court-induced modifications of proposed consent decrees.<sup>51</sup>

Given this potential increase in future “huffing and puffing,” the DOJ may decide that it needs to reinforce the Tunney Act’s “house” a bit in certain cases. For example, the DOJ may find it

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at \*21.

<sup>49</sup> *Id.* at \*22.

<sup>50</sup> Note, however, that these cases may not be over yet—COMPTEL, one of the amici that protested the consent decrees before Judge Sullivan, has filed a motion for leave to intervene for purposes of appealing Judge Sullivan’s decision. At this writing, the court has not acted on COMPTEL’s request.

<sup>51</sup> On the other hand, there is some evidence that courts may not be likely to engage in the type of detailed evidentiary analysis conducted by Judge Sullivan, even in relatively high-profile cases where amici protest that the proposed remedy does not adequately address the alleged harm. For example, another district court judge recently approved a consent decree regarding Mittal Steel’s acquisition of Arcelor solely on the basis of the complaint, CIS, and proposed Final Judgment, despite vocal opposition from certain third parties. *United States v. Mittal Steel Co. NV*, Case No. 1:06-CV-01360 (D.D.C. May 23, 2007), available at <http://www.usdoj.gov/atr/cases/f223500/223550.htm>.

worthwhile to develop more detailed Competitive Impact Statements and Responses to Public Comments in high-profile, controversial cases in order to provide additional record material upon which the reviewing court may base its decision. Similarly, the DOJ may be more likely to cooperate willingly if future courts want more record material on which to evaluate consent decrees in the face of vocally unhappy amici. If a careful judge wants the DOJ to supply him or her with the kind of additional material the DOJ provided Judge Sullivan, one wonders whether the DOJ could very easily escape the procedural precedent it arguably set in this case. It is likely that future “huffing and puffing” in this area will be centered around these issues, as Judge Sullivan’s decision seems to have left the rest of the Tunney Act “house” standing largely as it did prior to 2004. ●