

# Putting the Tunney in Tunney Act: Will Evidentiary Hearings Become the Main Event after *CVS/Aetna*?

**Dylan Carson**

The great majority of U.S. government antitrust litigation, like all other litigation, is resolved short of trial. In civil cases filed by the Antitrust Division of the U.S. Department of Justice the settlement takes the form of a consent decree and the Antitrust Procedures and Penalties Act details the process for turning negotiated consent decrees into enforceable judgments.<sup>1</sup> This law is commonly known as the Tunney Act after Senator John Tunney of California, the Floor Manager of the legislation in Congress.<sup>2</sup> Senator Tunney was the son of famed world champion heavyweight boxer Gene Tunney.<sup>3</sup>

In 2019, the Tunney Act lived up to its namesake. The effort to obtain approval of the consent decree regarding the merger of drug store giant CVS and health insurer Aetna turned into an unexpected boxing match. The DOJ and the merging parties tangled with multiple third parties who intervened to oppose the proposed consent decree. Even the referee, Judge Richard Leon of the U.S. District Court for the District of Columbia, landed a few jabs, challenging the DOJ on the proper procedures for the court's review of the proposed settlement. And for the first time in the Tunney Act's 45-year history, a court held an evidentiary hearing with live witnesses regarding whether the consent decree was in the public interest. After the hearing, Judge Leon ultimately entered the order sought by DOJ and the merging parties.

Despite approval of the proposed final judgment, the question for the antitrust bar remains whether Judge Leon's hearing of live witnesses is a harbinger of a future trend that may complicate and extend high-profile government antitrust investigations or an outlier from a historically predictable process. Early evidence from the consent decree process approving the merger of wireless carriers T-Mobile and Sprint indicates that the *CVS/Aetna* live sparring was the exception, not the new rule. But at a minimum, DOJ and merging parties will need to plan for the possibility that a mini-trial with live testimony may be required to persuade courts about the acceptability of proposed merger remedies in future Tunney Act proceedings. Moreover, third parties with an interest in derailing or modifying a proposed merger settlement may have greater incentive to seek intervention and air their grievances regarding the prosecutorial discretion of the DOJ. Extended

■ **Dylan Carson** is a Trial Attorney in the Telecommunications and Broadband Section of the Antitrust Division of U.S. Department of Justice in Washington, D.C. The views expressed in this article do not purport to reflect those of the U.S. Department of Justice, and the author and DOJ take the position that nothing in this document may be cited in any enforcement proceeding against the DOJ. The author thanks Patrick Pascarella and Alvin Chu for comments on this article.

<sup>1</sup> 15 U.S.C. § 16 et seq.

<sup>2</sup> Affidavit of John V. Tunney ¶ 3, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. Jan. 22, 2002), <https://www.justice.gov/sites/default/files/atr/legacy/2007/09/10/mtc-00032065.pdf>. There is abundant literature regarding the history and development of the Tunney Act, highlighted by former DOJ trial attorney Lawrence M. Frankel's seminal article, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 75 ANTITRUST L.J. 549 (2008).

<sup>3</sup> *Gene Tunney, Who Beat Dempsey Twice for Ring Title, Is Dead at 80*, N.Y. TIMES (Nov. 9, 1978), <https://www.nytimes.com/1978/11/09/archives/gene-tunney-who-beat-dempsey-twice-for-ring-title-is-dead-at-80.html>. Tunney is regarded as one of the greatest fighters of all time, losing only once in 65 career fights. *Id.*

hearings which could add months to the review process would, however, conflict with the legislative intent of the Tunney Act.<sup>4</sup> In short, *CVS/Aetna*, and the now reasonable prospect of live evidentiary hearings, have truly put the Tunney in Tunney Act.

### Ringling the Tunney Act Bell

Consent decrees have been used for over a century to settle DOJ cases and govern entire sectors of the economy.<sup>5</sup> Before the Tunney Act the process for entering decrees was uncodified and courts deferred to the government's judgment in accepting decrees to resolve antitrust investigations rather than proceed to trial.<sup>6</sup> For example, in a 1961 case the Supreme Court declined an "invitation to assess the wisdom of the Government's judgment in negotiating and accepting the [ASCAP] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."<sup>7</sup>

*In short, CVS/Aetna, and the now reasonable prospect of live evidentiary hearings, have truly put the Tunney in Tunney Act.*

Then came Watergate and political favoritism in the entry of several consent decrees involving conglomerate and political donor International Telephone & Telegraph Corporation, which ultimately led U.S. Attorney General Richard Kleindienst to plead guilty for failing to testify "accurately and fully" about the ITT case at his Senate confirmation hearings.<sup>8</sup> In 1974, the Antitrust Procedures and Penalties Act was introduced to provide transparency into the settlement process and address what Senator Tunney and others in Congress viewed as "abuses in consent decree procedures by the Antitrust Division."<sup>9</sup> With the goal of turning courts into "an independent force rather than a rubber stamp" when converting proposed decrees into enforceable judgments, the Tunney Act standardized the steps required before entry of a consent decree.<sup>10</sup> Those steps include notice to the public, the opportunity for the public to comment, and a requirement that the DOJ respond to the public's comments.<sup>11</sup>

The Tunney Act mandated that district courts determine that the judgment "is in the public interest" before entry.<sup>12</sup> The "public interest" is undefined in the law, but the Act listed two general categories of factors a court "may" consider: (1) the impact of the judgment upon competition in the relevant markets, the public, and individuals alleged to be injured; and (2) whether the judgment was sufficiently enforceable and unambiguous. The Act gave courts a laundry list of tools to make a public interest determination, including hearing testimony from government officials and experts,

<sup>4</sup> 119 CONG. REC. 24597, 24598 (1973) (statement of Sen. Tunney) ("The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.").

<sup>5</sup> See, e.g., *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y. 1941); *United States v. BMI*, 64 Civ. 3787 (S.D.N.Y. 1941) (both regarding the music licensing industry).

<sup>6</sup> After the Antitrust Subcommittee of the House Committee on the Judiciary issued a 1959 report critical of the DOJ's consent decree procedures, the DOJ responded with its 1961 "Consent Judgment Policy" to afford third parties the opportunity to comment on proposed decrees. *United States v. Blavatnik*, 168 F. Supp. 3d 36, 38–39 (D.D.C. 2016) (citing 28 C.F.R. § 50.1).

<sup>7</sup> *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 689 (1961).

<sup>8</sup> *Blavatnik*, 168 F. Supp. 3d at 39.

<sup>9</sup> H.R. REP. 93-1463, reprinted in 1974 U.S.C.C.A.N. 6535 at 6537, 1974 WL 11645 (Leg. Hist.).

<sup>10</sup> The Antitrust Procedures and Penalties Act: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong. First Session on S.782 and S.1088, 1 (1973) (statement of Sen. Tunney).

<sup>11</sup> 15 U.S.C. § 16(b)–(d).

<sup>12</sup> 15 U.S.C. § 16(e).

appointing a special master and experts, seeking input from third parties, and examining witnesses and documents.<sup>13</sup>

A court's broad power to employ these tools can be at odds with the expectation of Congress that the court also adopt the "least complicated and least time-consuming means possible" to answer the public interest question.<sup>14</sup> Preparing for and holding hearings where live fact and expert witnesses testify about documents can be the antithesis of uncomplicated and timesaving. For example, Clayton Act Section 7 preliminary injunction hearings involving testimony and evidence routinely require many months of preparation. The Tunney Act's drafters thus intended that, "[w]here the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, this is the approach that should be utilized."<sup>15</sup> Indeed, the drafters warned that "[o]nly where it is imperative that the court should resort to calling witnesses for the purpose of eliciting additional facts should it do so."<sup>16</sup> For 45 years, no court considered the testimony of live witnesses to be imperative.

### Notable Tunney Act Proceedings

Since 1974, several notable proceedings led to judicial interpretation of the public interest standard. As one of the first district courts addressing the Tunney Act noted, "Taken literally, the burden [that the Tunney Act places upon the court] is impossible."<sup>17</sup> In practice, generalist courts in Tunney Act proceedings have been deferential to antitrust enforcers who, using their expertise and prosecutorial discretion, represent that a particular settlement is in the public interest.

In the landmark *AT&T* case that resulted in the breakup of "Ma Bell" into regional operating companies, however, the district court was decidedly less deferential. The court opined that it should approve of a settlement which "falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of the public interest.'"<sup>18</sup> The court set out to define "the public interest in accordance with the antitrust laws" by articulating a standard that placed the burden on the DOJ to show a given consent decree enabled competition: "If the decree meets the requirements for an antitrust remedy—that is, if it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest—it will be approved."<sup>19</sup>

Applying this new standard about "opening markets," the *AT&T* court declined to enter the proposed consent decree unless the parties agreed to several changes in an amended decree to address the court's concerns about compliance and enforcement.<sup>20</sup> The DOJ and *AT&T* acqui-

---

<sup>13</sup> 15 U.S.C. § 16(f).

<sup>14</sup> *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975) (citing House and Senate reports on proposed Tunney Act).

<sup>15</sup> H.R. REP. 93-1463, *reprinted in* 1974 U.S.C.C.A.N. 6535 at 6539, 1974 WL 11645 (Leg. Hist.).

<sup>16</sup> *Id.*

<sup>17</sup> *Gillette*, 406 F. Supp. at 715. Instead, the court concluded that in "determining whether the settlement achieved is within the reaches of the public interest," the court's duty was to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass," noting that "too much tillage can destroy the garden." *Id.* at 715–16.

<sup>18</sup> *United States v. AT&T Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (internal citations omitted), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>19</sup> *Id.* at 149, 153.

<sup>20</sup> *AT&T*, 552 F. Supp. at 214–17.

esced, and after an appeal by certain intervening states, the Supreme Court summarily affirmed the court's order.<sup>21</sup>

In the mid-1990s, the *Microsoft* case provided greater clarity on the public interest standard. The DOJ sought approval of a consent decree to resolve allegations that Microsoft had unlawfully maintained a monopoly in personal computer operating systems and had engaged in anti-competitive licensing practices.<sup>22</sup> Judge Stanley Sporkin of the U.S. District Court for the District of Columbia declined to approve the decree because, among other things, it did not address claimed anticompetitive practices detailed in a book about Microsoft which the court had read.<sup>23</sup> Those “vaporware” practices were not alleged as part of the government’s complaint or included in the consent decree. The court concluded that the DOJ had not provided enough information about its investigation, complaining that “Tunney Act courts are not mushrooms to be placed in a dark corner and sprinkled with fertilizer.”<sup>24</sup> As a result, the court held, among other things, that it could not make a “proper public interest determination” and that the decree did “not constitute an effective antitrust remedy.”<sup>25</sup>

*Given separation-of-powers principles, judicial redrafting would “exceed [a judge’s] constitutional role” to interpret the Tunney Act, not enforce it.*

In an interlocutory appeal, the DOJ urged the D.C. Circuit “to flatly reject the district judge’s efforts to reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made.”<sup>26</sup> The circuit court agreed, ruling that the Tunney Act did not enable a district court to construct its “own hypothetical case and then evaluate the decree against that case.”<sup>27</sup> A Tunney Act judge may not, “by reformulating the issues, effectively redraft the complaint.”<sup>28</sup> Given separation-of-powers principles, judicial redrafting would “exceed [a judge’s] constitutional role” to interpret the Tunney Act, not enforce it.<sup>29</sup> The circuit court instructed district courts to consider the “purpose, meaning, and efficacy of the decree,” any foreseeable difficulties in implementing the remedy, and whether the relief would injure third parties.<sup>30</sup> At the same time, the court concluded that “[a] decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power.”<sup>31</sup>

The D.C. Circuit did not define what kind of consent decree would mock judicial power. One lower court concluded that this was a very high bar and, therefore, that “the public interest inquiry authorized by the Tunney Act is so limited in scope as to be very nearly a ministerial task.”<sup>32</sup> In connection with the merger of Thomson and West, however, the Tunney Act judge concluded that “the

<sup>21</sup> *Maryland v. United States*, 460 U.S. 1001, 1001 (1983).

<sup>22</sup> *United States v. Microsoft Corp.*, 159 F.R.D. 318, 322 (D.D.C. 1995) (quotations omitted).

<sup>23</sup> *Id.* at 336–37 (“It is clear to this Court that if it signs the decree presented to it, the message will be that Microsoft is so powerful that neither the market nor the Government is capable of dealing with all of its monopolistic practices.”).

<sup>24</sup> *Id.* at 333.

<sup>25</sup> *Id.* at 332.

<sup>26</sup> *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1459.

<sup>29</sup> *Id.* at 1462 (noting that “the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General”).

<sup>30</sup> *Id.*

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

<sup>32</sup> *United States v. Pearson plc*, 55 F. Supp. 2d 43, 45 (D.D.C. 1999); *see also id.* at 46 (“Ultimately, however, these concerns about possible or anticipated—but not yet proven—injury to authors are beyond this Court’s limited powers to address under the Tunney Act.”).

court is to compare the complaint filed by the government with the proposed consent decree and determine whether the remedies negotiated between the parties and proposed by the Justice Department clearly and effectively address the anticompetitive harms initially identified.”<sup>33</sup> In the *Thomson* case, despite numerous divestitures, the court held the DOJ’s entire consent decree was not in the public interest and denied the motion to enter it based on the amicus criticism by numerous competitors to one component of the consent decree. The court held that “the parties will have to modify [the proposed final judgment] to cure the defects” raised by the opponents and suggested ways to do so.<sup>34</sup> When the parties returned with an amended proposal, the court approved it.<sup>35</sup>

### 2004 Amendments to the Tunney Act Public Interest Standard

After *Microsoft*, Congress was concerned that courts might enter any proposed consent decree as long as it did not make “a mockery of judicial power.”<sup>36</sup> As a result, 2004 amendments to the Act changed the discretionary factors for assessing competitive impact of the decree into mandatory factors that the court “shall consider” in making its public interest determination.<sup>37</sup> The amendments also made clear that the Act does not “require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.”<sup>38</sup>

The 2004 amendments were quickly put to the test. In early 2005, two pairs of telecommunications giants—SBC/AT&T, and Verizon/MCI—announced industry-changing mergers. After lengthy investigations, the DOJ moved for entry of consent decrees resolving both cases with agreed divestitures.<sup>39</sup> Seeking to land some haymakers, numerous third parties sought to intervene and participate as amici, which Judge Emmet Sullivan of the U.S. District Court for the District of Columbia allowed.<sup>40</sup>

After two hearings regarding the decrees, the court ruled there was “insufficient material in the record, which consisted largely or exclusively of unverified legal pleadings,” to rule on whether the decrees were in the public interest.<sup>41</sup> “Rather than hold an evidentiary hearing, the court ordered the government to provide further materials that would allow the court to make the public interest determination required by the Tunney Act.”<sup>42</sup> DOJ then submitted the declaration of a DOJ economist along with

retail customer statements, network maps and buildings lists of the merging parties and other firms, business plans of other firms, interrogatory responses by other firms, internal business records of the merging parties, and the divestiture assets purchase agreements for three firms that have agreed to purchase Divestiture Assets from AT&T under the proposed final judgments.<sup>43</sup>

---

<sup>33</sup> *United States v. Thomson Corp.*, 949 F. Supp. 907, 913 (D.D.C. 1996) (*Microsoft* “made plain that the district court should not second guess the prosecutorial decisions of the Antitrust Division regarding the nature or scope of the claims brought in the first instance.”).

<sup>34</sup> *Id.* at 931.

<sup>35</sup> *United States v. Thompson Corp.*, No. 96-1415, 1997 WL 90992 (D.D.C. Feb. 27, 1997).

<sup>36</sup> Frankel, *supra* note 2, at 564.

<sup>37</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, § 221, 118 Stat. 665 (2004).

<sup>38</sup> 16 U.S.C. § 16(e)(2).

<sup>39</sup> *United States v. SBC Commc’ns, Inc.*, 489 F. Supp. 2d 1, 3 (D.D.C. 2007).

<sup>40</sup> *Id.* at 8–9.

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *SBC Communications*, 489 F. Supp. 2d at 10.

<sup>43</sup> *Id.*

More economist declarations from third parties and another hearing followed to discuss the supplemental material.<sup>44</sup>

Judge Sullivan then ruled that *Microsoft* prevented an inquiry beyond the allegations in the complaints. The court noted it was only required to consider the “specific enumerated factors” in the Tunney Act, “address[ing] the competitive impact of the proposed remedies” and non-competitive factors such as enforcement.<sup>45</sup> The court ruled that, even with the 2004 Tunney Act amendments, the DOJ “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>46</sup> Based on its review of the evidence relating to those factors, the court found the settlements in the public interest on March 29, 2007, over two years after the mergers were announced and almost a year after the DOJ moved for entry of the judgments.

*The court ruled that, even with the 2004 Tunney Act amendments, the DOJ “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.”*

### ***Comcast/NBCU and Judicial Skepticism of DOJ Safeguards***

In 2009, cable company Comcast Corp. announced its plan to acquire entertainment conglomerate NBC Universal. During its investigation, the DOJ was concerned that Comcast would use its “control of highly valued video programming” to harm rival video-distribution companies, particularly new online video distributors (OVDs) for which NBC Universal was a supplier.<sup>47</sup> In conjunction with an order by the Federal Communications Commission governing post-merger conduct, the DOJ agreed to resolve its investigation through a consent decree.<sup>48</sup>

Judge Leon of the U.S. District Court for the District of Columbia held a public interest hearing where he expressed skepticism that arbitration processes at the FCC or DOJ would adequately protect OVDs, and that the court’s ability to oversee the consent decree was limited. After supplemental briefing, the court noted it did not have “a crystal ball to forecast how this Final Judgment, along with its arbitration mechanisms, will actually function,” so it ordered “certain additional steps” to ensure the consent decree was in the public interest. Specifically, Judge Leon required two years of reporting to the court about OVD arbitrations and an annual hearing about any issues with the judgment.<sup>49</sup>

Unlike in *Microsoft* or *Thomson*, the DOJ’s proposed remedy was not rejected, but the court added its own reporting obligations to augment the DOJ’s proposed “safeguards,” based on Judge Leon’s skepticism of the ability of DOJ’s proposed remedy to protect the public interest. This lack of deference to DOJ’s recommendation turned out to be a preview of what was to come.

### ***CVS/Aetna: The Rumble in the Swamp***

In December 2017, Aetna, the nation’s third largest health insurer, agreed to be acquired by CVS Health, an American healthcare company that owns a large retail pharmacy chain, after Aetna’s

<sup>44</sup> After the *SBC* case, submission of economist declarations explaining the competitive impact of proposed decrees became more common. See, e.g., *United States v. Abitibi-Consol. Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008) (“In support of its conclusion that divestiture of the Snowflake mill will adequately remedy the harms identified in the Complaint, the United States submitted the Declaration of Nicholas Hill, an economist at the Antitrust Division of the United States Department of Justice.”).

<sup>45</sup> *SBC Communications*, 489 F. Supp. 2d at 17.

<sup>46</sup> *Id.*

<sup>47</sup> *United States v. Comcast Corp.*, 808 F. Supp. 2d 145, 147–48 (D.D.C. 2011).

<sup>48</sup> *Id.* at 147–49.

<sup>49</sup> *Id.* at 149–50.

proposed merger with Humana was blocked following a DOJ lawsuit.<sup>50</sup> For nearly a year, the DOJ and numerous states undertook an in-depth investigation of the proposed acquisition. As explained in the DOJ's competitive impact statement, the government's complaint alleged a relevant product market of individual Medicare Part D prescription drug plans (PDPs) under Section 7 of the Clayton Act and noted the increase in concentration of CVS and Aetna's individual PDPs as a result of the combination. The consent decree proposed to resolve any competition concerns related to overlap in the individual PDP market by divesting Aetna's PDP business to WellCare, another health insurer.<sup>51</sup>

On October 10, 2018, the proposed final judgment was filed, detailing the divestiture proposal. Although the competitive impact statement noted that CVS owned Caremark, a large pharmacy benefit manager (PBM), and that Aetna also provided PBM services, there were no allegations related to any PBM market in the complaint, nor did the complaint address any vertical aspects of the merger.

The case was assigned to Judge Leon, who had recently denied the DOJ's attempt to block a vertical merger in the *AT&T/Time Warner* trial,<sup>52</sup> and from the outset, the Tunney Act proceeding took some unexpected turns. On October 25, 2018, the court entered an asset preservation stipulation and order requiring the parties to preserve the divestiture assets during the pendency of the Tunney Act proceeding.

CVS and Aetna completed their merger on November 28, 2018. The next day, Judge Leon held a hearing on the DOJ's unopposed motion to appoint a monitoring trustee to oversee the divestiture to WellCare. Echoing Judge Sporkin's comments in *Microsoft*, Judge Leon explained that he felt the court "was being kept in the dark, kind of like a mushroom" and that "[t]his Court is not a rubber stamp."<sup>53</sup> The court informed the merging parties that they "need[ed] to figure out a way, now that [the] merger is closed, that the parties stay unintegrated" because the court had concerns about the merger based on a 140-page opposition by the American Medical Association.<sup>54</sup> The court asked, "[I]f [he] were to conclude, after reading all the comments, taking evidence, that [he] wouldn't enter the final judgment, because it would be unfair to the public to do so[,] [h]ow do we unwind it then?"<sup>55</sup>

The court ordered a hearing for a few days later, at which he told the parties that under *Microsoft* Tunney Act courts "must ensure that the government did not draft its complaint so narrowly as to make a mockery of its judicial power" and that, given the proposed purchase price of the divestiture, he was "concerned that [DOJ's] complaint raises anti-competitive concerns about one-tenth of one percent of this \$69 billion deal."<sup>56</sup> Judge Leon followed up with an order explain-

---

<sup>50</sup> *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017).

<sup>51</sup> Competitive Impact Statement at 3, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. Oct. 10, 2018), <https://www.justice.gov/atr/case-document/file/1100111/download> ("In recognition of the significant competitive concerns raised by the proposed merger, Defendants have agreed to divest Aetna's individual PDP business.").

<sup>52</sup> In his decision following the Section 7 trial, Judge Leon even noted how in the *Comcast/NBCU* merger, which "as fortune would have it" was assigned to him, he had "approved the Government's proposed final judgment with a few modifications to allow [the court] to better monitor the implementation of the remedies imposed as part of the judgment." *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 169 n.3 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

<sup>53</sup> Transcript at 4:18–19, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. Nov. 29, 2018).

<sup>54</sup> *Id.* at 8:4–7, 9:4–6.

<sup>55</sup> *Id.* at 9:9–12.

<sup>56</sup> Transcript at 6:20–24, 7:4–6, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. Dec. 3, 2018).

ing that, because he was “less convinced of the sufficiency of the Government’s negotiated remedy than the Government is,” the parties needed to show cause why the court “should not order CVS to hold its acquired Aetna business as a separate entity and to insulate management of the CVS business from the management of the Aetna business, and vice versa, until [the court has] made [its] determination as to whether to enter final judgment in this case.”<sup>57</sup>

In its response to the show cause order, the DOJ asked the court “not to order CVS to hold the Aetna business separate” and asserted that “the Court would not have a legal basis for ordering that business to remain separate because,” among other things, “the Tunney Act allows a court to reject a proposed settlement, not to enjoin the merger.”<sup>58</sup> At the show cause hearing, however, CVS represented that it would undertake four measures to address the Court’s concerns about integration, including “keeping Aetna as a separate unit within the CVS Health enterprise,” while the Tunney Act process was completed.<sup>59</sup> Judge Leon complimented CVS for its response as “appropriately deferential to the Court’s role post Tunney Act amendments in 2004.” In contrast, the court castigated the DOJ’s response for being “tone deaf” and “unnecessarily defensive, if not hostile, to the role of the Federal Courts in the post Tunney Act amendments period.”<sup>60</sup> The court followed with a hold separate order and also ordered CVS to provide quarterly compliance statements and to request permission to change any of the court’s hold separate requirements.<sup>61</sup>

In February 2019, the DOJ moved for entry of the final judgment. The court granted leave to intervene as amici to several third-party healthcare and consumer organizations and ordered a hearing to determine if witnesses should be called at the public interest hearing. At that interim hearing, the court ruled that it would hold an evidentiary hearing with live witnesses. When CVS noted that there had never been a “Tunney Act proceeding where live evidence was received,” the court noted that “we’ve done a lot of novel things in this courthouse and courtroom” and that it found “live testimony very helpful in the AT&T-Time Warner case.”<sup>62</sup> The court then ordered the parties and each amicus to provide witness lists with the basis of each proposed witness’s knowledge, as well as the subject matter and duration of their testimony.<sup>63</sup> Judge Leon ruled that he would decide if any of the witnesses would be called.

After the amici filed their witness lists, the DOJ and CVS filed their own lists of proposed witnesses, in addition to motions in limine to exclude irrelevant testimony. The court denied the motions and issued an order setting an evidentiary hearing. Establishing the ground rules, the court “decided that it would be most helpful for [various] witnesses to be called at a hearing” and emphasized that the hearing “is *not* a trial,” so the DOJ would “not be required to offer evidentiary proof of the allegations in its complaint or, for that matter, any evidence at all,” and “[w]itnesses will not be subject to cross-examination.”<sup>64</sup> Although several experts would testify, the court noted

*When CVS noted that there had never been a “Tunney Act proceeding where live evidence was received,” the court noted that “we’ve done a lot of novel things in this courthouse and courtroom” . . .*

<sup>57</sup> Order to Show Cause, *United States v. CVS Health Corp.*, No. 18-2340, at 2–3 (D.D.C. Dec. 4, 2018). *See United States v. BNS Inc.*, 858 F.2d 456, 461 (9th Cir. 1988) (under the All Writs Act, “a district court . . . is empowered to issue a preliminary injunction to preserve its jurisdiction under the APPA”).

<sup>58</sup> The United States’ Response to Order to Show Cause at 2, 11, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. Dec. 14, 2018).

<sup>59</sup> Transcript at 5:20–25, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. Dec. 18, 2018).

<sup>60</sup> *Id.* at 17:24–18:3.

<sup>61</sup> Memorandum Order, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. Dec. 21, 2018).

<sup>62</sup> Transcript of Status Conference at 19:8–12, 20:3–11, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. Apr. 5, 2019).

<sup>63</sup> Order, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. Apr. 8, 2019).

<sup>64</sup> Order, *United States v. CVS Health Corp.*, No. 18-2340, 2019 WL 2085718, \*1 (D.D.C. May 13, 2019).



that, “[b]ecause the hearing is simply an opportunity to provide the Court with additional information, and because the witnesses will not be subject to cross-examination, the parties are not required to exchange expert reports in advance of the hearing.”<sup>65</sup>

On the substance of the hearing, the court concluded that “an understanding of how participants in markets for individual prescription drug plans (‘PDPs’) are affected by markets for pharmacy benefit management (‘PBM’) services would appear to be essential to [the court’s] evaluation” of whether the divestiture remedy is in the public interest.<sup>66</sup> The court noted:

The fact that the possible impact on the PBM services market is not mentioned in the four corners of the complaint is, of course, not dispositive of its relevance to the Court’s analysis. Our Circuit Court has recognized that Tunney Act review is not, in all cases, strictly cabined by the text of the complaint or proposed judgment: Courts are “not obliged to accept [a consent decree] that, on its face and even after government explanation, appears to make a mockery of judicial power,” and “if third parties contend that they would be positively injured by the decree, a district judge might well hesitate before assuming that the decree is appropriate.” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995). Indeed, even if analysis of PBM markets was not so intertwined with evaluating the Government’s proposed remedy, the Court could still hear from these witnesses before deciding whether the Government’s proposed final judgment makes a mockery of judicial power or affirmatively harms third parties. See 15 U.S.C. § 16(f).<sup>67</sup>

Although the DOJ’s complaint did not allege a PBM market, the court concluded “*Amici* have persuasively argued, in effect, that an assessment of the proposed judgment on the public interest must take into account, among other things, the ways the divestiture remedy may be affected by PBM markets” so the court, therefore, would “hear testimony that concerns, in part, the impact of the merger on PBM markets.”<sup>68</sup>

The DOJ asked Judge Leon to reconsider the structure of the hearing to allow for cross-examination of third-party witnesses and, in the event the court had questions about whether the consent decree was in the public interest after the evidentiary hearing, to give the DOJ the opportunity to provide a rebuttal case several weeks later.<sup>69</sup> The court summarily denied what it called the DOJ’s “thinly veiled motion to modify the procedures” previously established and rejected the “eleventh-hour request to reshape [the] hearing.”<sup>70</sup>

At the two-day hearing in early June 2019, the AMA presented an expert healthcare economist, the AIDS Healthcare Foundation presented its chief medical officer, and two other amici presented the president of the American Antitrust Institute as an expert antitrust economist.<sup>71</sup> CVS then presented an expert economist, a CVS executive, and an Aetna executive responsible for the Medicare Part D business divested to WellCare. The DOJ had cross-designated the Aetna exec-

---

<sup>65</sup> *Id.* at \*1 n.1.

<sup>66</sup> *Id.* at \*2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *United States’ Motion to Clarify and Amend the Court’s Planned Tunney Act Procedure, United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. May 24, 2019).

<sup>70</sup> Minute Order, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. May 30, 2019).

<sup>71</sup> Like the AMA and AIDS Healthcare Foundation, public advocacy groups Consumer Action and U.S. PIRG participated in the hearing, while two other groups (Pharmacists United for Truth and Transparency and the Pharmacists Society of the State of New York) only filed briefs. *United States v. CVS Health Corp.*, 407 F. Supp. 3d 45, 48 n.2 (D.D.C. 2019).

utive as a witness but asked no questions.<sup>72</sup> Per the court's order, none of the witnesses were cross-examined.<sup>73</sup>

Post-hearing, the DOJ, plaintiff states, CVS, and amici submitted supplemental briefing about the proposed final judgment, and the court held oral arguments on the DOJ's motion for entry. In multiple instances, the court denied the DOJ's request to provide additional factual and expert testimony.<sup>74</sup> The court then asked the DOJ to address the vertical competition theories raised by the amici but not by the plaintiffs' complaint: "Well, let's just assume for the sake of discussion they're not outside the scope of a court doing a Tunney Act review that has to decide whether something is in the public interest. Proceeding on that assumption, tell me why those arguments have no merit."<sup>75</sup>

*In multiple instances,*

After the amici's vertical arguments were addressed, the court asked whether it should look at issues outside the complaint:

*the court denied the*

So the government's position is even if the Court were to somehow identify harms that were not mentioned in the complaint and those harms would in some way undermine the public interest, the Court is to turn a blind eye to those and focus on just the harms that were alleged in the complaint?<sup>76</sup>

*DOJ's request to*

*provide additional*

The DOJ reiterated that the public interest determination in the proposed judgment is measured against the allegations in the complaint, but the court later stated that "Congress made [it] clear" that the court "can look beyond the complaint in making its public interest determination," asking one amicus what "has to be there to constitute a mockery [of judicial power]?"<sup>77</sup>

*factual and expert*

*testimony.*

While the amicus did not articulate the standard, the amicus did press for three additional remedies related to vertical theories not alleged by the complaint, and another amicus argued for rejecting the proposed divestiture entirely.<sup>78</sup> At the close of arguments, the court pointed out that it "appreciate[s] fully that the novelty of this proceeding has not been popular in some quarters and it's been popular in other quarters," but asserted that "the Court is endeavoring to get as much assistance as it can in working its way through these issues, which are not simple, which are tricky, and which have grave consequence to millions of people in this country" and that "the mere fact that this is a novel way of proceeding should not block or in any way hinder any court . . . from making extra efforts to reach out to hear as wide an array of expertise and input as possible."<sup>79</sup>

After much suspense, in September 2019, the Court issued its ruling that the consent decree was "well within the public interest." The court ruled that, although "the *amici* raised substantial issues that deserved serious consideration . . . the record did not persuasively undermine the parties' contention that the proposed final judgment is in the public interest."<sup>80</sup> The court character-

<sup>72</sup> Transcript at 363:4–5, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. June 5, 2019) ("No questions from the United States, Your Honor.").

<sup>73</sup> Transcript at 365:14–18, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. June 5, 2019).

<sup>74</sup> Transcript at 9:21–22, *United States v. CVS Health Corp.*, No. 18-2340 (D.D.C. July 19, 2019) ("That phantasmagorical request will be denied for obvious reasons."); *id.* at 21:2–5 ("The first law of holes is if you find yourself in a hole, stop digging. You've been in this hole a long time. I would strongly recommend that you stop digging.").

<sup>75</sup> *Id.* at 15:6–11.

<sup>76</sup> *Id.* at 19:24–20:4.

<sup>77</sup> *Id.* at 51:2–7, 20:21.

<sup>78</sup> *Id.* at 57:24–25, 58:22–59:6.

<sup>79</sup> *Id.* at 75:9–22.

<sup>80</sup> *CVS*, 407 F. Supp. 3d at 48.

ized the DOJ's initial Tunney Act submissions as “perfunctory” and leaving “much to be desired,” leading the court to hold an evidentiary hearing.<sup>81</sup>

The court confirmed that its public interest inquiry is not “a de novo determination of facts and issues.”<sup>82</sup> But Judge Leon concluded that the *Microsoft* decision “never says that allegations in the complaint are the *only harms* courts may consider,” and that a “Tunney Act review that ignores harms that will flow from the entry of a proposed judgment to the general public ignores the language Congress uses in the Act.”<sup>83</sup> Judge Leon concluded that Tunney Act courts are empowered to look beyond the allegations of the complaint:

*If widely accepted, Judge Leon’s standard would affirmatively enable third parties to present evidence beyond the allegations of the complaint to persuade a Tunney Act court that they would be harmed by a merger.*

The *Microsoft* Court went on to specifically identify three examples of when complaint allegations do not circumscribe a Tunney Act inquiry. Courts, it said, may review whether a “decree is ambiguous, or . . . difficult[ ] [to] implement[ ],” whether “third parties . . . w[ill] be positively injured by the decree,” and whether entry of a decree would “make a mockery of judicial power.” Adequately reviewing any of these potential harms to the public interest could require a court to look beyond the four corners of the Government’s complaint.<sup>84</sup>

Judge Leon articulated that his standard for denying a proposed consent decree is that, “while the Government is certainly entitled to great deference—if not a presumption of accuracy—when it contends that a proposed final judgment is in the public interest, evidence by third parties that persuasively demonstrates actual or likely harm to the public interest will overcome that presumption and the proposed final judgment will be denied.”<sup>85</sup>

Armed with this standard, the court then analyzed the amici’s claims that, because “CVS is a major player in the PBM market,” post-merger it would be able to leverage its “power in the PBM market to disadvantage” rival health insurers by, “for example, rais[ing] the price of its PBM services when selling the services to health insurance competitors.”<sup>86</sup> Judge Leon, however, was more persuaded by the expert and fact witness testimony presented by CVS, holding that “the record here did not persuasively establish that amici’s contention that the proposed final judgment’s failure to address the PBM market will likely result in harm to the public interest.”<sup>87</sup> If widely accepted, Judge Leon’s standard would affirmatively enable third parties to present evidence beyond the allegations of the complaint to persuade a Tunney Act court that they would be harmed by a merger.

### ***T-Mobile/Sprint: No Evidentiary Hearing or Exploration Outside the Complaint***

Following *CVS/Aetna*, a number of Tunney Act consent decrees were entered without fanfare.<sup>88</sup> The first contested proceeding after *CVS/Aetna* sprung from the high-profile merger of the third and fourth largest wireless carriers in the United States, T-Mobile and Sprint. A number of third par-

<sup>81</sup> *Id.* at 50.

<sup>82</sup> *Id.* at 52.

<sup>83</sup> *Id.* at 53.

<sup>84</sup> *Id.* (citation omitted).

<sup>85</sup> *Id.* at 54.

<sup>86</sup> *Id.* at 56–57.

<sup>87</sup> *Id.* at 58. The court also rejected arguments that divestiture to WellCare was not an adequate remedy and that HIV and AIDS patients would be harmed by the merger.

<sup>88</sup> *See, e.g.*, *United States v. Symrise AG*, No. 19-cv-3263, 2020 WL 3047480 (D.D.C. Mar. 12, 2020); *United States v. Nexstar Media Grp.*, No. 19-cv-2295, 2020 WL 1809727 (D.D.C. Feb. 10, 2020).

ties—including numerous states litigating to block the merger—sought to submit amicus briefs supporting and opposing entry of the proposed consent decree, which made the merger contingent on certain divestitures to, and commitments from, satellite company DISH Network as a new wireless entrant. Judge Timothy Kelly of the U.S. District Court for the District of Columbia set a briefing schedule for how interested amici could participate but determined a hearing was “unnecessary.”<sup>89</sup> In approving the proposed consent decree, Judge Kelly noted that in a Tunney Act proceeding “the United States’ views are entitled to substantial deference,” “in part because of the constitutional questions that would be raised if courts were to subject the government’s exercise of its prosecutorial discretion to non-deferential review.”<sup>90</sup> Further, Judge Kelly noted that a court’s “inquiry should also not venture beyond the allegations and issues identified in the complaint,” specifically citing *CVS/Aetna* as contrary authority.<sup>91</sup>

### Conclusion

The *CVS/Aetna* Tunney Act proceeding has provided the antitrust bar with notice that evidentiary hearings featuring live fact and expert witnesses may become part of the merger approval process. Whether that evidentiary hearing was an outlier or a preview of coming attractions remains to be seen. Judge Kelly’s decision in *T-Mobile/Sprint* is an early indicator that the live *CVS/Aetna* fight was a departure from the norm.

Still, the *CVS/Aetna* proceeding may foreshadow increased sparring between the DOJ and the merging parties to reach agreement on whether a potential settlement is sufficient to withstand the scrutiny of an evidentiary hearing. The public may be motivated to play a more vocal role in determining whether mergers are in the public interest or raising questions about alleged harms not covered by the proposed remedies or contained within the four corners of the complaint. And courts may be motivated to hear from interested third parties about proposed merger remedies and other aspects of mergers.

While there is, of course, no guarantee that future courts will follow the procedures established by Judge Leon in *CVS/Aetna*, future Tunney Act courts may allow for full evidentiary hearings, with cross examination, or hold multiple hearings separated by several weeks to allow for rebuttal cases. Depending on the scope of any hearings, constitutional issues about the deference due to antitrust enforcers may arise. At a minimum, more hearings, more witnesses, and more examinations would add months of additional work to merger reviews and further unpredictability to government antitrust investigations. That would be far from the “least complicated and least time-consuming means possible” contemplated by Senator Tunney’s legislation.<sup>92</sup> ■

---

<sup>89</sup> *United States v. Deutsche Telekom AG*, No. 19-2232, 2020 WL 1873555, at \*3 (D.D.C. Apr. 14, 2020) (noting that the “court can make its public interest determination based on the competitive impact statement and response to public comments alone.”) (citations omitted).

<sup>90</sup> *Id.* at \*3–4, n.1 (citations and quotations omitted).

<sup>91</sup> *Id.* at \*4.

<sup>92</sup> *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975).