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Consent Decrees – Problems, Pitfalls, and Exit Strategies

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Introduction

Many cases seeking systemic injunctive relief – both cases brought by private parties against government institutions and agencies and cases brought by government agencies against private parties – result in the entry of consent decrees. A consent decree suspends, at least for a while, active litigation between the parties and litigation is replaced by a contract/decree to which the parties agree and which the court approves and enters as an order. From there, compliance activities and monitoring of compliance follow. These activities, in turn, are followed often by motions to enforce. In time and with perseverance, a motion to terminate the decree may be filed someday and, if granted, the court's oversight and supervisory role ends.

This is a well-trod path, familiar to many government lawyers and to lawyers who sue government agencies, and perhaps less familiar to most counsel for private parties. For those familiar with this path, there is a tendency to accept this sequence of events as more-or-less inevitable and, as a consequence, the key basic questions get glossed over or go unasked altogether. Those key questions include why should a defendant, a government agency or a private party, enter into a consent decree?; why do plaintiffs seek consent decrees?; what does a defendant lose by entering a consent decree?; what does the plaintiff gain?; and what is the path to exit from a consent decree and when does that path become available?

This paper offers observations about these basic questions from one who has been on both sides of litigations leading to consent decrees as well as being on both sides after decrees have been entered. The hope is that this general discussion will provide some guidance for thinking about the costs and benefits of entering into a consent decree. Ultimately, how one answers the basic question of whether in a particular case to enter into a consent decree is a matter of judgment, involving far more art than science, and, unfortunately, there is no way to run a controlled experiment to compare the outcome achieved for plaintiffs or defendants as a result of entering into a consent decree as compared to the alternative. As Robert Frost's famous poem teaches, there is no way of knowing the outcome of the "road not taken."

Why a Consent Decree?

The term "consent decree" is something of a misnomer. A more accurate term would be "compelled decree" because the party subject to the decree "consents" in the face of an alternative seen to be much worse. Yielding when a loaded gun is pointed at one's head is not generally viewed as "consenting." In a case in which plaintiffs challenge the lawfulness of the conditions in a correctional facility, for example, the defendant might well enter into a consent decree because the conditions in the facility are, or are at least perceived to be, so bad as to make the case effectively indefensible; or because the forum is hostile to the party's defense and the likelihood of reversal on appeal seems poor; or because the cost, burden, and disruption of defending the case exceed the party's capacity to bear. These and similar factors compel a party to "consent."

When contemplating whether to abandon the fight in favor of entering into a consent decree, counsel needs to distinguish between and disentangle lawyers' reasons/motivations for settling from those of the client. There is a risk that the lawyers, not the client, will dictate the direction to a consent decree because it is the lawyers who bear most of the brunt and burden of the litigation grind. This risk needs to be acknowledged and accounted for or the client's right to control fundamental decisions and policy direction is lost. Active litigation about the types of things which give rise to consent decrees, including, for example, litigation over institutional conditions, systemic challenges to hiring and disciplinary practices, or manufacturing practices, is by its nature protracted, painful, annoying, and expensive. When one is in the midst of such litigation, it certainly seems that things could not get worse, but they can. Living under a consent decree may be worse, even much worse.

The fundamental characteristic of a consent decree – indeed, its primary purpose – is to wrest control from the legally responsible authority. The very point of the consent decree exercise is to infringe significantly on the authority and discretion of the responsible agency or official. This is true when a government agency enters into a consent decree with respect to its water treatment facilities or the hiring practices of its police department, and it is true when a pharmaceutical manufacturer enters into a consent decree with its federal regulatory authority because the manufacturer has allegedly failed to comply with good manufacturing standards. A consent decree imposes on the offending party (defendant) a new boss and, in many instances, that new boss is unfamiliar with and perhaps not even particularly sympathetic to the problems and culture of the institution.

Consent decrees typically bring with them an apparatus. This apparatus is imposed on the offending ("consenting") entity. The person in charge of this apparatus – whether denominated as a monitor, a master, a consultant, an auditor, or something else – sits astride the entity as the court's agent, is cloaked in the authority of the court, and reports to the court (often without counsel for the offending party present). And the offending entity has the dubious privilege of paying all the costs and expenses associated with this new layer.

Consent decrees are not benign; they are intrusive; they often take on a momentum and life of their own; and rarely are they of short duration. Consent decrees frequently last for years and sometimes for many years. While problems and business practices change over time and new issues and contingencies arise, an agency or institution subject to a consent decree is governed by a static document or at least by a document which can be changed only with the court's permission and only after "opening up the can of worms" and asking the court to change the decree.

A party which cannot tolerate having someone running its business or at least telling the party how to run it (and complaining to the court in the event of resistance) should, if at all possible, not enter into a consent decree. Put another way, if there is any way to avoid entering into a consent decree, including engaging in protracted litigation with all the downsides associated with doing so, that course will, in the long run, almost certainly be preferable to entering into a decree. There are prominent examples of city and state governments across the United States which have had their destinies shaped and their priorities established by virtue of

being enmeshed in consent decrees. Few, if any, speak of their experience with fondness or satisfaction.

Contrary to the expectations which many hold when entering into a consent decree, consent decrees do not end the litigation. At most, a consent decree changes the nature of the parties' potential disputes. Compliance disputes, for example, may arise not long after the ink dries on the signature lines of the decree. The framework within which these disputes are viewed and resolved is typically quite narrow and almost universally unfavorable to the defendant, with the balance tipping rather strongly against it. The party asserting non-compliance is likely to be the entity which holds its position by virtue of a court order. Further, notwithstanding denials of liability in consent decrees, the *de facto* presumption is that the party entered into the decree because it was liable. This *de facto* presumption of fault colors how post-decree compliance disputes are viewed. And finally, decrees, by their nature, are likely to impose new obligations and these new obligations are also fertile and inhospitable terrain for post-decree disputes.

There are many reasons why consent decrees often turn out badly for governments in particular (and, therefore, again why consent decrees are to be avoided if at all possible). One reason is that the ongoing attention necessary to assure decree compliance is inconsistent with the rhythm, pace, and competing demands which governments face. Signing a decree prompts a collective sigh of relief after which the government moves on. Problems which received focused attention when they were the subject of active litigation tend to get overwhelmed by new and seemingly more pressing problems. This, too, is a path to compliance problems.

Perhaps paradoxically, plaintiffs and their counsel are driven to enter into consent decrees by roughly the same impulses as those driving defendants. Plaintiffs, no less than defendants, find litigation taxing and burdensome. No one really enjoys discovery, for example. For plaintiffs (and their counsel), the way to end the misery – or at least to end the liability phase of the misery – is to extract a consent decree, declare victory, issue a press release, and, ideally, collect attorneys' fees.

Looking at the matter from the plaintiffs' perspective, the question should be whether the entry of a consent decree actually solved or at least ameliorated the problem which prompted the litigation in the first place? The honest answer is often "no." Managerial problems are typically at the core of the problem which prompted the initiation of litigation which resulted in a consent decree. Litigation, however, including court supervision *via* a consent decree, is a notoriously blunt instrument, and thus not an effective way to solve complex managerial problems. Management is all about exercising judgment and discretion. Consent decrees, by contrast, are all about defining and limiting the discretion of the otherwise responsible officials. Attempting to constrain discretion generally works better in theory than in practice.

There are, of course, systemic judicial decrees, some judicially imposed and many agreed to by the parties, which have accomplished a great deal. Perhaps the clearest positive example of judicial supervision effecting major change is the dismantling of *de jure* segregation of public schools following *Brown v. Board of Education*, 347 U.S. 483 (1954). The submission here is that *Brown* and its progeny are not fairly representative of the track record of systemic decrees.

Consent decrees more typically generate a lot of paper and maybe a lot of attorneys' fees, but precious little actual substantive change.

In sum, consent decrees rarely do as much good as they promise while creating their own substantial sets of problems. Governments, in particular, should avoid them almost at all costs. Assuming, despite all of that, one is going to enter into a consent decree, then what?

Consent Decree – Now What?

Former Secretary of State Hillary Clinton wisely observed that one of the great challenges of her job was knowing the difference between urgent issues and important ones. As anyone who has worked in government knows, sometimes that which is urgent is important, but often the urgent matter of today is of minimal real importance. Similarly, much that is truly important is not urgent, albeit it may become so. The dynamic in government is to devote time and attention to urgent matters even at the expense of plainly more important things. If a consent decree is entered into, that is at once and until terminated an important matter even if there are extended periods when it is not an urgent matter. A consent decree requires attention. It will not improve with age; nor will it go away if neglected. Inattention and neglect will generate new problems.

A party's overall post-decree objective is to have the decree terminated, ending judicial intervention and supervision. This will not occur without first complying with the decree and establishing a solid consistent record of compliance. Executive branch functions and managerial functions more generally do not prosper under a regime of judicial scrutiny. That scrutiny will not come to an end absent compliance and compliance will not occur unless persons undistracted by other tasks are focused on compliance. A party subject to a consent decree needs to mobilize and organize to manage the post-decree compliance process. If, for example, a government program or agency is subject to a consent decree, the person in charge of the agency needs to designate competent engaged people to be directly responsible for managing and complying with the decree. Close oversight of the decree needs to be their job, and not just one of many responsibilities, including matters which will push aside consent decree work because they are more urgent. A closely related point is that a party under a decree wants to establish a record of compliance from the outset; early compliance earns credibility and yields benefits over time; conversely, early non-compliance digs a yet deeper hole out of which it is very difficult to climb.

Merely having persons nominally responsible for compliance will not suffice, however. In government, the chief executive (the Governor or the Mayor) and, in private entities, the CEO must have in place metrics, mechanisms, and structures for holding the responsible officials accountable. Compliance cannot be an abstraction (*i.e.*, "we will comply with the consent decree"). It must be specific, particular, and granular; milestones must be set; and progress must be measured. If, for example, a decree requires an increase in the number or percentage of employees of a certain demographic, this will occur only if the agency undertakes targeted recruitment efforts and the effectiveness of those efforts is monitored and measured. An agency will not comply with its ultimate decree employment obligations (*e.g.*, a decree mandated requirement of a 30% increase in minority employment) if it fails at the threshold to identify a sufficient number of applicants and those identified are found to be qualified by passing the

entrance examination or satisfying whatever the qualifying criteria are. These threshold objectives must be tracked and measured.

Tracking and measuring compliance must occur regularly and constantly – no less frequently than every two weeks. Objectives and milestones which are missed can be corrected with minimal, if any, harm to the overall effort only if they are known in real time and not after time has slipped away and the entire compliance effort is jeopardized. Good intentions and high hopes are not a compliance strategy. A compliance strategy requires clear and specific definition of goals and objectives, followed by timely constant measurement of performance. A compliance strategy paves the path to exiting from a consent decree. Failing to have a compliance strategy means one will remain in consent decree purgatory.

Exiting a Consent Decree

There are cases in which the parties mutually agree that a consent decree should terminate. The court in almost all such cases will honor and uphold the parties' agreement and vacate and terminate the decree. Those are the easy cases. The challenging cases are the ones in which the parties do not agree, where the party subject to the decree wants "out" and the opposing party and/or the court's monitor/master objects.

A consent decree is a court order (injunction), even if it has its origins in an agreement between the parties. Thus, the decision to terminate (or not) a decree rests in the discretion of the court having jurisdiction over the decree. *See Johnson v. Florida*, 348 F.3d 1334, 1349 (11th Cir. 2003); *McDonald v. Carnahan*, 109 F.3d 1319, 1321 (8th Cir. 1997). The party seeking termination must show that the basic purposes of the decree have been "fully achieved" and that it is unlikely the defendant will return to its former ways following termination. *Board of Educ. of Okla. City Public Schools v. Dowell*, 498 U.S. 237, 247 (1991); *United States v. Miami*, 2 F.3d 1497, 1505 (11th Cir. 1993). Relevant factors are (1) whether the defendant has complied in good faith since the decree was entered; (2) terms in the decree providing for continuing supervision; (3) how long the decree has been in effect; and (4) whether the decree has eliminated the legal (constitutional) violations to the extent practicable. *Bd. of Educ. of Oklahoma City Public Schools*, 498 U.S. at 249-50; *Gonzales v. Galvin*, 151 F.3d 526, 531 (6th Cir. 1998); *Cody v. Hilliard*, 139 F.3d 1197, 1199 (8th Cir. 1998). Absent compliance with the decree or a substantial change in the law upon which the decree is predicated, *see Tobin v. Alma Mills*, 192 F.2d 133 (4th Cir. 1951) (compliance); *Coca-Cola Co. v. Standard Bottling Co.*, 138 F.2d 788 (10th Cir. 1943) (change in law), the exit door is shut.

One should review with great care the law governing the standards for terminating a decree before, not after, drafting a decree, let alone entering into a decree. A party entering into a decree should want to know what it must do to get out from under the decree. Broadly stated decree goals or purposes, for example, should, if at all possible, be avoided because the broader the decree's purpose the harder it will be to prove compliance. The perspective of the party pressing for the decree is just the reverse; it has an interest in drafting the decree in the broadest, most open-ended terms possible because broad decree language will help to defeat an attempt to exit the decree.

Conclusion

Consent decrees are now established features of American legal culture. This is not going to change. The equitable relief objective of cases against governmental or other large institutional entities which challenge systemic legal deficiencies is change in the operations of those entities. For better or worse, the judicial vehicle for imposing and overseeing systemic institutional change is an injunction, either imposed directly by the court following a trial or pursuant to the parties' nominal agreement by way of a court approved consent decree. The central points of this paper are that consent decrees are serious business; a party should not enter into a consent decree casually or with the view that they bring an end to the problem; and once a consent decree is in place, it will likely remain in place for an extended period.