



Q&A: Department of Justice Policies on Consent Decrees and Injunctions¹

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Q: Our office has ongoing litigation against a state agency. The United States Department of Justice is also prosecuting the case. We seek declaratory and injunctive relief; however, we may be able to resolve the case with a consent decree or settlement agreement. I understand the Attorney General recently addressed these forms of relief. Please explain.

A: A September 13, 2018 memorandum from the Attorney General states opposition to nationwide injunctions and addresses the Department's arguments in cases that present the possibility of a nationwide injunction. This Q&A briefly summarizes that memorandum and offers fuller discussion of the Attorney General's November 7, 2018 memorandum on consent decrees and settlement agreements. This memorandum could affect cases involving numerous state and local governmental entities, from institutions and residential settings to foster care systems, Medicaid programs, prisons, and housing authorities.

Discussion

The Nationwide Injunctions Memorandum

On September 13, 2018, the Attorney General issued a memorandum addressing nationwide injunctions. See Memorandum from The Attorney General to Heads of Civil Litigating Components and United States Attorneys, *Litigation Guidelines for Cases Presenting the*

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Possibility of Nationwide Injunctions (Sept. 13, 2018).² While noting opposition to such injunctions from various Administrations, *id.* at 1, the Memorandum derives particular support from opinions by Justice Clarence Thomas, who views nationwide injunctions as “legally and historically dubious.” *Id.* at 3-4 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (Thomas, J., concurring)). The Memorandum instructs Department of Justice (“DOJ”) attorneys to oppose nationwide injunctions and argue, when appropriate, that such injunctions:

- exceed constitutional limits on judicial power;
- have no basis in equitable practice;
- impede discussion of disputed legal issues by different courts;
- undermine legal rules meant to ensure the orderly resolution of disputed issues;
- interfere with judgments that belong to other branches of government; and
- undermine public confidence in the judiciary.

Id. at 2-6.³

DOJ attorneys are specifically instructed to make these arguments in Administrative Procedure Act cases that might result in universal vacatur of a challenged rule. *Id.* at 2, 7-8. The Memorandum concludes by seeking to limit other parties’ use, stating that the guidelines “are intended only for Department of Justice litigators and should not be relied upon by any party as a limitation on any Department attorney’s authority to assert any argument in any particular case or as a standard against which the government’s arguments in briefs are to be measured.” *Id.* at 8.

The Consent Decree and Settlement Agreement Memorandum

Over the last decade, state attorneys and federal courts have become increasingly hostile to consent decrees that bind state and local government entities. Some state legislatures have enacted laws that strictly limit how and whether state agencies can enter consent decrees.⁴ Even absent a legal requirement, some states’ attorneys announce their client’s refusal to enter into a consent decree in initial settlement discussions. Importantly, the United States Supreme Court has made its antipathy known. For example, in *Horne v. Flores*, the Court stated that comprehensive, long-running institutional consent decrees need to be carefully

² <https://www.justice.gov/opa/press-release/file/1093881/download>.

³ For an example of a brief making these arguments, *see id.* at 2 n.1 (referring litigators to the DOJ’s brief in the Seventh Circuit case, *City of Chicago v. Sessions*, No. 17-2991, at <https://www.justice.gov/file/1064606/download>).

⁴ *See, e.g.*, Utah Code Ann. § 63G-10-302 (eff. May 5, 2008) (requiring legally binding agreements that might exceed \$100,000 to be approved by the governor).

tailored and limited because they “raise sensitive federalism concerns” that threaten to deprive elected state officials of their ability to implement their own policies. 557 U.S. 433, 448 (2009).

On November 7, 2018, the Attorney General relied on *Horne* when he issued a memorandum, *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* (“Consent Decree Memorandum”).⁵ As the title states, the Memorandum concerns consent decrees—negotiated agreements entered as a court order and enforceable through a motion for contempt, and settlement agreements—out-of-court resolutions that require specific performance by the defendant and are enforceable through a lawsuit for breach of contract. Settlement agreements also include memoranda of agreement (“MOAs”) and memoranda of understanding (“MOUs”). Consent Decree Mem. at 1 n.2. This Q&A refers to all these types of agreements collectively as consent decrees.

The Consent Decree Memorandum instructs DOJ civil litigating components to limit the use of consent decrees and to narrowly tailor any decrees that are developed, stating:

The consent decree must not be used to achieve general policy goals or to extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.

Id. at 5.

The Attorney General announces three internal policies that will apply when a consent decree is being considered. First, he describes how DOJ civil litigating components and United States Attorneys’ Offices are to handle *investigations and reports of allegations* of legal violations by state or local governmental entities. Second, he announces *notice, approval, and substantive requirements* for consent decrees. Third, the Memorandum sets *limits on the use of monitors*. Each policy is explained below.

Investigation and reports of allegations

While acknowledging that the DOJ has the legal authority to investigate allegations of legal violations by state and local entities, the Consent Decree Memorandum opens by counseling DOJ personnel to “afford the subject governmental entity the respect and comity deserving of a separate sovereign....” *Id.* at 2. The entity must be given an opportunity to respond to the allegations against it. And if the investigation results in a letter, notice, or report, that document must clearly state that it is only making allegations that have not been proven in court.

⁵ <https://www.justice.gov/opa/press-release/file/1109681/download>. References to state and local governmental entities include territorial and tribal entities. Consent Decree Mem. at 1 n.1.
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Notice, approval, and substantive requirements

The Deputy or Associate Attorney General must be notified of any decision by a litigating component of the DOJ to initiate negotiations with a state or local entity for a consent decree that would: (1) establish the court as a long-term monitor (or, in a settlement agreement, place the DOJ or other federal agency as a long-term monitor); (2) create long-term “structural or programmatic” obligations or long-term, indeterminate financial obligations on the entity; or (3) otherwise raise “novel questions of law or policy.” *Id.* at 3. “Long-term” means that the obligations are likely to last more than 24 months. *Id.* The notification must describe the alleged violation and explain why a consent decree is needed.⁶

Before a consent decree is agreed to by the DOJ or submitted to the court for approval, it must be approved by the U.S. Attorney or the Assistant Attorney General for the litigating component responsible for the subject matter. The case team must draft a “justification memorandum” for the U.S. Attorney/Assistant Attorney General that explains the legal and factual basis for a consent decree, estimates of the costs of compliance, summarizes the defendant’s expected defenses, and verifies that the defendant was given an opportunity to respond to the allegations against it. *Id.* at 4. Significant modifications of a consent decree that is covered by the new policy will also need to be approved through the justification memorandum process. *Id.*

Of note, the Memorandum describes when a consent decree with a state or local entity may be appropriate, listing the following circumstances:

1. The defendant has an “established history of recalcitrant behavior” or is known to be unlikely to perform.
2. The defendant has unlawfully attempted to obstruct the investigation.
3. The defendant has engaged in a pattern or practice of deprivation of rights or other violations of federal law and other remedies have proven ineffective, “such that ensuring compliance without ongoing supervision of a court is unrealistic.”
4. A consent decree is necessary to secure statutory protection or relief for the defendant (*e.g.*, statutory challenges and claims by third parties or statutory relief that preempts state law).

Id. at 4. When a consent decree is appropriate, the decree must generally adhere to the following requirements:

⁶ The notification and approval requirements do not apply when their use would contradict requirements contained in statutes or regulations. See Consent Decree Mem. at 3 n.5.

1. The decree must set a duration and be no longer than needed to achieve an “effective and durable remedy.” Absent compelling justification, a decree should generally last no more than three years.
2. The consent decree must include “specific and measurable” actions that trigger termination and must include a “sunset” provision providing that, “regardless of the decree’s specific requirements, the decree terminates upon a showing by the defendant that it has come into durable compliance with the federal law that gave rise to the decree.” The decree must provide for partial termination when the state or local entity shows durable compliance with particular provisions.
3. The consent decree must require parties to return to court periodically to report on the extent of compliance.
4. Provisions of the decree must be narrowly tailored to remedy the injury caused by the alleged illegal violation.”
5. The consent decree must not be used to achieve general policy goals or to extract greater or different relief from the defendant than could be obtained through agency enforcement or by court judgment.”
6. A consent decree involving federal control of a state or local government entity must be limited in scope and return responsibility to the relevant officials as soon as the injuries caused by the alleged violations have been remedied.

Id. at 5.

Use of monitors

The Attorney General also expresses concern with the “unconstrained use” of monitors:

Just as it would be extraordinary for a federal agency to consent to the use of a monitor to oversee its operations or policies, in most cases there is little reason to expect or require a state or local government, equally a democratically accountable entity, to do so.

Id. at 6. As a result, the Consent Decree Memorandum provides that the Department will usually take direct responsibility for ensuring compliance. However, if it is “prohibitively difficult” for the DOJ or client agency to oversee the decree, a monitor can be considered. *Id.*; see also *id.* n.6 (stating that use of a monitor may be indicated if the decree or settlement is “so complicated or long-term” that the federal agency cannot effectively monitor compliance but that inadequate Department resources, standing alone, with not normally justify the use of a monitor).

DOJ litigation components must obtain permission from the component head or U.S. Attorney before including a provision for a monitor in a consent decree, and the decree must address and include the following:

- Incentives for the monitor that encourage early conclusion;
- Replacement of the monitor at appropriate intervals, usually every two to three years;
- Specificity regarding payment of the monitor's costs and fees, including a cap (thus requiring the monitor to complete tasks even if the cap is met);
- Selection of the monitor in accordance with DOJ guidelines established to avoid conflicts of interest and ensure that monitors are independent and qualified. *Id.* at 7 (incorporating Mem. from Acting Assoc. Att'y Gen. Stuart F. Delery, *Statement of Principles for Selection of Corporate Monitors in Civil Settlements and Resolutions* (Apr 13, 2016)).⁷

Conclusion and recommendations

The Attorney General's November 7, 2018 Memorandum does not take consent decrees and settlement agreements between federal agencies and state and local governmental entities off the table. However, the Memorandum is clearly intended to curtail use of such decrees/settlements and otherwise limit their scope and duration. Advocates must monitor implementation of the instructions contained in the Consent Decree Memorandum. Depending on how it is used by DOJ case teams and ultimately the Deputy Attorney General or Assistant Attorney General, the Memorandum could have a significant chilling effect on consent decrees and settlement agreements and the use of court monitors. The Memorandum could affect cases involving numerous state and local governmental entities, from institutions and residential settings to foster care systems, Medicaid programs, prisons, and housing authorities.

The following considerations may be relevant to advocates involved in cases with federal and state/local governmental entities:

1. The Consent Decree Memorandum appears to apply only to future cases and not to existing consent decrees/settlement agreements. See Consent Decree Mem. at 2 n.3 (superseding prior memoranda to the extent they are inconsistent), *id.* at 4 (establishing new guidelines for resolving cases with a consent decree or settlement agreement and stating that "any significant modifications ... of a consent decree

⁷ https://www.justice.gov/oip/foia-library/asg_memo_statement_of_principles_corporate_monitors_civil_settlements/download.
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covered by this policy” are subject to the guidelines). That said, the extent of implementation will need to be monitored.

2. In some areas, for example, where state agencies are violating anti-discrimination laws, disability advocates have asked the DOJ to become involved in their case against the state or local entity. This strategy will need to be reassessed on a case-by-case basis in light of the Consent Decree Memorandum. Before reaching out to federal attorneys, advocates must consider, among other things, the extent of relief needed to cure the violations, the time that will be needed to obtain durable relief, and whether the relevant federal department or DOJ has the resources needed to appropriately monitor implementation of the agreement.
3. Advocates must not only be aware of litigation between federal agencies/DOJ and state or local governmental entities, they will need to monitor the specifics. If the parties are considering a consent decree or settlement agreement and there is concern that the agreement will provide inadequate relief to individuals who are being harmed by the violations, advocates should consider whether to intervene in case on behalf of their clients. Intervention is governed by Federal Rule of Civil Procedure 24, which allows intervention by right or by permission of the court.
4. Advocates should be familiar with any relevant statutes or regulations that address how disputes are to be resolved. These laws may preclude application of the Consent Decree Memorandum. See Consent Decree Mem. at 3 n.5.
5. Even if a law does not preclude application of the Memorandum, the interplay between the law and the Memorandum could raise concerns about whether the process is fair to people who are alleging harm. To illustrate, federal regulations address how complaints of race, color or national origin discrimination are to be investigated. 45 C.F.R. §§ 80-80.13. When an investigation has revealed a violation, the federal agency is instructed to make every effort to secure compliance by voluntary means. *Id.* at § 80.8(d) (“No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means....”). Not surprisingly, the vast majority of administrative complaints are resolved through settlement agreements/MOUs in lieu of a court case. Thus, we have a long-standing regulation that directs federal attorneys to seek settlements of race/national origin discrimination violations, and now, an Attorney General’s Consent Decree Memorandum that limits the instances when settlement agreements/MOUs can be used and, when such are agreements are possible, sharply limits the scope and duration of relief that is available.

6. The Memorandum deserves close scrutiny to assess whether there are provisions in it that are at odds with existing court precedents or civil practices. For example:
- According to the Memorandum, consent decrees and settlement agreements must include “specific and measurable” actions that trigger termination. Consent Decree Mem. at 5. This requirement is not controversial.⁸ However, the Memorandum next provides that

the consent decree must include a ‘sunset’ provision providing that, regardless of the decree’s specific requirements, the decree terminates upon a showing by the defendant that it has come into durable compliance with the federal law that gave rise to the decree.

Id. This instruction is at odds with the Supreme Court’s long-standing understanding of consent decrees. In *Frew v. Hawkins*, 540 U.S. 431 (2003), the Court rejected the State’s argument that federal courts should only be allowed to enforce a consent decree arising from a suit by Medicaid beneficiaries if the court found a violation of federal law (as opposed to a provision of the decree) at the enforcement stage. The Court recognized that consent decrees have elements of both contracts and judicial decrees and, as such, contain agreements that will be reflected in the decree and enforceable as a judicial decree. *Id.* at 437 (citing *Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367, 378 (1992) and *Firefighters v. Cleveland*, 478 U.S. 501, 519 (1986)). The Court further acknowledged that

[t]he decree does implement the Medicaid statute in a highly detailed way, requiring the state officials to take some steps that the statute does not specifically require. The same could be said, however, of any effort to implement the general EPSDT [Early and Periodic Screening, Diagnostic and Treatment] statute in a particular way. The decree reflects a choice among various ways that a State could implement the Medicaid Act. As a result, enforcing the decree vindicates an agreement that the state officials reached to comply with federal law.

Id. at 439, *same case*, *Frazer v. Ladd*, 457 F.3d 432 (5th Cir. 2006) (refusing to dissolve decree). The problem here is apparent: The Attorney General has instructed DOJ litigators to include sunset provisions in consent decrees with

⁸ For discussion of negotiating consent decrees in Medicaid cases, see Jane Perkins, Nat’l Health L. Prog., *Consent Decrees in Medicaid Cases* at 5-10 (Mar. 2007) (on file with National Health Law Program).

state and local entities that, in some cases, will terminate the decree before the details set forth in the agreement have been achieved.

- As discussed above, the Memorandum also lists the circumstances when it is appropriate for the DOJ to enter into a consent decree with a state or local government entity. Consent Decree Mem. at 4. One reason is that the consent decree will secure statutory protection or relief for the defendant, for example when the decree will protect the defendant from statutory challenges and claims by third parties. *Id.* Implementation of this rationale by federal and state parties will need to be monitored to ensure that good faith, arm's length negotiations have occurred.
7. The Consent Decree Memorandum only applies to DOJ components. However, given many state officials' views of consent decrees, advocates should be prepared for state attorneys to rely on the rationale and restrictions set forth in Memorandum as they seek to curtail consent decrees in beneficiary cases against state and local governmental entities.