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# Interpretation of Consent Decrees and Microsoft v. United States I: Making Law in the Shadow of Negotiation

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## Introduction

People negotiate agreements "in the shadow of the law," whether in the private ordering of affairs such as drafting contracts or in the public forum of settling lawsuits.[1] A reverse phenomenon, however, has gone largely unnoticed: judges occasionally declare law in the shadow of negotiated settlements. In interpreting the terms of a consent decree[2] when the parties themselves cannot agree on what obligations such terms impose, the judge may determine that both the words and the parties' own intentions are so ambiguous that the words must be interpreted in light of the substantive law that gave rise to the plaintiffs' claim. This writer has previously contended that the meaning of an ambiguous term should be determined, in part, "by reference to the constitutional or statutory rights sought to be vindicated in the litigation." Even if the law is somewhat uncertain, part of the judge's interpretive effort should be to determine which interpretation "will best serve the policies of the relevant law."[3] It appears that the federal courts, at least, have adopted this position.[4]

A recent decision by a divided federal appeals court, however, reached an alarming result that requires reconsideration of this position. In *Microsoft v. United States*, 56 F.3d 1448 (D.C. Cir. 1995) ("*Microsoft I*"), the parties settled an antitrust lawsuit by entering into a consent decree in 1995. One provision in the decree prohibited Microsoft from requiring computer manufacturers to license an "other product" as a condition of licensing its Windows 95[5] operating system, but also permitted Microsoft to develop "integrated products." When Microsoft sought to require manufacturers to license its Internet Explorer[6] browser as a condition of licensing Windows 95, the government contended that Microsoft had violated the decree because the browser was an "other product." A panel majority of the Court of Appeals for the District of Columbia (hereinafter D.C. Circuit), however, held that Microsoft's Internet Explorer browser is an integral part of the Windows 95 operating system rather than an "other product," and, therefore, Microsoft did not violate the consent decree.[7] The majority determined that the prohibition against mandatory licensing of an "other product" was intended to prohibit Microsoft from engaging in anticompetitive "tying" of one product to a distinct product.[8] Relying on a test proposed in a leading antitrust law treatise, the *Microsoft I* majority concluded that mandatory inclusion of Microsoft's browser with its Windows 95 operating system was not an illegal tying arrangement.[9]

Less than a week after the *Microsoft I* decision, however, the author of the tying test relied upon by the majority objected publicly that the majority had misinterpreted the test and thereby reached the wrong result.[10] Other critics have charged that the *Microsoft I* decision "appears to be nothing less than a direct assault on" the leading precedents of the U.S. Supreme Court[11] and that the panel majority "wholly ignored the competitive consequences that Microsoft's practices had on the market for browser software" and "abdicated its responsibility to protect consumers against anticompetitive ties."[12] Even commentators who have accused the government of attempting to use consent decrees as a form of disguised regulation lamented that this interpretive effort was "not a process designed for the intelligent formulation of antitrust policy." [13]

The D.C. Circuit's embarrassing mistake in interpreting a consent decree in a way that conflicts with the underlying substantive law has the flavor of an ill-considered rush to judgment. The *Microsoft I* case has been largely superseded by a second, broader antitrust lawsuit against Microsoft by the United States and numerous states ("*Microsoft II*") which, as of this writing, is still in trial.[14] It has been noted that *Microsoft II* "may determine the antitrust standard for monopolization for the next generation,"[15] but others have predicted that the *Microsoft I* decision "may also have sounded the death knell for the [government's] ability to prevail on the tying claims in its most recent complaint."[16] Thus, the *Microsoft I* decision raises a troubling question about the interpretation of consent decrees: should judges decide questions of substantive law in interpreting ambiguous words in consent decrees when the issue of law may not be properly before the Court, when the relevant law is unclear, or when the court disagrees with established law?

Resolution of this question is important in two respects. First, it will define the proper role of the federal judiciary in making substantive law through interpretation of consent decrees rather than through the normal trial and appeal process of adjudication. Second, it will affect the use of consent decrees as a form of dispute resolution, because to the extent the federal judiciary claims the authority to declare substantive law through interpretation of settlement terms, litigants may conclude that it is undesirable to have lawmaking occur in this manner. They may well opt for traditional adversary litigation, thus undermining the policies favoring settlement of cases.

This article explores the history of federal judicial interpretation of consent decrees and advocates a restrained approach to interpreting ambiguous settlement terms in light of the underlying substantive law. The proposed approach does not eliminate such a method of interpretation, but avoids the misguided effort of the D.C. Circuit in *Microsoft I*. Part I reviews the standards for interpretation of consent decrees that have emerged in the federal courts over the past three decades and sets forth a model of interpretation that is consistent with the emergent caselaw. Part II examines the problem of interpretation that arose in *Microsoft I* and analyzes the difficulties posed by the D.C. Circuit's declaration of substantive antitrust law in that case. Part III discusses the policy considerations that should be weighed in determining the extent to which judges should declare law "in the shadow of" negotiation. The Conclusion argues that it is appropriate for courts to interpret ambiguous terms in consent decrees in light of underlying

substantive law if other extrinsic evidence of the parties' intent surrounding the negotiation of the terms does not clearly resolve the issue. If the issue of law is not properly before the court, however, or if the law is not reasonably clear, courts should not decide what the law is, but instead should interpret ambiguous terms based solely on other extrinsic evidence of the parties' intent. Furthermore, if the law is clear, the court should follow it rather than decide what it thinks the law should be.

## I. THE STANDARDS FOR INTERPRETATION OF CONSENT DECREES

### A. The Basic Model: From the "Four Corners" Rule to "Aids to Construction"

The Supreme Court of the United States set the basic parameters of consent decree interpretation in a trilogy of cases decided in the past quarter century. The first of these cases, *United States v. Armour,* involved the Meatpackers Antitrust Consent Decree of 1920, which prohibited meatpacking companies from engaging in the retail food business.[17] When a company engaged in the retail food business acquired a controlling interest in one of the defendant meatpackers, the government sought a court order that the food retailer divest ownership of the meatpacker. The consent decree did not expressly prohibit acquisition of a meatpacker by a company engaged in food retailing. The government contended, however, that the acquiring company was engaged in business activities that the decree prohibited the meatpacker from engaging in, and that the acquisition would cause the meatpacker to become engaged in the prohibited activities in violation of the decree's purpose to effect a complete separation of meatpacking from food retailing.[18] In its decision, the Court emphasized that the decree did not by its terms mandate a complete separation, but only prohibited certain activities which did not include acquisition of a meatpacker by a food retailer.[19]

Rejecting the argument that such an acquisition should be divested because it would frustrate the overall purpose of the decree, the Court set forth what has come to be known as the "four corners rule": Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation; . . . in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus, the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.[20]

The most obvious reading of *Armour* is that it sets forth a rule of strict construction: if a consent decree specifically prohibits certain activities, it cannot be

construed to impose additional prohibitions not mentioned in the decree. The Court's rationale for this rule is that a consent decree is a contract in which the parties have waived their right to fully litigate the issues in exchange for the agreed-upon terms, so that imposing additional terms would be unfair.

First, consent decrees by their nature provide for prospective relief into the future in which unexpected events often threaten the reforms intended by the decree. If courts cannot take cognizance of unexpected events in interpreting consent decrees, then much of the incentive to settle cases is lost because the parties know that the decree will prove ineffective when such events occur. Second, the Court's premise that a consent decree is a contract supports a mode of interpretation that takes account of circumstances surrounding the decree in order to determine the mutual intent of the parties, rather than focusing exclusively on the precise words of the contract.[21]

An even broader reading of *Armour* is that it stands for the proposition that if a consent decree does not expressly address a particular issue, it cannot be interpreted in a way that permits the court to address the issue. The Court soon disavowed any such proposition, however, in *United States v. I.T.T. Continental Baking Co.*[22] In *I.T.T.* the defendant violated a consent decree which expressly provided that a penalty should be imposed for such violations, but was silent on what should be the precise nature of the penalty.[23] Because the parties had not agreed on a precise penalty, the "four corners" rule of *Armour* could have been applied to strip the judge of the authority to impose any penalty.

The Court, however, made clear that *Armour* did not support such a conclusion: Since a consent decree or order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree. Such reliance does not in any way depart from the "four corners" rule of *Armour*.[24]

Applying this rule of construction, the *I.T.T.* court found that federal antitrust law provided the underlying substantive law for the original complaint and that the term "penalty" had a specialized meaning in antitrust law. Thus, concluded the Court, federal antitrust law defined the manner in which a penalty should be assessed.[25]

At first glance, it might appear that *I.T.T.* overruled *Armour* by establishing a method of interpretation that is not limited to the express terms of the consent decree, but instead permits and may require those terms to be given a meaning consistent with extrinsic evidence of the parties' intent. This view is bolstered by the fact that the *I.T.T.* consent decree did not say penalties were to be assessed in the manner provided for by federal antitrust law. On the other hand, the Court stated that reliance upon "aids to construction" to interpret a consent decree is not inconsistent with *Armour*. A close comparison of the two cases reveals what the Court meant. In *Armour*, the consent decree prohibited various activities but it did not prohibit the activity at issue.

In other words, the decree was unambiguous in that it did not prohibit a food retailer from acquiring a meatpacker. In *I.T.T.*, on the other hand, the consent decree expressly provided that a penalty would be imposed for a violation of the decree, but did not define precisely what penalty the court should impose. Thus, in *I.T.T.*, and unlike *Armour*, the decree was ambiguous because the disputed term was capable of two plausible interpretations; specifically, the term "penalty" could have been interpreted to mean a single monetary fine for the violation, or a monetary fine for each day the violation had occurred.[26]

This comparison of the *Armour* and *I.T.T.* decisions reveals how the method of interpretation formulated in *I.T.T.* is consistent with the "four corners" rule of *Armour*. If the consent decree is unambiguous with respect to the issue at hand, the court must interpret the decree in that manner without resort to extrinsic evidence to determine the parties' intent. If the decree contains terms that are capable of more than one plausible interpretation, *I.T.T.* permits the court to rely upon external aids to construction to determine which interpretation is correct. According to *I.T.T.*, one of the aids to interpretation that may be employed in determining the meaning of ambiguous terms is the substantive law that gave rise to the litigation if the disputed terms have a specialized meaning in the substantive law, such as "penalty" in antitrust law. This particular aspect of the *I.T.T.* decision has provided the opportunity for courts to declare substantive law in cases that have not been fully litigated, but instead ended in a consent decree.[27]

The Court revisited the question of interpretation in the third of this trilogy of cases, *Firefighters v. Stotts*.[28] In *Stotts*, the consent decree expressly provided for goals to increase minority representation within each job rank and contained an express statement that its purpose was to remedy past discrimination in hiring and promotion. The decree did not provide for racial preferences in the event of layoffs. After this decree resulted in minority gains in hiring and promotion, the defendant proposed to lay off workers due to a financial crisis, and to do so according to the terms of a collective bargaining agreement which required layoffs according to seniority. Layoffs conducted in this manner would have reduced minority representation because minority workers recently hired pursuant to the consent decree had less seniority than older white workers.[29] The Court held, however, that the express terms of the consent decree could not be interpreted to prohibit seniority-based layoffs. Relying heavily on the "four corners" rule of *Armour*, the court found that "there is no mention of layoffs or demotions within the four corners of the decree; nor is there any suggestion of an intention to depart from the existing seniority system or from the City's arrangements with the Union."[30]

The Court found that the decree's express purpose was limited to remedying racial discrimination in hiring and promotion and "did not include the displacement of white employees with seniority over blacks."[31] Conspicuously absent from the Court's Opinion is any reference to the "aids to construction" analysis of *I.T.T.*

One analysis of the *Armour - I.T.T. - Stotts* trilogy is first, that *Armour* adopted a rule of strict construction of consent decrees under which courts should never impose obligations not expressly agreed to, that *I.T.T.* was a departure from this rule, and third

that *Stotts* reestablished *Armour's* rule of strict construction. In this view, the trilogy of cases left massive confusion in its wake because the Court was unclear whether use of aids to construction is appropriate in all disputes over interpretation, or only when the express terms are ambiguous.[32] If use of extrinsic evidence is proper only when the terms of the decree are ambiguous, then this trilogy raises a second issue: under what circumstances is it appropriate for courts to expound upon the underlying substantive law as one such aid? A closely related question arises in cases in which the parties' own intent differs from the substantive law with respect to the parties' obligations, should the parties' intent or the law prevail in interpretation of consent decrees? Some guidance for answering these questions is provided by an examination of cases decided subsequent to the *Armour - I.T.T. - Stotts* trilogy.

**B. The Post-Trilogy Era**

*1. The "Four Corners" Rule*

It has been observed that an "unsettled" issue is whether it is proper to resort to aids to construction in interpreting a consent decree when the terms of the decree are unambiguous.[33] One proponent of this view contends that some courts have resorted to extrinsic evidence only if the express terms are ambiguous, while others use extrinsic evidence without making a finding that the terms are ambiguous.[34] By now, however, this issue has been settled. All but two of the circuit courts of appeals have held that if the terms of a consent decree are unambiguous, it is improper to use extrinsic evidence to extract an interpretation at odds with those terms.[35] Thus, it is no longer accurate to conclude that the *Armour - I.T.T. - Stotts* trilogy has sown massive confusion. The courts of appeals have not concluded that *I.T.T.* overruled *Armour* or that *Stotts* overruled *I.T.T.*, but rather have understood those cases as establishing a rule that use of aids to construction is proper if, and only if, the agreed terms are ambiguous.[36]

This rule is consistent with both the nature of consent decrees and the policies such decrees are designed to promote. Although a consent decree is a legal hybrid -- a contract between the parties and an order of the court -- when questions of interpretation arise it is to be treated as a contract.[37] The intent of the parties is expressed in the words they chose to embody in their contract. If the words they chose are capable of only one plausible interpretation, the use of extrinsic evidence to divine a different interpretation carries grave dangers of imposing obligations never agreed upon and of avoiding the responsibility to perform functions that were agreed upon. Moreover, the overriding value of consent decrees is that they avoid the costs of full-scale litigation while permitting the parties to craft a resolution of their dispute that is likely to be a more practical solution to their problem than an order imposed by a judge who is less familiar with the dispute than the parties themselves.[38] A major incentive to enter into such an agreement is the parties' confidence that the court will measure their obligations by the words they choose, and if the words are clear, so are their obligations. If the court is free to change those obligations no matter how clearly set forth in the agreement, this incentive to settle will be reduced and much of the value of consent decrees will be lost.[39] The parties' agreement would be more like a roll of the dice than a document with predictable outcomes, so they would be more likely to spurn a risky settlement and

take their chances at trial. Giving unambiguous terms their plain meaning without resort to extrinsic evidence will promote settlement and ensure fairness to the parties.[40]

This understanding of the *Armour - I.T.T. - Stotts* trilogy refutes the notion that *Armour* and *Stotts* established a strict rule that consent decrees cannot be interpreted to impose requirements that are not expressly spelled out in the decree. That is not the "four corners" rule. There is an important distinction between increasing a party's responsibilities to include additional obligations not agreed to, which *Armour* and *Stotts* prohibit, and construing a decree to include requirements designed to ensure compliance with terms the parties agreed to, which *I.T.T.* permits. This distinction is illustrated by two lines of cases, one holding that a consent decree cannot be interpreted to impose additional obligations the parties did not agree to, and the other holding that terms the parties agreed to implicitly include requirements designed to assure compliance with the agreed terms.

The latter line of cases is exemplified by a series of decisions resolving numerous disputes over interpretation of a consent decree between the United States government and the Teamsters Union. In 1988, the United States sued the Teamsters Union claiming that the Mafia controlled the Union through extortion and other illegal acts in violation of the Racketeer Influenced and Corrupt Organizations Act.[41] The government sought relief that would reform the Union's election process, prohibit Mafia and Union officers from associating with each other, and generally rid the Union of Mafia influence. On the eve of trial in 1989, the parties agreed to settle the case with a consent decree providing reform in two primary areas of union operation: elections and discipline of corrupt members. With respect to elections, the decree required appointment of an independent Elections Officer with the authority to supervise the first-ever direct rank-and-file vote to elect Teamsters Union officers. With respect to disciplining corrupt Union members, the decree provided for the appointment of an Investigations Officer to investigate and prosecute charges of corruption, and of an Administrator to hear and decide charges of corruption.

Unfortunately, numerous disputes erupted over implementation of the decree, which the government viewed as Mafia attempts to retain control of the Union despite the settlement. The Elections Officer was appointed and she promptly promulgated rules to govern rank-and-file election of delegates to the Union convention, conduct of the nominations process at the Union Convention, and rank-and-file election of Union officers. The Union objected on the ground that the Election Officer had no authority to issue rules to govern the election process because the decree did not expressly authorize such rules. It is clear that the rules imposed obligations on the Union that were not provided in the decree itself,[42] so that if *Armour* and *Stotts* established a flat rule that consent decrees cannot be interpreted to impose obligations the parties have not expressly agreed upon, these rules would have been invalid.

The court, however, upheld the elections rules on the ground that the decree expressly authorized the Elections Officer to "supervise" union elections and to "distribute materials about the election."[43] The court reasoned that the power to

"supervise" conferred "broad supervisory authority" on the Elections Officer to ensure a fair rank-and-file election, which should include "any reasonable effort to inform the [Union] membership of matters relating to the election."[44] This decision in the Teamsters litigation thus stands for the proposition that express terms of a consent decree may be interpreted to encompass reasonable efforts to ensure compliance with such terms, even though such efforts are not spelled out in the decree. The decision did not impose obligations upon the Union that it had not agreed to, for it agreed to allow the Elections Officer to "supervise" its elections. As such it is not inconsistent with a proper understanding of *Armour* and *Stotts*, but instead falls within the rationale of *I.T.T.* that a decree may be construed to include requirements designed to achieve compliance with terms the parties agreed to.[45]

Pursuant to the authority granted by the consent decree, the Investigations Officer charged two Union officials with bringing "reproach upon the Union" in violation of the Union Constitution. These charges were based upon the officials' criminal conviction of racketeering and embezzlement, for which the Investigations Officer sought their removal from office. The Union's governing board attempted to defeat the effort to remove the two officials from office by passing a resolution interpreting the term "reproach upon the Union" in a restrictive manner that excluded the charges against these two officials. Based upon this resolution, the two officials challenged the Administrator's authority to hear the charges. The Administrator ruled that he was not bound by the resolution, sustained the charges, and suspended the officials for one year.[46]

The court held that the Administrator had the authority to disregard the exculpatory resolution.[47] The Union Constitution gave its governing board the authority to issue definitive interpretations of its disciplinary rules and the consent decree did not expressly authorize the Administrator to override such interpretation. The consent decree, however, expressly vested the Administrator with "the same rights and powers" as the governing board to discharge duties related to disciplining corrupt officers and also with the authority to "review" decisions by the board on disciplinary charges. The court reasoned that the Administrator's power to review disciplinary decisions by the board "necessarily includes the final authority to determine what constitutes an offense subject to discipline under the [Union] Constitution."[48] Like the interpretation of the electoral provisions, this interpretation of the disciplinary provisions of the consent decree imposed a requirement that was not stated precisely in the decree, but that was essential to ensure compliance with the decree's express terms. As such, it falls within the rationale of *I.T.T.* and is not a departure from the "four corners" rule.[49]

The other line of cases, adhering to the *Armour - Stotts* rule that a consent decree cannot be interpreted to impose additional obligations the parties did not agree to, is exemplified by several decisions interpreting a consent decree between the United States government and American Telephone and Telegraph Co. ("AT&T"). The government sued AT&T claiming that AT&T's monopoly over both long distance and local telephone service violated federal antitrust law. The settlement required AT&T to divest its twenty-two Bell Operating Companies ("BOCs") and to create seven Regional Holding Companies ("RHCs") to own and operate the BOCs. Each RHC was thereby limited to

providing local telephone service in its BOC's region. The consent decree also prohibited the BOCs from entering various lines of business so that they could not use their monopoly over local service to impede competition in the prohibited lines of business. The decree further provided that the court could waive a particular restriction if a BOC could show that permitting it to engage in the prohibited activity would not impede competition.[50] Like the Teamsters consent decree, these restrictions spawned numerous disputes over what activities the BOCs were prohibited from engaging in without first obtaining a waiver.

One restriction prohibited the BOCs from providing "interexchange telecommunications services." Several RHCs proposed to provide two-way mobile phone and one-way paging services outside their assigned regions and sought clarification of whether they were prohibited from doing so.[51] The court held that the consent decree did not prohibit the RHCs from providing exchange services outside their assigned regions, including mobile phone and one-way paging services.[52] The court reasoned that the decree did not explicitly prohibit RHCs from providing services outside their regions, nor was there any evidence that the parties had "reached any agreement on the issue of extraregional exchange services."[53] The fact that the decree assigned certain localities to each BOC so that each RHC was assigned a region in which its BOCs operated "was merely a function of the need, at the time of divestiture, to divide the Bell System's local operations into coherent units in which the BOC could function without entering the interexchange, or long distance, business." The regional designation was not intended to impose geographic restrictions on all future BOC activities.[54] The decree's silence on this issue had, in the court's view, a simple explanation: "the parties and the district court never considered the possibility that the BOCs might want to provide exchange services outside of their geographic regions."[55]

This AT&T case is similar to *Stotts* in that both cases involved new circumstances subsequent to the consent decree - layoffs in *Stotts* and new technology in AT&T. The parties had not contemplated the effects of these new circumstances and, therefore, had not reached agreement concerning their impact on the decree. In such circumstances, the decree cannot be interpreted to impose additional obligations or prohibitions.

A second interpretation dispute arose from a provision in the AT&T consent decree that the BOCs were prohibited from engaging in certain lines of business either "directly or through any affiliated enterprise" without a waiver. One of the BOCs proposed to acquire an option to purchase a company engaged in developing a transatlantic cable system. Thus, the question arose whether acquisition of a conditional interest in a company creates an "affiliated enterprise" requiring court approval.[56] The court held that the decree could not be interpreted as imposing an obligation on the BOCs to seek a waiver before acquiring a conditional interest in a company that allegedly is engaged in a line of business prohibited to the BOCs.[57] The court reasoned that the decree did not expressly require BOCs to seek such a waiver merely to acquire a conditional interest. Moreover, imposition of such an obligation would mean that a BOC who acquired a conditional interest in another company would be in violation of the decree even if the company were determined not to be engaged in activities prohibited to

the BOCs. Such an interpretation "necessarily goes beyond the scope of the bargain embodied in the decree."[58] Like the previous AT&T decision, this decision stands for the proposition that a consent decree cannot be interpreted to impose additional obligations upon which the parties reached no agreement, for in this AT&T case the parties did not agree that the BOCs must obtain a waiver in order to acquire a conditional interest in another company. The decree provided only that, if a BOC did acquire such an interest, it must seek a waiver in order for the acquired company to engage in the restricted lines of business.

It is thus implicit in the "four corners" rule of *Armour* and *Stotts* that courts may not interpret consent decrees in a way that imposes additional obligations with respect to issues on which the parties reached no agreement. The "four corners" rule, however, does not mean that if a particular obligation is not spelled out with precision in the decree a court can never interpret the decree to encompass such an obligation. A court clearly has the authority to do so if imposing such an obligation is a reasonable means of assuring compliance with terms the parties have agreed upon.[59]

This distinction between additional obligations and obligations implicit in the need to implement the decree is consistent with the legitimate values served by consent decrees. Such decrees typically entail structural, long-term reform of large, complex entities such as corporations, unions, prisons and school districts. It is simply impossible to spell out in precise detail every single requirement that must be met over a period of years in such a case, so that the parties often agree on general terms such as "supervise" and "review,"[60] leaving the elaboration of precise requirements to future contingencies as they arise. If nothing at all could be implied from general terms then it would be easy, as demonstrated by the Teamsters cases,[61] for a recalcitrant defendant to evade compliance with the general terms through new schemes the decree did not address. Moreover, the incentive to settle such cases would be greatly diminished, for general terms would be unenforceable because they could have no specific application. On the other hand, allowing courts to impose new obligations with respect to issues on which the parties reached no agreement, solely to advance the perceived purpose of the decree, smacks of unfair surprise to the defendant and reduces the incentive to settle. Parties settle cases in the belief that the agreed terms both create and limit the scope of their obligations. Thus a consent decree, while providing for reform, should not become a power unto itself, constantly expanding into new areas that the parties never contemplated. If consent decrees could do so through a rule of interpretation that permitted imposition of new obligations, defendants would be much more likely to forego settlement in favor of adjudication, where the limits of authoritatively declared law would restrain the court's ability to expand its remedial authority.

**2. Ambiguous terms and "Aids to Construction"**

The "four corners" rule of *Armour* and *Stotts* does not apply if the parties to a consent decree are in dispute over the meaning of terms used in the decree and the terms are indeed ambiguous. In such a case, *I.T.T.* makes clear that the court may utilize "aids to construction" to determine the parties' intent concerning the terms.[62] In *I.T.T.*, the

Court listed several such aids: "the circumstances surrounding the formulation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree."[63]

The "four corners" rule of *Armour* and *Stotts* does not apply if the parties to a consent decree are in dispute over the meaning of terms used in the decree and the terms are indeed ambiguous. In such a case, *I.T.T.* makes clear that the court may utilize "aids to construction" to determine the parties' intent concerning the terms.[62] In *I.T.T.*, the Court listed several such aids: "the circumstances surrounding the formulation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree."[63]

The federal courts of appeals have further elaborated upon the constructional aids identified by the Supreme Court. Among the surrounding circumstances that may be consulted are the original pleadings,[64] the history of the prior negotiations, the parties' own statements concerning the purposes and operation of the settlement during the process of obtaining court approval of the decree,[65] and the manner in which the parties conduct themselves after the decree has been approved.[66] Technical meaning may be ascribed not only to words that appear on their surface to have specialized meaning,[67] but also to ordinary, everyday words which, in the context of settlement, appear to have a more particularized meaning that it would have normally.[68] Additional documents that may be consulted include both documents that the decree expressly includes as part of the agreement approved by the court and those attached to the decree which shed light on the parties' intent but were not formally approved by the court.[69] In addition to the factors listed by the *I.T.T.* Court, courts have also considered the manner in which the parties have structured a consent decree, as a means of assuring that the disputed terms are given an effect that accords with the overall operation of the decree. Such structural factors include statements of general purpose explicitly incorporated in the decree,[70] the manner in which the same word is used elsewhere in the decree,[71] and the effect the interpretation will have on the operation of other provisions of the decree.[72] The richness and variety of interpretive materials used by the courts demonstrate that interpretation of ambiguous terms is a "practical enterprise" in determining the intent of the parties, not a process bound by rigid, technical rules.[73]

Resorting to "aids to construction" has led courts in some cases, including *Microsoft I*, to review the substantive law that gave rise to the lawsuit even though the case was settled rather than resolved through adjudication, the normal route by which the law is declared. Herein lies the process of making law in the shadow of negotiation. There are three circumstances in which courts have determined that resort to substantive law is essential to the process of interpretation. One such circumstance is where the consent decree expressly refers to such law as a source of the parties' obligations. In such a case, an authoritative declaration of law is a means of effectuating the parties' expressed intent.[74]

Second, when one party asserts that one of the competing interpretations is in conflict with the requirements of the underlying substantive law, the court must review

such law in order to determine whether a conflict actually exists, for it is well-established that the terms of a consent decree cannot be given an interpretation which would, if enforced, violate the law.[75] This does not mean, however, that a consent decree cannot be interpreted to require a party to do more than the law requires. The Supreme Court has held that, since the parties' agreement rather than the law the complaint was based upon creates the parties' obligations, their obligations are to be measured by the agreement and not the law. A consent decree is not invalid solely because it imposes greater obligations than a court would have the authority to impose through adjudication.[76] This rationale implies that a court's task is to determine whether one competing interpretation is inconsistent with the law, not whether such interpretation would require a party to do more or less than a court could order it to do. Thus, if the evidence shows that the parties intended to undertake obligations greater or lesser than required by law, that interpretation takes precedence over legal mandates.[77]

The third area in which review of substantive law is needed follows from the *I.T.T.* Court's inclusion of "technical meaning" of words as one of the proper "aids to construction."[78] If a disputed term in a consent decree carries with it a specialized meaning in the area of law that gave rise to the lawsuit, a court must review the law in order to determine precisely the term's specialized meaning.[79] Since it is this circumstance -- use of terms with specialized meaning in the relevant area of law -- that led the court in *Microsoft I* into its misadventure in interpretation,[80] it is important to examine the precise way in which courts have employed this particular method of interpretation in order to appreciate fully the error that occurred in *Microsoft I.*

*Goluba v. School Dist. of* Ripon[81] exemplifies this line of cases. In *Goluba,* the plaintiff claimed that school officials had violated the Establishment Clause of the First Amendment[82] by including prayers as part of graduation ceremonies. The parties agreed to entry of a consent decree that prohibited the school officials from "intentionally allowing or permitting" prayer at graduation. Thereafter, it came to several officials' attention that individual students planned, on their own initiative, to recite a prayer at graduation and invite other students to join them. The officials did not stop them from doing so. Plaintiff contended that permitting prayer to occur in this manner violated the prohibition against "intentionally" permitting prayer, contending that the word "intentionally" encompasses a situation in which school officials have knowledge of a student plan to conduct prayer, but fail to stop it. Defendants offered a competing interpretation of "intentionally" that, in the context of the consent decree, was limited to situations in which school officials purposefully promote or sponsor student-initiated prayer.[83]

The court found that the word "intentionally" was ambiguous so that the word should be given an interpretation that accorded with the mutual intent of the parties, which required "understanding the context in which the decree was entered."[84] The most significant part of the "context" of this case was the decision in *Lee v. Weisman,* in which the Supreme Court held that the Establishment Clause prohibits school officials from authorizing religious exercises at graduation ceremonies in a manner that obliges students to participate in such exercises.85 The defendants' agreement in *Goluba* to

abandon a policy of inviting clergy or students to pray at graduation came shortly after the *Lee* decision, from which the court inferred that defendants were aware of their obligations under *Lee*. Moreover, defendants' agreement to the consent decree indicated that they knew the *Lee* decision forebade school officials themselves to include prayer at graduation and that they understood the decree to focus "on their own activities."[86] The court also noted that First Amendment jurisprudence establishes a "fine line between preventing school officials from endorsing religion and permitting to students freedom of speech and the free exercise of religion." The court found it is unlikely that the *Goluba* defendants intended to expose themselves to a student lawsuit claiming that to prohibit voluntary student prayer at graduation violates free speech and free exercise of religion.[87] Thus, the court concluded that "purposefully" promoting prayer rather than "knowingly" allowing it to occur was the better interpretation of "intentionally" as used in the decree: "It was the active involvement of the School District in organizing graduation prayer that motivated the consent decree."[88]

A careful reading of *Lee v. Weisman* reveals that the *Goluba* court drew accurate conclusions from that case. In reaching its holding in *Lee*, the Supreme Court reasoned that the core principle of the Establishment Clause is that government cannot coerce people to participate in religious exercises.[89] The Lee Court, however, did not purport to interpret the Establishment Clause to require government to actively discourage voluntary religious exercise. To the contrary, the *Lee* Court observed that "though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself."[90] In emphasizing the limited nature of its holding, the Court also remarked that "there must be a place in the student's life for precepts of a morality higher even than the law we enforce today" and that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."[91] Thus, the *Lee* Court's own distinction between active government promotion of religious exercise and official repression of voluntary religious observance provided clear support for the court's conclusion in *Goluba* that the parties meant the word "intentionally" to prohibit official support for graduation prayer, not to obligate school officials to stop student-initiated prayer.

*Goluba* court analyzed the substantive Establishment Clause law that gave rise to the lawsuit led to a proper interpretation of the ambiguous term "intentionally" for two reasons. First, there was authoritative precedent -- the *Lee* decision -- that provided a context for understanding the mutual intent of the parties to the consent decree. Second, the rationale for the holding of the *Lee* case provided a clear basis for determining what the parties to the consent decree understood to be their legal obligations and what were the limits of their obligations. Indeed, in each of the cases prior to *Microsoft I* that used underlying substantive law to interpret ambiguous terms, the law exhibited both of these characteristics.[92]

This analysis of the federal appellate courts' application of the Supreme Court's trilogy of interpretation cases establishes several key propositions. First, if the words of a consent decree are unambiguous because they are capable of only one plausible meaning,

a court is obliged to give the words that meaning without use of extrinsic evidence to extract a contrary meaning. Second, when the terms of a consent decree are ambiguous, a rich and diverse body of "aids to construction" may be employed to determine which interpretation best expresses the mutual intent of the parties. Third, although the law that gave rise to the lawsuit is one of the "aids to construction," when the other extrinsic evidence demonstrates that the parties' own mutual understanding of their obligations under the decree differs from their obligations under the law, the court should adopt the interpretation that is consistent with the parties' mutual intent, unless to do so would be in conflict with or a violation of the law. This is especially true if the parties agreed to undertake obligations greater than required by law. Such an agreement should be respected by the court. Fourth, resort to underlying substantive law as a source of interpretation is clearly appropriate where there is available an authoritative declaration of the law and that declaration provides clear guideposts for understanding the intent of the parties who drafted the ambiguous terms. If, however, the underlying law lacks one or both of these characteristics so that the law itself is highly ambiguous, there is a grave danger of using such law to interpret incorrectly a term that is ambiguous to begin with.

## II. THE ISSUE OF INTERPRETATION IN MICROSOFT I AND THE UNDERLYING LAW OF ANTICOMPETITIVE TYING ARRANGEMENTS

The United States Department of Justice ("DOJ") sued Microsoft Corporation in 1994, claiming that Microsoft had sought to take advantage of its monopoly in the computer operating system market to engage in various anticompetitive practices. DOJ did not allege that Microsoft had obtained its dominance in operating systems illegally, but instead alleged that Microsoft had used its monopoly power to require original equipment manufacturers ("OEMs")[93] who wished to use Microsoft's operating system to enter into licensing agreements on terms that would discourage OEMs from licensing operating systems offered by Microsoft's competitors. Simultaneously with filing the complaint, DOJ and Microsoft filed a proposed consent decree that prohibited Microsoft from engaging in some of the allegedly anticompetitive practices. The district court, in a decision that ignited a major controversy, initially refused to approve the proposed decree on the ground that it failed to address a wide range of alleged abuses by Microsoft.[94] The Court of Appeals for the District of Columbia ruled that it was an abuse of discretion to reject the decree and ordered it approved.[95] Nevertheless, controversy did not end - it had just begun to erupt.

After the consent decree was approved, Microsoft released its new Windows 95 operating system amid great fanfare.[96] In its agreements licensing Windows 95 to OEMs, Microsoft required OEMs to accept the entire Windows 95 software package, including Microsoft's internet browser, Internet Explorer ("IE"). Prompted by cries from companies marketing competing internet browsers, chiefly Netscape, that Microsoft was attempting to achieve a monopoly in the browser market through its dominance of operating systems, DOJ filed a motion to hold Microsoft in contempt of court for violating the following provision in the consent decree: "Microsoft shall not enter into any License Agreement in which the terms of that agreement are expressly or impliedly conditional upon: (i) the license of any other Covered Product, Operating System

Software product or other product (provided, however, that this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products;" (emphasis added)

DOJ contended that the IE browser is a product separate from the Windows 95 operating system and therefore Microsoft violated the consent decree by requiring OEMs to license an "other product," the IE browser, as a condition of licensing the Windows 95 operating system. In particular, DOJ argued that the effect of this agreement was to create an anticompetitive "tying" arrangement in that the seller, Microsoft, agreed to sell one product, Windows 95, only on the condition that the purchasers, OEMs, also buy an "other product," the IE browser. Microsoft, on the other hand, contended that, when the consent decree was agreed to, Windows 95 and the IE browser were "integrated products" as a matter of cybernetic engineering and that, during the negotiations, DOJ was fully aware Microsoft intended to include the IE browser as a feature of Windows 95. Thus, the crucial issue was whether the IE browser was an integral part of Windows 95 or a separate product, which in turn depended on interpretation of the term "integrated."[97]

The district court first considered the issue raised by the motion actually before the court, whether to hold Microsoft in contempt. The court found that the term "integrated products" was ambiguous because, while DOJ interpreted it as meaning two products for which there is insufficient consumer demand for the two products sold separately, Microsoft had offered a plausible competing interpretation of the term: a product that combines functions that can operate independently but, when combined, complement each other in a way that offers additional advantages. Invoking a well-settled rule that a party cannot be held in contempt of court if the order is ambiguous, the court held that Microsoft could not be held in contempt.[98]

Having decided the issue raised by DOJ's motion, the court, apparently sua sponte, addressed an additional issue: whether Microsoft's interpretation of the ambiguous term "integrated products" was the correct one. The court found that the parties' intent in prohibiting the licensing of an "other product" as a condition of licensing Windows 95 but permitting Microsoft to develop "integrated products" was to prohibit anticompetitive "tying" arrangements. In order to interpret the term "integrated products" in a way the parties intended it to mean, the district court examined the substantive antitrust law that gave rise to DOJ's lawsuit against Microsoft.[99]

In determining whether an arrangement constitutes illegal tying, the court stated that the initial question is whether separate products are involved. Addressing Microsoft's argument that Windows 95 and the IE browser are not separate products because benefits are achieved when they are combined in one package, the court relied heavily on two leading Supreme Court cases, *Jefferson Parish Hospital District No. 2 v. Hyde* [100] and *Eastman Kodak Co. v. Image Technical Services*.[101] These cases establish a rule that the proper test for determining whether two products are separate is whether there is sufficient consumer demand so that it is efficient for firms to produce them separately. Thus, as an initial matter, the court concluded that it is irrelevant

whether combining Windows 95 and the IE browser in one package produced functional benefits, because antitrust law -- which the parties intended to be the measure of whether two Microsoft products were "integrated" or separate -- made clear that the test is consumer demand, not functional benefit.[102]

Applying the *Jefferson Parish - Eastman Kodak* test of consumer demand to Windows 95 and the IE browser, however, the court determined that "[w]ithout the benefit of further evidence in the record, an attempt to answer that question would be premature. Disputed issues of technological fact, as well as contract interpretation, abound as the record presently stands."[103] Specifically, further evidence was needed to address Microsoft's claim that permitting OEMs to install Windows 95 without the IE browser would cause other features of the operating system to become dysfunctional. Thus, the district court deferred ruling on the issue whether Microsoft had violated the consent decree, pending further discovery.[104] Nevertheless, the district court granted a preliminary injunction against Microsoft's licensing of its Windows 95 operating system on the condition that the licensee also install Microsoft's IE browser,[105] despite the fact that DOJ had not moved for a preliminary injunction. The court reasoned that, under the *Jefferson Parish - Eastman Kodak* consumer demand test, DOJ had demonstrated a substantial likelihood of success on the merits of its claim that there is sufficient consumer demand for operating systems and internet browsers sold separately to make it efficient for a firm to provide them separately. If so, Windows 95 and the IE browser were not likely to be an "integrated" product but instead would be separate products. Thus, Microsoft was prohibited by the consent decree from requiring OEMs to license the IE browser as a condition of licensing Windows 95.[106]

An examination of the Supreme Court's decision in *Jefferson Parish* and *Eastman Kodak* reveals that those two cases provided reasonably clear guidelines for determining, in the context of antitrust law, whether two products are separate or integrated. In *Jefferson Parish*, the Court stated that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."[107] Rejecting the argument that two products are not tied if they are a "functionally integrated package" when combined, the Court reiterated that "the answer to the question of whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for them."[108] The Court repeated these themes in *Eastman Kodak*, in which the Court stated that, in determining whether the defendant had tied two separate products, "there must be sufficient consumer demand so that it is efficient for a firm" to offer one product separately from the other.[109] Thus, in *Microsoft I* there were two authoritative declarations of what constitutes a separate product in the context of federal antitrust law. Those declarations clearly provided a test based on consumer demand for separate products rather than the functional benefit of a combined product.[110] Moreover, it is the test applied by the District Court in deciding to grant the preliminary injunction.

Microsoft appealed the preliminary injunction and the Court of Appeals unanimously reversed for procedural error. The appeals panel held that, by granting a preliminary injunction when no such motion had been made, the District Court failed to comply with the requirement that "no preliminary injunction shall be issued without notice to the adverse party."[111] In particular, the contempt motion could not be deemed to provide such notice because consideration of a preliminary injunction presents issues -- irreparable harm, balance of harms and the public interest -- that a contempt motion does not.[112] Surprisingly, however, having found a procedural error that rendered consideration of a preliminary injunction premature, a panel majority nevertheless proceeded to address one of the requirements for a preliminary injunction: whether DOJ was likely to prevail on the merits of the interpretation issue. At the outset, then, the majority's interpretation of the disputed terms "other product" and "integrated products" was the product of a premature rush to judgment.[113]

The majority began by observing correctly that ambiguous terms in a consent decree may be interpreted with the use of aids to construction that reveal the parties' mutual intent, and that one such aid, though not the exclusive one, is the substantive law from which the claims arose.[114] It was all downhill from there. DOJ next argued that one of the criteria the parties intended to be used in determining whether two products are separate or distinct is whether there is sufficient consumer demand for the products sold separately as stated in Jefferson Parish.[115] The majority, however, reasoned that the parties could not have intended such a criterion to be used because it would bar Windows 95 itself and yet the consent decree expressly permitted Windows 95.[116] The flaw in this reasoning is simply that the consent decree, like any settlement, was a compromise in which Microsoft successfully bargained to be allowed to sell one allegedly tied product -- Windows 95 -- while DOJ successfully bargained to prohibit any more tied products.

Having rejected DOJ's proposed formulation of underlying antitrust law as an aid to construction,[117] the panel majority formulated its own test that, in its view, reconciled antitrust law and the parties' mutual intent. Beginning with the premise that "[a]ntitrust scholars have long recognized the undesirability of having courts oversee product design, and any dampening of technological innovation would be at cross-purposes with antitrust law,"[118] the majority relied heavily on a leading antitrust law treatise for the proposition that the consent decree should be interpreted to permit "any genuine technological innovation."[119] Such an innovation was defined by the court as having two elements: the two products must be combined in a way that a purchaser could not if he bought them separately ("unity") and the combined products must produce benefit beyond what a purchaser could achieve if he bought them separately ("value").[120] This test supposedly was consistent with antitrust tying law because, although *Jefferson Parish* and *Eastman Kodak* ruled that products are to be deemed separate if there exists sufficient consumer demand for the products sold separately to allow firms to produce them efficiently, such a test should not apply to high-tech products such as software.[121] This latter theme was repeated in a rebuttal of the dissenting opinion, which had argued that the ambiguous terms "other product" and "integrated products" should be interpreted consistently with the *Jefferson Parish* - *Eastman Kodak* test of independent consumer demand.[122] The majority responded that

such a test for high-tech products "is not feasible in any predictable or useful way. Courts are ill-equipped to evaluate the benefits of high-tech product design."[123] In essence, then, despite its acknowledgment that a proper aid to construing the intent of parties who agreed to ambiguous terms is the substantive law that gave rise to the claims, the majority in *Microsoft I* contended that the law in existence at the time the agreement was negotiated should not apply to high-tech products. Subsumed within this analysis is a radical effort to change existing law by creating an exception to it, using interpretation of a negotiated settlement as the vehicle.[124]

*Microsoft I* truly represents making law in the shadow of a negotiated settlement, but unfortunately it is a misguided adventure. To begin with, even assuming it is appropriate to create an exception to existing substantive law through interpretation of a consent decree,[125] the author of the very section of the antitrust law treatise that the majority relied upon publicly criticized the opinion. He stated that the majority had misinterpreted the test he had proposed in the treatise. He explained that his proposed test is that "plaintiffs must show that the products could feasibly be separated and that some buyers would want to purchase them in their separated form;" if such a finding is made, defendants can rebut it in several ways, one of which is by showing "that the items operate better when combined by the seller than when bought separately and combined by the buyer."[126] The *Microsoft I* majority went astray, in his view, because "[w]hat the court forgot was the threshold rule to judge what constitutes one product: the plaintiff must first show that some buyers would actually want the items in their separated form". Had the court applied this test for determining whether two products are separate, he concluded, it should have found that Windows 95 and the IE browser are indeed separate products within the meaning of the consent decree, because "surely, there are buyers who would want to buy Windows 95 separately from Internet Explorer."[127] Thus, the majority in *Microsoft I* failed to comprehend the very exception it adopted, thereby misusing it.

The most objectionable part of the *Microsoft I* decision, however, is its assumption that it is appropriate to use a proposed change in substantive law as an aid to construction of a consent decree. A controversy has been brewing for some years over whether existing antitrust tying law will unduly hamper innovation in the design of high-tech products such as computer software. Some commentators have argued that antitrust tying law should be modified to permit new product combinations that genuinely improve product performance even if there is sufficient consumer demand for the products sold separately. Some proponents of this view have further argued that, in applying such a high-tech exception, judges should not undertake an independent inquiry into whether an innovative combination actually improves performance because they are not competent to do so. In this view, judges should only determine whether the claimed improvements are plausible.[128] The *Microsoft I* court leaped into this controversy by attempting to carve out a "high-tech" exception from existing legal standards set forth by the Supreme Court. The panel majority acknowledged that the Court had reiterated in *Eastman Kodak* that independent consumer demand is the test for whether two products are separate, but contended that "we doubt that it would have subjected a self-repairing copier to the same analysis."[129] There is not one word in the *Eastman Kodak* opinion, however, that

implies the Court would create a "high-tech" exception.[130] Moreover, since consumer demand is the established test, not whether a newly designed product functions better than previous ones, it is difficult to understand why analysis of consumer demand for high-tech products is so much more elusive than demand for other products as to place it beyond the comprehension of judges.

This is not to say that lower-level courts should never call for change in the law. Courts often sound such calls, and properly so, in cases which have been fully litigated and the court has rendered an adjudication on what the law is, or ought to be.[131] It is a different matter, however, when a court's task is to interpret ambiguous terms in a consent decree in accordance with the parties' mutual intent. The parties negotiate the terms in the context of what they understand their obligations to be under existing law. The yet-to-be declared law of the future by its very nature cannot be part of the parties' calculations, because they cannot know what the law will be. Thus, it is inappropriate to use interpretation of ambiguous terms in a consent decree as a vehicle for changing substantive law, because such change is irrelevant to determining what the parties intended such terms to mean when they negotiated their settlement.

*Microsoft I* is now history. DOJ did not petition the Supreme Court for a writ of certiorari. Instead, DOJ filed a new and much broader suit against Microsoft, accusing the software giant of engaging in a widespread pattern of anticompetitive business practices and abuses, of which tying its internet browser to its operating system is only one.[132] The trial of this case dragged on for many weeks, consuming enormous financial and judicial resources and diverting the energies of high-tech corporate executives from their businesses. This entire spectacle might have been avoided if the appeals court in Microsoft I either had not rushed to judgment or had simply applied existing antitrust law. It was the majority's interpretation of the consent decree, allowing Microsoft to require OEMs to license the IE browser as a condition of licensing Windows 95, that prompted DOJ, at least in part, to file the broader lawsuit. At least that case will end one day. The more lasting potential damage of the *Microsoft I* decision, however, is the improper way in which it used underlying substantive law as a method of interpreting ambiguous terms in a consent decree. The damage must be confined to that one case.

## III. POLICY CONSIDERATIONS IN THE USE OF UNDERLYING SUBSTANTIVE LAW AS AN AID TO CONSTRUING CONSENT DECREES: THE PROPER LIMITS OF MAKING LAW IN THE SHADOW OF NEGOTIATIONS

It is now established and proper that one of the aids to construing ambiguous terms in a consent decree is the law that gave rise to the claims in the case.[133] A consent decree is treated as a contract when an issue of interpretation arises, because the proper role of the court is simply to determine what the parties jointly intended the terms to mean when they negotiated the settlement. The policy that requires the parties' mutual intent to be the touchstone of interpretation is that settlement is strongly encouraged as a means of reducing the costs associated with full-scale adjudication. It permits the parties, through their own voluntary efforts, to achieve a more finely crafted solution to the practical

problems that gave rise to their dispute than a judge, less familiar with the problems, could arrive at through adjudication. Requiring judges to interpret terms by determining what the parties most likely intended them to mean provides a strong incentive to settle cases. It promotes the confidence of the parties to a settlement that it will not impose significantly greater or lesser obligations than they believed they were agreeing to. Conversely, such confidence would be severely shaken and major disincentives to settle would be created if some other standard -- such as the judge's personal opinion that established law is wrong and should be changed -- were the basis of interpretation. An important part of the context in which parties engage in negotiations to settle a lawsuit is their understanding of what their obligations under the law would likely be if the case were resolved through adjudication. It is in this sense that negotiations occur "in the shadow of the law."[134] Thus, when agreed terms are susceptible of more than one plausible interpretation, an understanding of the parties' legal obligations can shed considerable light on what they believed they were agreeing to.[135]

The very policy of encouraging settlement by respecting the parties' intent, however, also demonstrates that there must be limits on the use of underlying law to interpret ambiguous settlement terms. *Microsoft I* is an exemplar of what these limits should be. First, if the proceedings in the case have not been sufficiently thorough to afford an opportunity for the kind of mature deliberation required for an accurate determination of what the law is or should be, a court should not use the law as an aid to construing the parties' intent. The risk of error caused by a rush to judgment is too great. If the parties' intent is to be divined from an ill-considered, hasty evaluation of the law, they would have a strong incentive to take their chances with adjudication. In *Microsoft I*, for example, the Court of Appeals first ruled that the district court acted prematurely in addressing the issue of a preliminary injunction and then did the same thing itself by ruling that whether a preliminary injunction should be issued on remand must be decided by its own interpretation of the consent decree. Indeed, the *Microsoft I* decision bears one of the hallmarks of a rush to judgment: reliance on authority that contradicts rather than supports the legal proposition being asserted.[136]

Second, if the underlying law does not provide sufficiently clear guidelines for determining what the parties intended the words to mean, the law should not be used as an aid to construction because it cannot be an accurate measure of the parties' intent. Unclear law can only provide an unclear picture of the parties' intent. Use of such law as a basis for interpretation would discourage settlement because the parties' obligations would be unclear to the extent the court relies upon such law to resolve disputes of interpretation. *Microsoft I* again provides the negative example. Assume for the moment that antitrust law is unclear as to when two products are considered "separate" when the producer has in fact combined them into what appears to be a single product.[137] Such an assumption precludes a finding that DOJ and Microsoft negotiated the terms "other product" and "integrated products" with the thought that they were incorporating antitrust tying law into their agreement, for there was no clear law on that subject.

Finally, if the underlying law is reasonably clear, a court should not change the law by interpreting ambiguous terms in light of what the court thinks the law should be.

Not only does such a process of law-making lack the mature deliberation that it is a feature of traditional adjudication through trial and appeal, but also it cannot provide an accurate picture of the parties' intent at the time of settlement. To the extent the parties have the law in mind when they draft a settlement, it is almost certainly the law in existence at that time, not some law that might develop in the future. Using what a judge thinks the law ought to be rather than what the law was at the time of settlement will create a disincentive to settle because it robs a settlement of the very stability and predictability of obligation that the parties seek.

Herein lies the most critical disincentive to settle threatened by the way in which the consent decree was interpreted in *Microsoft I*. The issue of interpretation in the case was whether the Windows 95 operating system and the IE browser, once combined by Microsoft, became an "integrated" product or remained separate products such that requiring OEMs to license the browser in order to license the operating system was prohibited by the consent decree. The *Jefferson Parish* and *Eastman Kodak* decisions establish that products are deemed separate in antitrust law when there is sufficient consumer demand for the products sold separately to make it efficient for firms to produce them separately. Windows 95 and the IE browser would be deemed separate under this test because such demand almost certainly existed.[138] The Court of Appeals could avoid this result only by changing the law and creating an exception for "high-tech" products, in which combining previously separate products into one package creates an integrated package if the combination creates benefits that a purchaser could not achieve by buying them separately and combining them, without regard to consumer demand for the separate products. This exception was not part of the Supreme Court's jurisprudence at the time DOJ and Microsoft negotiated the consent decree, so it cannot be an accurate gauge of their mutually intended meaning of the words "other product" and "integrated products."

The D.C. Circuit's method of interpretation in *Microsoft I* could adversely affect negotiations to settle lawsuits by undermining the clarity of obligation settlement is designed to achieve. In government antitrust cases, for example, it raises the specter for DOJ that judges will narrow the scope of prohibited business activities agreed to by the parties by narrowing the scope of antitrust law and using the narrowed scope to measure the parties' antecedent intent. For a defendant business, it raises the converse specter that a judge will broaden the activities it may not engage in beyond what it thought it had agreed to, simply by broadening the scope of antitrust law and using it to expand the parties' intended meaning of the prohibitions. This interpretive method undermines the certainty and stability that are two of the chief values of settlement. Moreover, it makes the relative certainty of obligation produced by adjudication after trial and appeal much more attractive.[139]

## Conclusion

Consent decrees serve the important policies of preserving scarce judicial resources, reducing the costs of full-scale litigation, and promoting practical solutions to complex structural problems. When disputes arise over the meaning of particular terms

in consent decrees, courts should employ methods of interpretation that preserve litigants' incentives to settle. If disputed terms are unambiguous in that they are capable of only one plausible meaning the judge should adopt that meaning without resort to extrinsic evidence to divine the parties' intent. If the terms are ambiguous, aids to construction should be evaluated in order to determine what the parties most likely intended the words to mean. Such aids include the parties' claims and defenses, the course of negotiations, parties' statements made at the time of approval by the court, the parties' conduct in implementing the settlement, and the underlying law that gave rise to the lawsuit. When the latter aid is used, if evidence of the parties' own understanding of the terms differs from the underlying law, the parties' own understanding should prevail because their intent is the touchstone of interpretation. If there is no such difference and the underlying law becomes the basis for interpretation, judges should take care that their evaluation is the product of mature deliberation and that the law provides reasonably clear guidelines by which the parties' intent may be discerned. Finally, if the law is reasonably clear, judges should follow it and not attempt to change the law in measuring the parties' antecedent intent. These methods of interpretation will preserve the incentives to settle by making a consent decree a reasonably stable and certain statement of obligations.

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[FN1] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[FN2] A consent decree is a settlement agreed to by the parties to a lawsuit and approved as an order of the court. As such, it is a hybrid legal document with the features of both a contract between the parties and a judicial order. *See generally*, Lloyd C. Anderson, The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation, 1983 U. ILL. L. REV. 579 (1983); Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725 (1986).

[FN3] *See* Anderson, 1983 U. ILL. L. REV. 579, 631-32.

[FN4] *See infra*, text accompanying notes 72-90.

[FN5] Registered trademark of Microsoft Corp. The author and The Pittsburgh Journal of Technology Law and Policy are not affiliated with Microsoft Corp.

[FN6] Registered trademark of Microsoft Corp. The author and The Pittsburgh Journal of Technology Law and Policy are not affiliated with Microsoft Corp.

[FN7] *Microsoft v. United States*, 147 F.3d 935, 952 (D.C. Cir. 1998).

[FN8] Section 1 of the Sherman Antitrust Act, 15 U.S.C. ¤ 1 (1994) prohibits agreements that unreasonably restrain trade. A "tying" agreement is a sale of one product on condition that the buyer also purchase a separate product. Such an agreement violates § 1

of the Sherman Act if the seller has great economic power in the relevant market and the agreement affects a substantial volume of commerce. *See, e.g.*, Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) (holding that anesthetic and operative services are separate products, but tying them did not violate § 1 of the Act because the seller did not have dominant market power).

[FN9] *Microsoft*, 147 F.3d at 948-51. The treatise relied upon is Areeda, Elhauge and Hovenkamp, X Antitrust Law § 1746b (1996).

[FN10] Einer Elhauge, *Microsoft Gets An Undeserved Break*, N. Y. TIMES, June 29, 1998, at A17.

[FN11] Norman W. Hawker, *Consistently Wrong: The Single Product Issue and the Tying Claims Against Microsoft,* 35 CAL. W. L. REV. 1, 12 (1998).

[FN12] Michael W. DeVries, *Antitrust Sherman Act Violations: Monopolization: United States v. Microsoft,* 14 BERKELEY TECH. L.J. 303, 314 (1999).

[FN13] Michael P. Kenney & William H. Jordan, *United States v. Microsoft: Into the Antitrust Regulatory Vacuum Missteps the Department of Justice*, 47 EMORY L.J. 1351, 1357 (1998).

[FN14] *United States v. Microsoft*, No. 98-1232, (D.D.C., May 18, 1998) (Complaint). <http://www.usdoj.gov/atr/cases/f1700/1763.htm>. Site last reviewed December 21, 1999.

[FN15] Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards and Microsoft*, 7 GEO. MASON L. REV. 617 (1999).

[FN16] *See supra* note 11, 47 EMORY L.J. at 1389. The government has also presented a separate claim in Microsoft II under Section 2 of the Sherman Act (15 U.S.C. § 2) that Microsoft has a monopoly in personal computer operating systems and has engaged in exclusionary conduct in order to leverage its position in other markets. For a detailed analysis of the § 2 claims, *see supra* note 13, 7 GEO. MASON L. REV. at 649-671.

[FN17] *U.S. v. Armour*, 402 U.S. 673 (1971).

[FN18] *Id.* at 675-677.

[FN19] *Id.* at 677.

[FN20] *Id.* at 681.

[FN21] For additional discussion of these problems, *see supra* note 2, Anderson, 1983 U. ILL. L. REV. at 618-619.

[FN22] 420 U.S. 223 (1975).

[FN23] For more detailed discussion of the precise violation of the decree, see 420 U.S. at 235-237.

[FN24] 420 U.S. at 238 (emphasis added).

[FN25] *Id.*

[FN26] *Id.* at 235-237.

[FN27] For further discussion of the manner in which the underlying law is a source of interpretation of ambiguous consent decrees, *see infra*, text accompanying notes 72-90.

[FN28] *Firefighters v. Stotts*, 467 U.S. 561 (1984).

[FN29] *Id.* at 565-67.

[FN30] *Id.* at 574.

[FN31] *Id.* at 575. The Court also delved into the underlying substantive law to explain why the decree failed to address layoffs. In the Court's view, Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et. seq., protects bona fide seniority systems. *Id.* at 575-76. As explained infra, text accompanying notes 33-38, however, since the decree unambiguously failed to address layoffs, it was inappropriate for the Court to employ substantive law as an aid to construing the decree. *See also* 467 U.S. at 590 ("The Court's discussion of Title VII is wholly advisory") (concurring opinion). The Court also held that the decree could not be modified to prohibit seniority-based layoffs. *Id.* at 578-83.

[FN32] *See, e.g.*, Thomas M. Mengler, *Consent Degree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 299-306 (1988).

[FN33] *Langton v. Hogan*, 71 F.3d 930, 934 (1st Cir. 1995). The court, however, gave no examples of decisions in conflict on this issue. *See also* United States v. Western Electric Co., 797 F.2d 1082, 1089 (D.C. Cir. 1986) ("We need not decide whether this is a case where it is appropriate to consider extrinsic evidence to the consent decree, because in this case such evidence does not change our result").

[FN34] *See, e.g., supra*, note 24, 29 B.C. L. REV. at 306.

[FN35] *United States v. Western Electric*, 894 F.2d 430, 435 (D.C. Cir. 1990); *United States v. Charter International Oil Company*, 83 F.3d 510, 518 (1st Cir. 1996); *Tourangeau v. Uniroyal*, 101 F.3d 300, 307 (2d Cir. 1996); *Harley-Davidson v. Morris*, 19 F.3d 142, 148 (3d Cir. 1994); *Young-Henderson v. Spartanburg Area Ment. Hlth. Ctr.*, 945 F.2d 770, 774-775 (4th Cir. 1991); *United States v. Ekco Housewares*, 62 F.3d 806, 814 (6th Cir. 1995); *Rumpke of Indiana v. Cummins Engine Co.*, 107 F.3d 1235, 1243

(7th Cir. 1997); *Musso v. University of Minnesota*, 105 F.3d 409, 411 (8th Cir. 1997); *Gates v. Rowland,* 39 F.3d 1439, 1444 (9th Cir. 1994); *Jacksonville Branch, NAACP v. Duval Cty. Sch. Bd.*, 978 F.2d 1574, 1580 (11th Cir. 1992). No reported decisions on this issue have been found for the Fifth and Tenth Circuits.

[FN36] *Compare,* United States v. Charter International Oil Co., 83 F.3d 510, 519 (1st Cir. 1996) (where text of decree is unambiguous, extrinsic evidence may not be considered) *with* Coca Cola Bottling Co. v. Coca-Cola Co., 988 F.2d 386, 402 (3d Cir. 1993) (extrinsic evidence of parties' intent may be considered where terms of decree are ambiguous).

[FN37] *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223, 238 (1975).

[FN38] *See, e.g.*, Ekco Housewares, 63 F.3d at 806. *See also, supra* note 2, 1983 U. ILL. L. REV. at 581-82.

[FN39] *See, e.g.*, Morris, 19 F.3d at 146 (allowing defendant to litigate issue expressly addressed in consent decree would remove incentive to settle because it would allow relitigation of issue previously settled).

[FN40] A consent decree can be given its unambiguous meaning even if doing so requires the defendant to do more than the law would require it to do. *Firefighters,* 478 U.S. at 522 (1986) (agreement of the parties, not the underlying law, creates the obligations, so that legal limitations on relief "simply do not apply when the obligations are created by a consent decree"). Such terms will not be enforced, however, if doing so would cause a conflict with the law. *See, e.g.*, Keith v. Volpe, 118 F.3d 1386 (9th Cir. 1997) (unambiguous term not enforced because in conflict with state law).

[FN41] 18 U.S.C. Sec. 1964 (1988). This description of the facts is derived from *United States v. Int'l Brotherhood of Teamsters,* 905 F.2d 610, 612-13 (2d Cir. 1990) and *United States v. Int'l Brotherhood of Teamsters,* 931 F.3d 177, 180-81 (2d Cir. 1991).

[FN42] The facts concerning this particular dispute are derived from *United States v. Int'l Brotherhood of Teamsters,* 931 F.2d at 181-92. The obligations imposed by the elections rules but that were not spelled out in the decree were that the Union must permit any candidate to publish campaign material in the Union magazine, to inspect membership lists and to utilize a random sample of members for pre-election polls.

[FN43] *Id.* at 187 and 188-89.

[FN44] *Id.*

[FN45] For a discussion of the *I.T.T.* rationale, *see supra,* text accompanying notes 20-25. For other decisions upholding efforts to achieve electoral reform in the Teamsters Union as a means of ensuring compliance with the express terms of the consent decree, *see* United States v. Int'l Brotherhood of Teamsters, 764 F. Supp. 787 (S.D.N.Y. 1991)

(electoral reform provisions construed to prohibit both Union vote against incorporating consent decree into Union Constitution and election of officers by convention delegate vote); 939 F. Supp. 226 (S.D.N.Y. 1996) (consent decree construed to prohibit proposed amendment to Union Constitution requiring debate among candidates).

[FN46] These facts are derived from *United States v. Int'l Brotherhood of Teamsters,* 905 F.2d 610, 613-14. For a description of how the resolution would have excluded the charges, *see id.* at 617-18.

[FN47] *Id.* at 618.

[FN48] *Id.* at 619.

[FN49] For another decision construing the disciplinary provisions of the consent decree to impose numerous obligations not spelled out in the decree, *see* United States v. Int'l Brotherhood of Teamsters, 803 F. Supp. 761 (S.D.N.Y. 1992).

[FN50] These facts were derived from *United States v. Western Elec. Co.*, 797 F.2d 1082, 1085-86 (D.C. Cir. 1986).

[FN51] *Id.* at 1085.

[FN52] *Id.*

[FN53] *Id.* at 1089.

[FN53] *Id.* at 1090.

[FN55] *Id*. at 1091.

[FN56] *United States v. Western Electric Co*., 894 F.2d 430 (D.C. Cir. 1990).

[FN57] *Id*. at 435.

[FN58] *Id.*

[FN59] *See supra*, text accompanying notes 39-47.

[FN60] For a discussion of the *Teamsters* cases in which these terms were used in a consent decree, *see id.*

[FN61] *Id.*

[FN62] For a discussion of *I.T.T., see supra,* text accompanying notes 20-25.

[FN63] *I.T.T. Continental Baking Co.*, 420 U.S. at 238.

[FN64] *See, e.g.*, Paralyzed Veterans of America v. Wash. Metro Area, 894 F.2d 458, 460 (D.C. Cir. 1990) (original complaint indicating that scope of case was limited to construction of access facilities provided evidence that decree was not intended to impose duty of maintenance).

[FN65] *See, e.g.*, United States v. Western Electric Co., 12 F.3d 225, 230-31 (D.C. Cir. 1993) (parties' own statements, at time consent decree was approved, that they believed BOCs would be prohibited from sharing expenses and revenues with companies engaged in lines of business prohibited to BOCs provided evidence that "affiliated enterprise" was intended to have broader meaning than ownership). *See also*, Little Rock School Dist. v. Pulaski Cty. Dist. 1, 60 F.3d 435, 436 (8th Cir. 1995), *on remand*, 934 F. Supp. 299, 300-01 (E.D. Ark. 1996), *aff'd*, 109 F.3d 514 (8th Cir. 1997); *United States v. Western Electric Co.*, 894 F.2d 1387, 1391 (D.C. Cir. 1990).

[FN66] *See, e.g.*, Coca-Cola Bottling Co. v. Coca-Cola Co., 988 F.2d 386, 402-04 (3d Cir. 1993).

[FN67] *See, e.g.*, I.T.T. Continental Baking Co., 420 U.S. 223 (1975) (term "penalty" had particular meaning in antitrust law).

[FN68] *See, e.g.*, Goluba v. School Dist. of Ripon, 45 F.3d 1035, 1038-39 (7th Cir. 1995) (term "intentionally" has particular meaning in law of Establishment Clause).

[FN69] *See, e.g.*, Pearson v. Fair, 935 F.2d 401, 409-10 (1st Cir. 1991).

[FN70] *Id. See also* Little Rock School Dist., 50 F.3d at 435; *Miller v. Dukakis*, 961 F.2d 1143 (1st Cir. 1995).

[FN71] *See, e.g.*, Application of City and County of Denver, 935 F.2d 1143 (10th Cir. 1995).

[FN72] *Id. See also* Paradise v. Prescott, 767 F.2d 1514, 1526 (11th Cir. 1985).

[FN73] *See* Little Rock School Dist. v. Pulaski Cty. Dist., 60 F.3d 435, 436 (8th Cir. 1997).

[FN74] *See, e.g.*, San Francisco NAACP v. San Francisco U. School D., 896 F.2d 412, 414 (9th Cir. 1990). *See also*, Langton v. Hogan, 71 F.3d 930, 935-37 (1st Cir. 1995).

[FN75] *Stotts*, 467 U.S. at 575-576 (1984); *State of Mo. v. Independent Petrochemical Corp.*, 104 F.3d 159, 162-63 (8th Cir. 1997); *United States v. Gila Valley Irr. Dist.*, 31 F.3d 1428, 1433-34 (9th Cir. 1994); *United States v. Int'l Brotherhood of Teamsters*, 931 F.2d 177, 189 (2d Cir. 1991). *Cf. United States v. Int'l Brotherhood of Teamsters*, 905 F.2d 610, 615-16 (2d Cir. 1990).

[FN76] *Firefighters v. Cleveland,* 478 U.S. 501, 522 (1986).

[FN77] *See, e.g.*, Western Electric Co., 12 F.3d at 230-233; *Paralyzed Veterans of America*, 894 F.2d at 458; *Little Rock School Dist*., 60 F.3d at 435; *Morris*, 19 F.3d at 145 (3d Cir. 1994); *Pearson*, 935 F.2d at 410 (1st Cir. 1991).

[FN78] *See supra*, text accompanying notes 20-25.

[FN79] *See, e.g.*, United States v. Int'l Brotherhood of Teamsters, 931 F.2d 177, 189 (2d Cir. 1991); *Keith v. Volpe*, 118 F.3d 1386, 1391-92 (9th Cir. 1997); *Brotherhood of Midwest Guardians v. City of Omaha,* 9 F.3d 677, 678 (8th Cir. 1993); *Berger v. Heckler*, 771 F.2d 1556, 1575-76 (2d Cir. 1985); *EEOC v. Local 40 Intern. Ass'n of Bridge Workers,* 76 F.3d 76, 80 (2d Cir. 1996).

[FN80] For a discussion of the improper use of substantive law as an aid to construction in *Microsoft I*, *see infra*, text accompanying notes 97-130.

[FN81] 45 F.3d 1035 (7th Cir. 1995).

[FN82] U.S. CONST. AMEND. I.

[FN83] These facts were derived from 45 F.3d at 1036-38. The consent decree in *Goluba* also prohibited school officials from authorizing, conducting or sponsoring prayer at graduation, terms not at issue in this case.

[FN84] *Id.* at 1038.

[FN85] 505 U.S. 577, 599 (1992).

[FN86] 45 F.3d at 1038-39.

[FN87] *Id.* at 1039.

[FN88] *Id.*

[FN89] 505 U.S. at 587.

[FN90] *Id.* at 589.

[FN91] *Id.* at 598.

[FN92] *See supra*, note 71.

[FN93] In this industry, OEMs are computer manufacturers.

[FN94] *United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C. 1995).

[FN95] *United States v. Microsoft Corp*., 56 F.3d 1448 (D.C. Cir. 1995). For a detailed discussion of this phase of *Microsoft I, see* Lloyd C. Anderson, United States v. Microsoft, Antitrust Consent Decrees and the Need for a Proper Scope of Judicial Review, 65 ANTITRUST L. J. 1 (1996).

[FN96] For a description of some of the advertising, *see id.*, 65 ANTITRUST L.J. at 3, note 16.

[FN97] The facts leading to the issue of interpretation are derived from *United States v. Microsoft*, 980 F. Supp. 537, 538-40 (D.D.C. 1997).

[FN98] *Id.* at 541.

[FN99] *Id.* at 541-542.

[FN100] 466 U.S. 2 (1984).

[FN101] 504 U.S. 451 (1992).

[FN102] 980 F. Supp. at 541-43.

[FN103] *Id.* at 543.

[FN104] *Id.*

[FN105] *Id.* at 543, 545.

[FN106] *Id.* at 544. The district court also found that irreparable harm would occur if Microsoft were allowed to continue tying the IE browser to Windows 95.

[FN107] 466 U.S. at 12. The specific issue in *Jefferson Parish* was whether a hospital's policy of permitting only anesthesiologists designated by the hospital to assist in operations at the hospital was an anticompetitive tying arrangement.

[FN108] *Id.* at 21. The Court also made clear that finding a company has tied two separate products is only the first step in deciding whether a per se violation of federal antitrust law has occurred. In addition, it must be shown that the seller has such market power that it is able to force consumers to purchase the tied product. The Court ultimately held that, although anesthetic and operative services are separate under the demand test, there was no per se violation in tying them because the hospital lacked requisite market power. *Id.* at 29-31. *See also, supra*, note 9, 35 CAL. W. L. REV. at 9; *supra* note 10, 14 BERKELEY TECH. L.J. at 309. In *Microsoft I*, it was clear that Microsoft had tied Windows 95 and the IE browser and, by virtue of its grip on 90% of the market for operating systems, wielded enormous economic power in that market.

*See, supra*, note 10, 14 BERKELEY TECH. L.J. at 309. Thus, the crucial issue was whether Windows 95 and the IE browser were separate products.

[FN109] 504 U.S. at 462. Once again, the Court rejected a "functionally integrated package" test. As to the second element of a per se antitrust violation, the Court's specific holding was that lack of requisite market power in the company's primary market does not preclude the possibility that it has such power in its derivative market in which its tying arrangement exists. *Id.* at 464.

[FN110] *See also, supra*, note 9, 35 CAL. W.L. REV. at 10; *supra*, note 10, 14 BERKELEY TECH. L.J. at 309 (both contending that the consumer demand test of *Jefferson Parish* and *Eastman Kodak* was settled law).

[FN111] FED. R. CIV. P. 65 (a)(1).

[FN112] *United States v. Microsoft Corp.*, 147 F.3d 935, 943-45 (D.C. Cir. 1998).

[FN113] Although DOJ's contempt motion presented the issue whether Microsoft had violated the decree's prohibition against bundling separate products, it did so only in the context of whether the terms "other product" and "integrated products" are ambiguous. Consideration of the preliminary injunction presented an issue which the contempt motion did not: which of two competing interpretations should prevail. Thus, the D.C. Circuit's consideration of the interpretation issue was premature.

[FN114] *Id.* at 946.

[FN115] For a discussion of the *Jefferson Parish* case, *see supra*, text accompanying notes 98-108.

[FN116] The reason such a test would bar Windows 95, in the majority's view, is that there was independent consumer demand for Microsoft's operating system (DOS) and the additional functions provided with Windows 95. *Id.* at 947.

[FN117] The court also rejected Microsoft's proffered interpretation. *Id.* at 947-48.

[FN118] *Id.* at 948.

[FN119] *Id.* The treatise is Areeda, Elhauge & Hovenkamp, X ANTITRUST LAW § 1746b, (1996).

[FN120] *Id.* at 948-49.

[FN121] *Id.* at 950. In applying its two-part test, the majority held that the combination of Windows 95 and the IE browser had both unity and value as defined by the court. *Id.* at 950-52.

[FN122] *Id.* at 956-64 (dissenting opinion).

[FN123] *Id.* at 952.

[FN124] *See also, supra*, note 9, 35 CAL. W. L. REV. at 11-12; *supra* note 10, 14 BERKELEY TECH. L.J. at 312-314 (both asserting that the panel majority in *Microsoft I* ignored the established consumer demand test for separate products in favor of a different, functional integration test). The radical nature of the proposed exception is illustrated by the comment of one observer: "The alternative to judicial control over antitrust issues is direct regulation and Congressional action. Thus, if a court were to conclude that any 'plausible' benefit should immunize a monopolist's conduct because the high tech issues are too complicated for judges, that court must recognize that it is dealing the courts out of antitrust." *Supra, note* 13, 7 GEO. MASON L. REV. at 671. *See also, supra*, note 10, 14 BERKELEY TECH. L.J. at 314 (contending that the panel majority "abdicated its responsibility to protect consumers against anticompetitive ties").

[FN125] This assumption is ill-founded, *as discussed infra*, text accompanying notes 126-130. The exception to the consumer demand test that the majority created to protect innovation in high-tech product design is analyzed herein merely to illustrate the hazards of failing to apply the law in existence at the time a settlement was reached.

[FN126] Einer Elhauge, *Microsoft Gets an Undeserved Break*, N. Y. TIMES, June 29, 1998 at A17.

[FN127] *Id.* Given the conclusion that Windows 95 and IE are separate products under the threshold rule of consumer demand, the majority should not have considered whether they operate better when combined by Microsoft, because the parties did not agree that Microsoft was allowed to bundle separate products if functional improvement were achieved. The decree flatly prohibited Microsoft from requiring OEMs to license an "other product" as a condition of licensing Windows 95. Upon a finding that Windows 95 and IE are separate products under Elhauge's threshold consumer demand test, that should have ended the task of interpretation. Even if Elhauge's proposed modification of antitrust tying law were an appropriate aid to construction of the consent decree, moreover, bundling Windows 95 and the IE browser would be prohibited by the decree. Consumers can obtain the benefits claimed by Microsoft for the Windows 95-IE browser combination by purchasing them separately and combining them on their own. *See supra*, note 10, 14 BERKELEY TECH. L.J. at 320-321 (asserting that, "Despite its differing focus, it is difficult to see how the distinct products analysis employed by the court, even when used in the way intended by Elhauge, takes any substantial departure from the *Jefferson Parish* distinct products analysis in terms of results").

[FN128] For a discussion of this controversy, *see supra*, note 10, 14 BERKELEY TECH. L.J. at 312-314.

[FN129] 147 F.3d at 950.

[FN130] If any implication regarding high-tech products could be gleaned from *Eastman Kodak*, it would be that there is no such exception, for that very case involved what the court itself called the "high-tech service industry," *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 463 (1992). *See also supra*, note 9, 35 CAL. W. L. REV. at 4.

[FN131] *See, e.g.*, Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) (overruling a doctrine of appellate procedure only after nearly every federal court of appeals had called for its abolition).

[FN132] *Supra*, note 12.

[FN133] For a discussion of this proposition, *see supra*, text accompanying notes 72-90.

[FN134] *Supra*, note 1.

[FN135] One commentator has argued that conditioning the licensing of Windows 95 upon the licensing of the IE browser was not at issue in the *Microsoft I* litigation and the propriety of this practice was not contemplated by the parties who negotiated the consent decree. "Whether Microsoft had impermissibly violated the terms of the 1994 Consent Decree by requiring OEMs to license Internet Explorer with Windows 95 was a simple matter of contract interpretation; it was not a license to investigate or to consider antitrust allegations. Internet Explorer is either an 'other product' under the plain language of the decree or it is not." *See supra*, note 11, 47 EMORY L.J. at 1387. The flaw in this argument is that the dispute did not involve a "simple" issue of interpretation that could be resolved by the "plain language" of the decree. The terms "other product" and "integrated products" are general, ambiguous terms that are capable of different plausible interpretations, so that resort to aids to construction was necessary in order to determine which interpretation comported with the parties' intent. Moreover, since the terms "other product" and "integrated products" have specialized meaning in antitrust law, that law was part of the context in which the negotiations were conducted and therefore was a proper aid to construction. *See supra*, text accompanying notes 72-90.

In a similar vein, another commentator "assumes that the Court of Appeals correctly interpreted the consent decree even though the Court of Appeals failed to follow antitrust law." *See supra* note 9, 35 CAL. W. L. REV. at 4. It is accurate to say the majority failed to follow established antitrust law to follow established antitrust law embodied in the consumer demand test and instead adopted a radically different "plausible benefit" test. If that is so, however, then the assumption that the majority correctly interpreted the terms "other product" and "integrated products " is wrong, because those terms have specialized meanings in antitrust law which are proper aids to construction. Thus, if Windows 95 and the IE browser are separate products under the consumer demand test, they are separate within the meaning of the consent decree.

[FN136] *See supra*, text accompanying notes 123-125.

[FN137] This assumption could be based, for example, upon a split of authority over whether consumer demand or functional benefit is the appropriate test for determining whether two "high-tech" items are a single product.

[FN138] *See supra*, note 9, 35 CAL. W. L. REV. at 24 (asserting that, under the consumer demand test, there is "little doubt that Internet Explorer and Windows 95 are distinct products under antitrust law of bundling").

[FN139] In *Microsoft II*, for example, District Judge Jackson will issue findings of fact prior to entering conclusions of law. If the findings of fact indicate Judge Jackson is likely to rule that Microsoft has violated the Sherman Act, there will be intense pressure to settle the case. If, however, the terms they agree upon are subject to the whims of an appellate court that might seize upon a dispute over ambiguous terms as an opportunity to change established law, they might find it preferable to await a final judgment on the merits and appeal adverse rulings.

This is not to suggest that all incentives to settle will be undermined. In antitrust cases in particular, a notable settlement benefit to defendants is avoidance of the rule that a judgment against the defendant in a government antitrust action is prima facie evidence against the defendant in subsequent private antitrust suits for treble damages. *See* Note, Ruing Rufo: Ramifications of the Lenient Standard for Modifying Antitrust Consent Decrees and an Alternative, 65 GEO. WASH. L. REV. 130, 135 (1996). Thus, Microsoft might still decide to settle despite uncertainty of interpretation in order to avoid increased risk of liability for treble damages to its competitors.