

## TEN TIPS FOR CLASS ACTION CONSENT DECREE SETTLEMENT SURVIVAL

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- 1. Settle if you want to or litigate if you must. Don't try to do both in the consent decree.** The objective of a consent decree, like any other type of settlement, is to end litigation. Parties make the decision to settle for many reasons, but most prominently to avoid the uncertainties of a litigated outcome. Presumably the negotiated settlement terms will embody conditions with which all parties are prepared to live. However, in order to do so, they first need to let go of the allegations, facts and issues that prompted the litigation in the first place. Life under the consent decree should be governed by its stated terms. If any party insists on continuing to try to vindicate their litigation posture they will subvert the healing and normalization that the settlement contemplates.
- 2. Consider and plan for your public posture both before and after settlement.** Employers very often feel tremendous pressure to settle employment discrimination lawsuits because of the negative impact of such charges with the public. This is particularly pronounced in the case of companies involved in consumer products industries. EEO agencies and plaintiff's counsel play on this vulnerability by issuing press releases, seeking media coverage and otherwise airing alarming allegations in the press. As much as public posture is an element in the litigation, it should be given equal consideration in planning for performance under a consent decree settlement. A company that has just shelled out thousands or hundreds of thousands of dollars to resolve a lawsuit with a strong non-admissions clause, is very likely to "feel the burn" if the agency press release repeats the complaint's allegations as if they were proven facts. By the same token, a company press release labeling the agency's lawsuit as "selective prosecution" vindictively launched on the basis of unproven allegations will rankle the employees whose hurt feelings started it all, particularly where an ongoing employment relationship continues. Thus, it pays to negotiate joint press releases on the settlement or plan what can be said by either party regarding the vindication of either party's litigation position.

3. **Draft Carefully: Say what you mean and mean what you say.** A consent decree contains both the elements of a regular contract and the attributes of a court order, since it is policed by the judiciary. Like any negotiated document, it will be interpreted first by a review of its terms. Further, a consent decree has the added stamp of judicial approval, making it even less amenable to subsequent modification. Thus, it is important for both parties to assure that they are in agreement with the stated terms. Toward this end it is advisable to avoid the wholesale use of boilerplate language and pro forma documents. Language negotiated in some prior instance will not necessarily fit the particular circumstances of a given matter. Take the time to get it right up front since the monitor, administrator or court will most likely limit any interpretation to the text of the agreement. Even in the case of changed circumstances, absent mutual agreement, you are likely to have the written terms cited back to you as the basis for an interpretation or ruling on the agreement. So say what you mean, mean what you say and be prepared to live with it for the duration of the decree.
  
4. **Balance benefits and burdens.** For both sides the most basic benefit of entering into a settlement agreement is to end the uncertainties of litigation and put the dispute behind them. Some employers mistakenly enter into such agreements believing that the dollars they pump into a settlement fund buy them a pass on any other burdens. In truth, the relief provided by a Title VII consent decree can run the full gamut of equitable remedies available under the statute, including affirmative relief, back pay, reinstatement or hiring, and other affirmative actions. One must closely examine the nature of the dispute to determine the implications of the agreement embodied in the consent decree. For the employer the question is whether the benefit is balanced by the short term burden of the settlement fund AND the longer term equitable relief requirements specified in the decree. If a commitment is not made to the benefit of the bargain, living under the consent decree will prove uncomfortable and unrewarding to all concerned.
  
5. **Make the non-admissions clause mean something.** Employment discrimination class actions are typically settled on the basis of an agreement including a specific denial of any wrongdoing on the part of the employer. Inclusion of such a non-admissions clause is usually essential to obtaining employer agreement to settle. The commitment and energy with which an employer undertakes the affirmative actions

required under a consent decree can be undercut by actions or statements by the agency, plaintiffs and/or their counsel which challenge the notion that no violations have been proven or admitted. Thus, again, public statements like press releases need to be controlled. Where employment is ongoing, internal discussions of the settlement also need to be structured so as not to sabotage the parties' efforts at putting the dispute behind them.

**6. Recognize the good, bad & ugly of agency litigation.** In litigation involving an agency such as the EEOC, the parties should recognize that the interests of the agency may differ substantially from those of the individuals on whose behalf the case was supposedly brought. Thus, not only is it necessary to structure an agreement that satisfies the needs of the underlying charging parties, sometimes it is also required to deal with the interests of potential class members yet to be identified, who may never have complained of mistreatment, and for whom the agency will search after the settlement fund and agreement have been established. Moreover, while requiring the employer to fund this effort, which often seems like a fishing expedition, the agency will resist every employer effort to couch its prior and existing practices in positive terms. Thus, for example, EEOC will seek settlement agreement language requiring an employer to provide sexual harassment training going forward and resist alternative language recognizing existence of a bona fide harassment training program that the employer simple needs to continue. This lack of recognition of what might be called "prior good acts" has caused friction during the monitoring periods of many consent decrees.

**7. Plan for compliance/enforcement and monitoring responsibilities.** Once the decision is made to forego a litigated resolution in favor of a settlement consent decree, the parties would be wise to at least have the situation examined by representatives who were not involved in the preparations for and/or conduct of the litigation. Better still would be to assign a different team to the monitoring process from those who bore litigation responsibilities. Because of the hardening of positions that typically occurs in litigation, it sometimes is difficult for those who have taken a litigation focus to do what is necessary to make a consent decree successful. Litigators believe in the strength of their cases and their abilities and want the opportunity to vindicate them by winning at trial. Any effort to seek vindication of the respective litigation positions will undermine the ability of the consent decree to advance the cause of equal

opportunity in the workplace. A consent decree is enforced as a forward looking document, not one that can finally resolve the underlying factual disputes that might have been addressed had the case proceeded to trial.

- 8. What collateral impact can you expect?** There is no way of knowing with certainty whether being sued in a class action lawsuit, by an EEO agency or by individuals, and/or entering into a consent decree settlement of such lawsuits makes a given employer more or less likely to be subjected to further workplace discrimination claims. Employers often fear that public disclosures or large monetary settlements will plant the idea that they are an easy mark and invite further actions. However, to the extent that a consent decree specifies remedial steps that should be taken and targets specific goals or timetables, the expectation is that workplace discrimination disputes will be lessened, not increased, by the decree. Moreover, many decrees specifically provide enforcement mechanisms calling for expedited resolution of new charges of discrimination, thereby short circuiting the progression of such matters to litigation.
- 9. Duration of the decree is a key term.** A consent decree must have a terminal date so that it will not continue indefinitely. This may be combined with a terminal or triggering event, such as the achievement of certain goals, but, absent a mutual agreement by the parties on an extension, a date certain should prevail for ending the decree's effect.
- 10. What happens after the decree expires?** After expiration, of course, the force and effect of the consent decree ceases to exist along with the continuing jurisdiction of the court. The employer no longer has to comply with the additional requirements which the consent decree mandated, its measure of compliance reverting to meeting the statutory dictates applicable to all employers. However, in an idealized situation, the affirmative actions required by the consent decree and any systems and mechanisms established will have had a positive effect which can be continued to the benefit of the organization and its employees. Whether because of the continuing benefits of the consent decrees or for some other reasons, it's clear that the employers involved in the most notorious examples of consent decrees have avoided falling prey to subsequent claims rising to the levels of those resolved through the consent decrees.