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The Federal Consent Decree Fairness Act (S. 489/H.R. 1229) , A Legal Analysis

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Abstract. The Federal Consent Decree Fairness Act (S. 489/H.R. 1229) would impose durational limits on the effectiveness of "any final order imposing injunctive relief" against state or local governments , or officials thereof sued in their "official capacity" , when that order is based in whole or part upon consent or agreement of the parties. Specific exception is made for private agreements not merged into a judicial decree and final school desegregation orders. Under the proposal, any decree could be modified or vacated on motion of the governmental defendant four years after the decree was originally entered or upon leaving office by the highest elected state or local official who consented to the decree, whichever is less. The burden in any such proceeding would be on the class plaintiff who originally filed the action , or the Department of Justice in cases filed by the federal government , to "demonstrate that the continued enforcement of a consent decree is necessary to uphold a federal right." Moreover, unless the court rules on the motion to vacate within a 90-day period, the consent decree would lapse and defendants would not be bound until a contrary decision is made. The appointment of any special master to oversee the decree would expire at the same time.

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Summary

A "consent decree" refers to an agreement or contract between the parties to a lawsuit which usually settles all outstanding legal issues and is adopted by the court hearing the case as a formal judgment, including appropriate remedies and relief. Such decrees differ from litigated judgments only in that they grow out of negotiation between the parties, rather than being forced on the parties by the court without their consent. In addition, they may be entered by the court at any time, frequently before trial or formal presentation of evidence, and permit resolution of the controversy without the defendant admitting any liability. Historically, consent decrees have frequently been used in institutional reform cases to compel state and local governmental compliance with legal and constitutional requirements regarding the operation of prisons, school systems, public housing, foster care, adoption, and child welfare systems, and other large public programs.

The Federal Consent Decree Fairness Act (S. 489/H.R. 1229) would impose durational limits on the effectiveness of "any final order imposing injunctive relief" against state or local governments – or officials thereof sued in their "official capacity" – when that order is based in whole or part upon consent or agreement of the parties. Specific exception is made for private agreements not merged into a judicial decree and final school desegregation orders. Under the proposal, any decree could be modified or vacated on motion of the governmental defendant four years after the decree was originally entered or upon leaving office by the highest elected state or local official who consented to the decree, whichever is less. The burden in any such proceeding would be on the class plaintiff who originally filed the action – or the Department of Justice in cases filed by the federal government – to "demonstrate that the continued enforcement of a consent decree is necessary to uphold a federal right." Moreover, unless the court rules on the motion to vacate within a 90-day period, the consent decree would lapse and defendants would not be bound until a contrary decision is made. The appointment of any special master to oversee the decree would expire at the same time. This report will be updated as required by events..

Generally, a "consent decree" refers to an agreement or contract between the parties to a lawsuit which usually settles all outstanding legal issues and is adopted by the court hearing the case as a formal judgment, including appropriate remedies and relief. Such decrees differ from litigated judgments only in that they grow out of negotiation between the parties, rather than being forced on the parties by the court without their consent. In addition, they may be entered by the court at any time, frequently before trial or formal presentation of evidence, and permit resolution of the controversy without the defendant admitting any liability. Historically, consent decrees have frequently been used in institutional reform cases to compel state and local governmental compliance with legal and constitutional requirements regarding the operation of prisons, school systems, public housing, foster care, adoption, and child welfare systems, and other large public programs.

The Federal Consent Decree Fairness Act (S. 489/H.R. 1229) would impose durational limits on the effectiveness of "any final order imposing injunctive relief" against state or local governments – or officials thereof sued in their "official capacity" – when that order is based in whole or part upon consent or agreement of the parties. Specific exception is made for private agreements not merged into a judicial decree and final school desegregation orders. Under the proposal, any decree could be modified or vacated on motion of the governmental defendant four years after the decree was originally entered or upon leaving office by the highest elected state or local official who consented to the decree, whichever is less. The burden in any such proceeding would be on the class plaintiff who originally filed the action – or the Department of Justice in cases filed by the federal government – to "demonstrate that the continued enforcement of a consent decree is necessary to uphold a federal right." Moreover, unless the court rules on the motion to vacate within a 90-day period, the consent decree would lapse and defendants would not be bound until a contrary decision is made. The appointment of any special master to oversee the decree would expire at the same time.

First, the bill is not apparently intended to prevent the formation of new agreements or consent decrees, but to end judicial supervision of all decrees after a statutorily mandated period. But the durational limitation raises a host of potential legal and practical considerations. First, it could be argued, the bill may discourage plaintiffs from entering such decrees in favor of seeking longer term, more effective relief through costly and time-consuming litigation. Moreover, because consent decrees are often entered without the formal presentation of evidence, or judicial findings on the merits of the underlying claim, it may be difficult for plaintiffs to prove that the decree is still needed. Unless the court decides the motion to vacate within 90 days, the state or locality is no longer bound by its terms until there is a ruling in plaintiffs' favor. Thus, by placing the "necessity" burden – a very strict legal standard – on the decree's advocates, and requiring judicial action within a short time frame, the bill could result in termination of a substantial number of outstanding decrees. Under current practice, the burden is on the party seeking termination of modification of the decree – usually the state or local defendants – to prove necessity. As one observer has noted:

> [I]t will be unusual for plaintiffs to be able to produce proof of the ongoing need for the decree when the defendants later move to have it vacated. But, if the defendant has taken the time to ask the court to vacate the Consent Decree, it is a fair assumption that the defendant wishes to do something that the decree does not allow. That assumption, however, is not proof, and plaintiffs will be at a terrible disadvantage if they are forced to prove anew, often years later, what they were about to prove in the

> original suit when the defendant offered instead to negotiate a Consent Decree. Thus, whether intentionally or not, [the bill] would create a situation in which many consent decrees against a state or local defendant will in fact expire either at the change of administrations or after four years.[1]

In such cases, whether the consent decree was enacted before or after the bill's enactment, class plaintiffs would have to relitigate the matter to obtain any further relief they considered necessary. Faced with this dilemma, plaintiffs may attempt to steer state and local officials toward alternative private agreements.

A unanimous 2004 ruling by the Supreme Court, in *Frew v. Hawkins*,[2] added judicial gloss to current federal consent decree procedures that may interest both proponents and opponents of proposed bills. The consent decree in *Frew* resolved a suit against the State of Texas for violating a condition of state participation in Medicaid, that the state carry out a program of early periodic screening, diagnosis, and treatment. A comprehensive plan for implementing the required program was ordered that was much more specific than the statutory mandate itself. The Fifth Circuit found that the violations of the decree were not violations of the federal statute, and that in the absence of a violation of federal law, the district court lacked jurisdiction to remedy the violations.

In a brief opinion authored by Justice Kennedy, the Supreme Court reversed, holding that the Eleventh Amendment does not preclude enforcement of a consent decree entered into by state officials, even if that decree imposes obligations not otherwise specifically required by federal law. First, the Court noted that the Texas officials did not contend that the terms of the consent decree were inconsistent with *Ex parte Young*,[3] which permits suits for prospective injunctive relief against state officials who violate federal law, or that the terms of the decree did not protect legitimate federal interests. Despite imposing specific obligations not found in the statute itself, the Court concluded that the decree reflected "a choice among various ways that a state could implement the Medicaid Act." Accordingly, the decree to be enforced – "a remedy the state officials themselves had accepted" – was "a federal decree entered to implement a federal statute," and its enforcement did not violate the Eleventh Amendment. As Justice Kennedy explained, federal courts "are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."

The Court's decision in *Frew* emphasizes that public officials who enter into court-approved consent decrees to settle disputes under federal law may be required to comply with the terms of those decrees, even if they impose specific obligations not found in federal law. At the same time, however, the opinion admonished federal judges against rigid adherence to decrees not suited to contemporary needs and to be more flexible when responding to requests for modification.

> The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations

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[1] See Hitov, Steve, Memorandum for the National Health Law Program Inc. p. 2 (March 17, 2005), available at [http://www.healthlaw.org/].

[2] 540 U.S. 431 (2004).

[3] 201 U.S. 123 (1908).

> is returned promptly to the State and its officials. As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities. A State, in the ordinary course, depends on successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. If the State establishes reason to modify the decree, the court should make necessary changes; where it has not done so, however, the decree should be enforced according to its terms.[4]

Thus, while *Frew* provides impetus for litigation to reform state and local social programs, it also counsels restraint when intruding on the policy making prerogatives of state and local elected officials unless necessary to safeguard federally protected rights.

Whatever the outcome of the political debate prefigured by *Frew*, it seems largely settled that Congress has authority to act on the subject. Thus, the Federal Consent Decree Fairness Act continues a trend of legislation to constrain the authority of the federal courts to grant remedial relief in various areas. For example, in 1996, Congress enacted the Prison Litigation Reform Act (PLRA) after the federal courts had already issued consent decrees covering the administration of prisons in more than 30 states.[5] The PRLA mandated termination of outstanding decrees unless the federal courts that issued them finds that they are "narrowly tailored" and "necessary to correct a current and ongoing violation of the Federal right."[6] Under an automatic stay clause, a judge has 30 days to make written findings to this effect or else the motion to terminate automatically stays the relief.[7] In the Telecommunications Act, that same year, Congress terminated the prospective effect of three prior consent decrees by providing that "[a]ny conduct or activity that was, before the date of enactment of the act," subject to any restriction or obligation imposed by "any of the decrees would, after the act, "be subject to the restriction and obligations imposed by" the new Act.[8]

Congress' power to "establish and ordain" the lower federal courts[9] includes authority to set standards and procedures for review of cases, provided that the legislature does not usurp or interfere with Article III judicial prerogatives in violation of the separation of powers. Early Circuit Court rulings were divided over whether the PLRA termination provisions violated the separation of powers as impermissible legislative

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[4] 540 U.S. at 541.

[5] See Richard J. Costa, The Prison Litigation Reform Act of 1995: A Legitimate Attempt to Curtail Frivolous Inmate Lawsuits and End the Alleged Micro-Management of State Prisons or a Violation of Separation of Powers?, 63 Brook. L. Rev. 319,328-29 (1997).

[6] 18 U.S.C. § 3626(b)(2)-(3).

[7] Id at § 3626(e).

[8] 47 U.S.C. § 152.

[9] U.S. Constitution, Art. I, § 1.

interference with the judiciary.[10] Any doubts on that score were settled, however, when the Supreme Court decided *French v. Miller* in 2000.[11]

In *Miller*, the Seventh Circuit had affirmed a remedial order finding Eighth Amendment violations and imposing capacity limits, rules about the use of mechanical restraints, staffing standards, food, and medical services. With minor modifications, the injunction remained in effect until 1997 when the state filed a motion to terminate the relief under the PLRA. Plaintiffs moved for a temporary restraining order to enjoin the automatic stay, citing both due process and separation of powers principles. Ultimately, the stay provision was found to violate the separation of powers by the Seventh Circuit, which did not address the plaintiffs' due process claims. A five-member majority of the Supreme Court, however, disagreed with the Seventh Circuit and upheld the automatic stay, remanding the case for termination proceedings. The majority was led by Justice O'Connor who emphasized that prospective relief is subject to changes in substantive law because it lacks the finality of compensatory relief. The automatic stay "helps to implement the change in the law," but it did not dictate how the courts must rule on each motion. However, some concern was expressed by the Court for the "relative brevity" of the time limit for judges to rule on the termination motion before relief is automatically stayed:

> [W]hether the time limit is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question, an issue that is not before us. We leave open, therefore, the question whether the time limit, particularly in a complex case, may implicate due process concerns.[12]

As dicta, the open question is not central to the *Miller* holding, but does suggest that overly short time limits could meet judicial objection.

The Federal Consent Decree Fairness Act is distinctive, of course, for the generality of its reach – covering all federal civil and civil rights litigation, except for school desegregation – in contrast to earlier laws, which are limited to discrete subject areas. But after *Miller*, the prerogative of states and localities to move under the bill for termination of prospective relief appears fairly well-established.

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[10] Compare e.g. Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998)(per curiam)(PLRA termination provision is consistent with constitutional separation of powers), cert. denied 118 S.Ct. 2368 (1998) with Taylor v. United States, 143 F.3d 1178, 1181 (9th Cir.)(PLRA termination provision improperly "reopen[s] the final judgments of the federal courts and unconditionally extinguish[es] past consent decrees affecting prison conditions") withdrawn, 158 F.3d 1059 (9th Cir. 1999).

[11] 530 U.S. 327 (2000).

[12] Id. At 350