COMMENTARY: Kenneth Davidson, The FTC Monitor Trustee

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COMMENTARY

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THE FTC MONITOR TRUSTEE

During the 1990s, the Federal Trade Commission began to include a new kind of entity in its antitrust consent orders, particularly divestiture orders. The trustee, often referred to as a Monitor Trustee, an auditor trustee or even simply an auditor or a monitor is now in many orders. Lawyers who have settled merger cases with the FTC over the last decade are probably familiar with the procedures involving these trustees and how they differ from roles that other persons have played who have also been termed trustees. This commentary is directed primarily at those who are unfamiliar with Monitor Trustees or respondents who have resisted the inclusion of a Monitor Trustee in a consent order with the Commission.

My experience has been that respondents have benefited from the inclusion of Monitor Trustees in two major ways. First, the existence of a trustee has allowed the Commission to agree to settlements of competition issues that would be too complex for the Commission to monitor by itself. Without a trustee provision, the merger would likely have been opposed in its entirety. Second, trustees have frequently been able to resolve implementation problems that would be difficult for the respondent and the buyer of divested assets. These difficulties arise because, unlike most buyers and sellers of commercial properties, buyers of divested assets are normally direct competitors of the respondent; thus the parties seller and buyer of divested assets have no economic reason to trust each other. In many divestitures, the parties respondents and buyers of divested assets have been able to rely on the Monitor Trustee to provide an impartial assessment of the issues. Such resolutions have generally been quicker, cheaper and more effective than an investigation and resolution by the Commission or the Commission staff.

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The concept of a Monitor Trustee has dual parentage. The concept was (1) born in merger orders which required the divestiture of pharmaceuticals products whose manufacture required FDA approval and (2) was further developed as a result of research on the effectiveness of Commission divestiture orders.

It was clear to FTC staff that FDA approval for a new drug producer normally takes a number of years, that the respondent would have to supply the divested drug product to the buyer during that time to maintain competition, and further, that the respondent would have to supply technical assistance to the buyer to establish its own production facilities and to obtain FDA approval. It was unrealistic to imagine that the FTC's Compliance Division would have the technical expertise to know whether the respondent was fully complying with such responsibilities. The complexities of technology transfers and the requirements of the regulatory approval process are generally outside the competence of antitrust lawyers. After all, it is one thing to deliver Blackacre (a piece of property) or Acme Corporation, (an ongoing business complete with staff and customers); it is quite another to transfer the technology to make a regulated product and to supply timely, well-made drugs for a period of years when the respondent will obtain no ongoing reward from the success of the product in the hands of the buyer. In fact, as a competitor, the respondent would benefit from the failure of the product in the hands of the buyer.

As a result, the respondents in a series of merger cases sought to alleviate the skepticism of the lead staff attorney that a successful technology transfer would occur by undertaking a set of obligations, including an agreement to pay for the services of a technically qualified person to certify to the FTC that the respondent was, in fact, doing what the FTC had ordered. (I was not in the rooms when these offers were first developed, but I had a peripheral role in the final formulation of a number of these orders, so my description of these exchanges are second hand.) The FTC staff attorney was adamant that the Commission needed to be confident that these respondents were fulfilling their obligations, and that the buyers of the divested assets did not, as a result of frustration, intervening calamity, or change of strategy decide to abandon, or delay the acquisition of the rights to produce and market the drug. On the other side of the table, the attorneys for these hard pressed respondents were not to be put off. The fate of some very large mergers would be determined by the respondents' ability to persuade the FTC that a divestiture was possible, would succeed, and would be executed in a manner that preserved competition.

Over the course of several mergers in the mid 1990s, attorneys for respondents suggested or agreed to several safeguards against the failure by the buyer of the divested technology. The buyer would not only be subject to the approval of the Commission, as is always true, but the buyer would be required to commit to a business plan to implement the acquisition, and that, should the buyer cease to pursue sales, production plans or fail to seek and secure FDA approval, the technology would be returned to the respondent and divested by a trustee appointed by the Commission. A time limit would be imposed on the buyer of the divested assets to make sure that it did not delay and become a distributor for the respondent. To avoid unfairness of a predetermined deadline the Commission retained the discretion to extend that time where the failure to obtain approval was not due to a lack of diligence on the part of a buyer. Further, the divestiture trustee would be authorized to also divest further assets of the respondent to make the sale of the technology and the securing of approval quicker and more certain.

These proposed safeguards, which became order provisions, were not arrived at in a single conversation or in a single merger order. They were the product of lengthy negotiations in which respondents' attorneys working with the FTC attorneys sought to find acceptable solutions to continued competitive concerns.

Ultimately, the key to agreement was the invention of the monitor trustee, a person who could be trusted by the merging parties, the potential buyers of divested assets, and the Commission. It was simply not credible that a Commission attorney could monitor the ongoing compliance by the respondent or diligence of the buyer in seeking FDA approval. How was a person to be found who would be paid for by the respondent, who would have access to confidential business information of the respondent and the buyer of the divested asset, and who would protect the interests of the FTC and the public? The first individuals proposed by the respondents were academics or former civil servants who had the necessary technical background, business experience and no previous economic connection with the respondent. The lead attorney, after discussions with the proposed monitors, recommended the settlements and the monitors to the Commission. (Contrary to rumor, almost none of the persons that have been appointed as Monitor Trustees have been former FTC employees. The reason should be self evident: the Monitor is appointed to add a skill set that FTC employees do not have.)

At roughly the same time as these orders were being negotiated, the FTC staff was conducting a retrospective review of the effectiveness of recent Commission divestiture orders. The findings of that review were troubling. Although a substantial majority of the divestitures succeeded in the sense that the buyer was able to establish itself in business, the study indicated that the Commission's divestiture orders and the implementation of the orders were subject to systemic problems. The problems were widespread. Buyers did not get all of the assets they needed to facilitate entry. Buyers did not get all the technical assistance provided for in the Orders. Buyers often paid more than the assets were worth. As a result, it is likely that competition was often restored more slowly and less completely than the Commission had expected.

The *Study of the Commission's Divestiture Process* (1999), which was a Bureau of Competition staff report written by Naomi Licker and me, provided some insights into the sources of these problems. The primary problem was created by the Commission's overreliance on opinions expressed by buyers and prospective buyers of the assets that were to be divested.

> Staff further assumed that respondent's [self-interested] conduct would be balanced by the self-interest of buyers who have the advantage of bidding on a contract that must be accomplished within a stated period of time at no minimum price. . . . Furthermore, staff relied on the fact that buyers were willing to enter

> into divestiture contracts as evidence that the divested assets were valuable and adequate to establish the buyer as a viable competitor to the respondent.
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> Contrary to these expectations, it appears that buyers generally perceived that they had much less bargaining power than respondents . . . . as a result of two factors. First, some seemed willing to trade away the competitive strengths and protections the order was intended to give them because they assumed the divested assets were a bargain and they were afraid some other buyer would be chosen by the respondent if they haggled. Second, many buyers, including large, apparently sophisticated multinational corporations, seemed to be unaware of major economic factors in the businesses that they were buying. Accordingly, they sometimes agreed to pay too much for the assets that they were acquiring or did not insist upon the transfer of necessary additional assets. (Public Version at 16)

In addition, staff had often assumed incorrectly that most buyers would complain to the Commission if they had problems with the assets or technical assistance delivered by the respondent. It appears that most buyers did not complain either because they were unaware of what assets and assistance they should expect or they feared that, if they complained, an adversarial dynamic with the respondent would be established and they would receive even less assistance. (Public Version at 26)

The Study established that the problems that had been identified in the context of pharmaceutical divestitures were common to many divestitures, including most divestitures that included technology transfers. Moreover, it appeared that many if not most of the problems might be resolved by the appointment of a Monitor Trustee.

The Appointment of a Monitor Trustee

The Monitor Trustee is normally created by a Commission order and the Commission's appointment of an individual to act as the trustee. The order language describing the appointment, powers, duties and responsibilities are largely taken from language that has long been used in Commission orders to describe the attributes of the divestiture trustee. One difference is that the term of the trustee is usually set by an event, such as FDA approval by the buyer to produce the product, rather than a term of years. The Order provides that the respondent must agree to the appointment of the person selected by the Commission (except in certain instances not relevant here). The trustee is to have full access to the premises and files of the respondent and is to be paid reasonable and customary fees set by the Commission; the trustee may hire assistants to perform his functions as needed, etc. The trustee is normally a person who has technical knowledge critical to the implementation of the order that is not normally present in the Commission and/or a person who has time available to devote to examining the implementation of the Order.

Although the Order appears to grant the Commission draconian powers, the practice is quite different. The existence of the Commission's powers appears to be more in the nature of insurance against the possibility that voluntary compliance might not be forthcoming. In the normal course the Monitor Trustee is selected by the respondent at a pay rate that is agreed upon between them. When asked by respondents, staff sometimes indicates names to respondents of individuals who have previously served as trustees. Such suggestions may help respondents who seek a quick appointment of a person that the staff and Commission are unlikely to reject. But, ultimately, it is most important that the respondent have confidence in the trustee. Without such trust, it would be difficult to monitor the implementation. The need to enforce a Monitor's rights by the Commission and the Courts would recreate much of the bureaucratic inefficiency that the Monitor was intended to obviate.

To facilitate the cooperation and access that the Monitor needs, it is obviously advantageous for the Commission to appoint a person that the respondent has approved. At the same time, it is vital that the monitor understand that its primary responsibility must be to the Commission and the Commission staff. Thus, the staff reviews both the technical qualifications of the proposed trustee and the question of whether the trustee is likely to be biased toward the respondent or otherwise have conflicts of interest in implementation of the Order. In several instances, it was agreed by both the respondent and the buyer of the divested assets that a former employee of the respondent had the best technical qualifications to monitor the Order. The Commission staff recommended the appointment, but only on the condition that the trustee's retirement benefits be converted so they no longer depended in any way on the financial performance or health of the respondent.

The responsibilities of the Monitor are to determine if the Order is being correctly and fully implemented and, if not, to inform staff of the problems so that staff can take appropriate timely action. The Orders require regular written reports to the Commission by the Monitor Trustee, but these generally supplement immediate telephone conversations between staff attorneys and the Monitor when problems arise. Given this role, it is typical that an Order or Agreement Containing Consent Order provides that the Commission may appoint a trustee any time after the respondent agrees to the settlement agreement, even though the Order may not yet be in effect. Whether or not the Commission has issued a Hold Separate or Maintain Assets Order, that normally goes into effect before an Order becomes final, but after the Commission has accepted the Order for public comment, it is the Commission's expectation that the respondent will not make changes that affect the terms of the Order. The existence of a trustee can increase the Commission's confidence that those expectations are not violated during the period before the Order becomes final.

There are additional practical reasons to appoint the Monitor Trustee at the time an order is accepted for public comment. It serves at least two efficiency functions. First, it requires the respondent to focus during the negotiating period on who will be the trustee and avoids the sometimes time consuming problem of getting respondents to understand after the agreement is signed with staff what the trustee does and who might be an acceptable trustee. Second, it serves a nontrivial bureaucratic function by presenting the Commissioners with a single package relating to the settlement of the transaction.

Writing a separate memorandum that characterizes the proposed settlement, the usefulness of the trustee under the order and reviews the qualifications of the trustee is likely to add time to the trustee approval process, time that may be important in assuring that the respondent understands its obligations after signing an agreement with the staff. A separate memorandum is likely to originate in the Compliance Division, it may be reviewed by the litigation division that recommended settlement, the Bureau of Economics, the Bureau Director's office, the Secretary's Office, and the Offices of each the Commissioner. Although appointment of the trustee is rarely a controversial matter, those outside the Compliance Office, who have moved on to other matters will have to reacquaint themselves with the proposed Order even to make an easy judgment. For these reasons the appointment of the Monitor Trustee at the time an Order is accepted for public comment ought to be made standard practice.

It has become traditional for Monitor Trustees to insist that respondents sign a separate agreement with the trustee stating the terms of remuneration and reiterating the powers and duties granted to the trustee in the Order. This separate agreement may serve to underline the acceptance of the trustee's rights of access and the fact that, notwithstanding that the trustee is paid by the respondent, the respondent has no right to direct the actions of the trustee and no right to see or limit the communications between the trustee and the Commission or its staff.

In most Orders, the buyer of the divested assets has no role in the approval of the Monitor Trustee. Where the assets are a stand alone business and to be divested to an upfront buyer, there may be no need to have a Monitor Trustee so the issue would not arise. However, if there is to be a delay in the transfer and the buyer is known, there is no reason not to at least provide the buyer with an opportunity to object to the Hold Separate or Maintain Asset trustee. A preappointment role for the buyer is obviously not possible if the divestiture is to be made after the Order becomes effective. That does not mean that the buyer when approved by the Commission should not have both an opportunity to object to the trustee and an obligation to cooperate with the trustee.

Role of the Buyer

Existing Order provisions probably permit the former in cases where the buyer can show a significant conflict of interest issue, because the trustee serves at the pleasure of the Commission. However, to facilitate administration, it may be in the interest of the Commission and the parties not to reopen the appointment issue other than in exceptional cases. In contrast, I think a strong case can be made for requiring the buyer of divested assets to cooperate with the Monitor in at least some instances. The clearest examples are Orders in which the Commission retains the right to revoke a divestiture on the grounds that the buyer has failed to seek diligently to assume full responsibility for the a business being transferred or cases in which buyers have failed to obtain regulatory approval within the time required by the Order and are petitioning the Commission to extend, pursuant to the Order, the time allowed to obtain that approval. In either circumstance, the Commission is likely to benefit from the advice of the Monitor Trustee.

I believe that the buyer should be required to sign an agreement to cooperate with the Monitor Trustee, unless there are special circumstances that would make such approval inappropriate. Such agreements would not oblige the buyer to pay the trustee, but they would acknowledge the right of the Monitor to the access needed to perform his or her duties. In general, the Commission has not provided for in its Orders or even encouraged buyers to sign such agreements. The argument against requiring such agreements is that they are unnecessary because in the overwhelming number of cases the trustee is clearly acting to benefit the buyer of the divested assets; consequently, it is in the interest of the buyer to cooperate with the trustee. Although, like the respondents' pattern of proposing only acceptable Monitor Trustees, the normal voluntary compliance by buyers does not mean that such compliance should not be reinforced by mandatory requirements for the exceptional case.

There are instances where the Monitor may report that the buyer is not pursuing independence from the supplies provided by the respondent because it is cheaper for the buyer than supplying itself. In some instances, this might be grounds for revoking a divestiture and therefore the buyer might have reasons for not wanting to give access to the Monitor. In other instances there may be disputes as to whether the correct machinery was delivered or was installed properly. The Monitor is supposed to assure compliance with the Order. There is no reason to tempt the buyer to game the monitoring by limiting the access of the trustee.

Are Monitor Trustees Valuable and to Whom?

My view is that the Monitor Trustee has been valuable to respondents, buyers of divested assets and to the Commission and its staff. This view is based on working with monitors in many cases for which I had compliance responsibilities and from hearing about the experiences of my coworkers in the Compliance Division. This conclusion makes no pretense of making a cost benefit calculation, although it may be significant that I have heard almost no complaint from respondents about the fees of Monitor Trustees. Accordingly, this commentary is more a collection of vignettes than a systematic study of the activities of Monitor Trustees.

It is worth noting that the origins of the Monitor Trustee come from respondents. In conducting the Divestiture Study, the earliest monitor I found was contained in a divestiture agreement and not part of the order. As I recall, the parties needed a period of more than a year to separate the to-be-divested assets and the buyer was concerned that the respondent would take advantage of that time to reduce the value of the business being sold. The individual selected to monitor compliance appears to have made complaints on more than one occasion that respondent was taking unfair advantage of its ongoing information about the operations of the to-be-divested business. It is clear that the parties thought oversight would make the transfer fairer and more effective. The records are not clear on how successful this arrangement was for the buyer in the absence of a Commission approved Monitor.

The early pharmaceutical Orders make clear the value of the Monitor to respondents. The competitive overlaps between the firms that wished to merge involved small dollar revenues in terms of the proposed overall merger, but those overlaps were clearly anticompetitive. The overlap product line in these cases could not be divested quickly because the respondent needed to retain the production facilities to produce other drugs. Accordingly, the creation of a supply contract/technology transfer that was overseen by a monitor was a remedy breakthrough of major proportions for the respondents. It allowed them to consummate transactions that would otherwise have been stopped as illegal mergers.

The Monitor Trustee also solved a hidden problem that was uncovered in the course of the divestiture study. Buyers of divested assets either did not know or were reticent to complain about inadequate delivery of assets or technical assistance for fear that a complaint would be resented by the respondents. The buyers recognized that they were dependent on the respondents and were reluctant to make formal complaints. Monitors, in contrast, have no such inhibitions. Moreover given their greater access to the facilities of the respondent, and a technical understanding of the processes, the Monitors have been more able to determine if the buyers were receiving all services, assets and supplies provided for in the Order and divestiture contract. The Monitor, therefore, has had clear benefits to the buyers and to the Commission in assuring a more effective implementation of Orders and the maintenance or restoration of competition.

These were the results that were planned when the concept of the Monitor was introduced. Experience has shown, however, that many of the Monitors have facilitated divestitures in unexpected ways that benefited both parties and the Commission. From the beginning, the concept of the Monitor was to add technical skills and understanding of the divestiture process that the Compliance Division lacked. It sometimes turned out that the parties also lacked some of those skills. In one case that I worked on, the respondent was required to move a small production facility from its plant to the buyer's production plant. Neither company had any experience with this kind of transfer which required among other things regulatory approvals. The trustee had such experience and was able to advise the parties on the necessary steps.

In another of my cases, the buyer purchased a small part of a large chemical complex. The Order and divesture agreement detailed dozens of rights and duties that were intended to make the buyer's business viable. The agreement could not anticipate all of the implementation problems. Some of the issues that arose after the divestiture concerned how to calculate input quantities with measuring devices that were not designed for that purpose. Others concerned issues of access to the buyer's facility that required passage through the respondent's property and deciding on priority for using testing facilities that were shared. One conflict dealt with issues concerning the negotiation of a separate contract with the union for the buyer's workers. I discussed each of these matters with the Monitor and made clear that the Order required that they be resolved in a way that would maintain the viability of the buyer's business, but I had no idea what a reasonable solution would be. The Monitor, who had years before managed this plant, had ideas, and was able to negotiate a resolution to these and other issues.

I had opposed this Order precisely on the grounds that the Commission could not foresee and mandate solutions to all the problems that were likely to arise. I did not doubt that the Commission or a court could arrive at a workable solution to the various problems, but I doubted that this could be done in a timely fashion that would permit the parties to operate businesses. I explained the time and expense of formal resolution of these issues to the Monitor who used that explanation to persuade the parties that a negotiated resolution was more desirable for them. In a significant number of these disputes, the parties adopted suggestions by the Monitor either because his ideas were better or because they used him as an arbitrator. Although I continue to have misgivings about these kinds of Orders, it is clear they could not be implemented without a knowledgeable Monitor who is trusted by the parties.

This kind of active role by the Monitor was not foreseen. I and others who had responsibilities for compliance with orders came to understand that the dynamics of the monitor process was likely to encourage the parties to seek the aid of the Monitor in implementing the Order. We repeatedly emphasized to the Monitors that they had no power to impose solutions on the parties, but supported their roles in facilitating solutions when asked to do so by the parties.

My favorite example of a Monitor playing this role concerned an order in which the respondent divested the North American rights to a product but retained the European rights to sell the product. The respondent was responsible for supplying the American buyer with the product during the years that it took to build its own production facilities and to obtain all of the necessary approvals. The product was produced once a year in a European facility that used a batch process. The buyer was required to order product quantities for the entire year because the machinery used to make the product was used for other purposes after the single batch was produced. The American company was unexpectedly successful in its sales and a year arrived when the respondent maintained that it could not supply both the amounts requested by the American firm and supply its own customers. Failing to supply its own customers would not only have disrupted European competition for this drug, but also might have violated the Commission's Order that required the respondent maintain the European product as a "crown jewel," should the divestiture fail.

The fact that the respondent did not have the capacity to supply the amounts projected by the two firms was confirmed in a meeting I held with the Monitor and representatives of the parties. Had I been required to recommend a decision in the matter, I was inclined to require that the orders of the buyer be supplied first, even though this might have jeopardized a contingent remedy that was included in the Order. Before I made my views known, the Monitor, a man for whom I have the highest respect, suggested that the meeting adjourn to allow him to go over the projections of the two companies and determine whether they could be analyzed in a way that would permit both firms to feel confident that they would have sufficient supplies. Had the firms themselves suggested reviewing each other's projections, I would have had serious antitrust concerns. The Monitor, however, had no reason to share with either firm the plans and projections of the other firm. He could look dispassionately at the calculations of each firm to determine whether mistakes had been made, whether either was unreasonably stockpiling supplies, or trying to disadvantage the other by inflating projected needs. He determined that the projections of each could be safely lowered and the impasse was avoided.

The solution in this case reflected both the powers of the Monitor to examine confidential business information, but more importantly, it reflected the trust the two companies had in the judgment of the Monitor to be fair, to be accurate and to use good business sense. That trust is something that he earned over the years that he had been Monitor for this Order.

The question of trust has been central to the success of Monitors. In at least one case, the respondent, who had previous Commission experience with Monitors, agreed to the appointment of a "quasi monitor" prior to signing a settlement. The Compliance Division felt that it could not evaluate the adequacy of the assets offered by the respondent. It agreed, however, to consult on the adequacy of the asset package, at the expense of the respondent, with a person who had on two occasions acted successfully as a Monitor under other Orders. He reviewed respondent's proposal and helped develop a divestiture process that would not have required the use of a Monitor Trustee. Based on its prior experience with this individual, the Compliance Division recommended this process to the Commission which approved an Order containing the process.

The absence of a Monitor has in some cases illustrated why Monitors are useful or necessary. I worked on a civil penalty investigation in which the buyer of the divested assets claimed that it had not received the computer technology required by the Order. We quickly established that the respondent had at least technically violated one portion of the Order. It was less clear that the respondent was deliberately refusing to supply the technology or data needed to operate the business. With the assistance of FTC computer personnel, we visited the facilities of both the respondent and the buyer, and examined documents we had requested. Unfortunately, these steps did not help us decide what steps needed to be taken to transfer the business. The business used a unique legacy technology developed by the respondent.

The buyer was convinced that the respondent was attempting to prevent the buyer from getting into business. The respondent who was supplying product to the buyer was convinced that the buyer was not competent to manage the complex software of its system. The issue was a serious one. We could have brought a civil penalty action and declared the divestiture a failure, but that would not have restored competition. The attorney for the respondent suggested a procedure that had some promise. She suggested that given the complete absence of trust by each party of the other that they appoint an "auditor" to monitor the efforts that the respondent was making to make the computer system work for the buyer. Other than being incorporated in the Order and approved by the Commission, the Auditor performed essentially the same function as a Monitor. He reported to the Compliance Division, not the parties.

The respondent's suggestion to empower an Auditor worked to its benefit. Instead of sending instructions on how to establish the computer system, the respondent sent a team of their experts to install the programs on the buyer's equipment. On the day the experts completed their work, the respondent's experts, the Auditor and the buyer watched as the system was turned on. Almost immediately, the system crashed. Had the Auditor not been there, we would have be inclined to believe the buyer that respondent was either refusing to install a working system or could not do so.

We had worked previously with this Auditor and were convinced by him that the problems of transferring this legacy system were substantial but could be overcome with sufficient time and effort. He recommended that we make it clear to the respondent that they had an obligation to turn over a workable system to the buyer however much effort that took and that it was not sufficient to transfer plans to the buyer for what was allegedly a functional system. With the confidence of the Auditor's analysis, we told the respondent that it had to expend whatever effort it took to enable the buyer to function. Neither we nor the Auditor, despite his training, could determine if the system was workable unless it did in fact work. If the respondent failed to produce a workable system, we would have to consider whether, in addition to recommending civil penalties, the merger that had given rise to the divestiture obligation should be undone. After considerable additional effort, the buyer's system was enabled to use the technology.

This was an extreme example of how a neutral intermediary can make a transfer work in a case where there was no trust between the respondent and the buyer of the divested assets. We at the Commission did not have the capacity to assess whether the technology was in fact transferable. Without the assurances of the Auditor, we might have been inclined to give up the transfer efforts and recommend instead that the respondent take back the rights to its legacy system and divest the newer technology that they had purchased.

The Monitor is not indispensable to the work of the Compliance Division; it simply gives the Division and therefore the Commission a greater set of options for resolving or forestalling disputes between respondents and buyers. In one of my cases where the buyer refused to agree to have a Monitor (I am not sure why), the buyer said it would be fully protected for the five month period before the transfer was to take place by having a contractual right to have its representative on sight at the plant that was to be transferred. I received an urgent phone close to the beginning of the third month that the respondent was limiting the access of the buyer's representative and was taking actions that were inconsistent with the effective transfer of the business. After conversations with the General Counsel of the respondent, I concurred with the buyer that respondent's action violated the Maintain Assets Order. I persuaded respondent's General Counsel that the actions were in violation and he agreed that such actions would stop immediately and that respondent would not take advantage of the unlawful actions. Although I was able to resolve this matter quickly, I believe it would never have arisen if a competent Monitor had been in place.

The Monitor Trustee is a major addition to the arsenal of FTC remedial options, but it is not a panacea. Although we have used Hold Separate Trustees who have actual power to make business decisions, I think that is a bad idea if implemented for more than a very short period of time. Government officials, even derivative ones, are not appropriate to make investment, price, or sales decisions. Indeed, I think one of the greatest strengths of the Monitor Trustees is that they lack any decisional power. Their influence is mostly derived by their expertise, their personal skills and the trust they are able to build. Precisely because parties may reject, or not even ask for their advice, the advice of Monitors, when asked for, is taken seriously and evaluated on its merits.

To be sure, there are possibilities of abuse. Respondents may attempt to game the appointment of friendly monitors, or monitors might try to increase their fees by padding their work, or buyers may try to use Monitors as free consultants (i.e., ones paid by the respondent). There is little indication that any of these have become serious problems and some reason to believe that the problems are self limiting. Generally, Monitors have taken their responsibilities very seriously and indicate some sense of honor to be given the position. Frequently, they indicate they would like to serve again should a suitable position be available. They know that if they are to be considered for another appointment they will have had to satisfy the Commission and both parties. When asked for suggestions, the Compliance Division often mentions individuals who have previously acted well as Monitors. That possibility of repeat business and the sense of performing a public duty seem to have encouraged Monitors to do a very good job.

Some Monitors have been less successful than others. Sometimes the problems have been the personality of the Monitor, their lack of relevant technical skills, the existence of a bad Order, or the absence of a need for a Monitor Trustee. Whatever failings there have been, I believe the good has far outweighed the bad. The Monitors who have engendered trust have allowed the parties to settle inexpensively, quickly and voluntarily disagreements that otherwise would be resolved more slowly and less well by cumbersome, often antagonistic, legal procedures.